

Grand Central Partnership and Local 210, International Brotherhood of Teamsters, AFL-CIO.
Cases 2-CA-28910, 2-CA-28964, 2-CA-29054,
and 2-CA-29826

March 24, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND LIEBMAN

On December 12, 1997, Administrative Law Judge Steven Fish issued the attached decision.¹ The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel filed an answering brief.

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

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

We adopt, with one exception, the judge's decision finding violations of Section 8(a)(1), (3), and (4) of the Act.⁴ The judge found that certain statements made by William Chabot, the Respondent's chief of sanitation, during an employee meeting held on November 8, 1995, violated Section 8(a)(1) on two separate theories. In the judge's view, Chabot's comments (1) imply that it was futile for employees to support the Union and (2) constitute an unlawful promise of benefits if they reject union representation. We adopt only the judge's unlawful promise theory.

The credited evidence shows that Chabot told employees that he knew that they were circulating a petition to get a union, and that he did not think the Union would be a good idea for the employees to have at that moment. Chabot further said that the employees should give the

Respondent some time and see what the Union achieved in bargaining for sanitation employees at another facility, the 34th Street Partnership. Chabot told them that whatever the Union got at 34th Street, the employees would also get because the Respondent and the 34th Street Partnership were one company.⁵

We find that Chabot's statements do not expressly or implicitly threaten that it would be useless to vote for the Union. Thus, the instant situation is factually distinguishable from *Hertz Corp.*, 316 NLRB 672, 686 (1995), *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992), *E.I. Dupont De Nemours*, 263 NLRB 159, 165 (1982), and *Electric Hose & Rubber Co.*, 262 NLRB 186, 215 (1982), the cases cited in sec. III,A, par. 4 of the judge's decision. There, the employers had instilled a sense of futility of union representation by indicating that their employees would receive no better benefits with union representation or they would be restricted to the terms and conditions of employment in existence at other nonunion facilities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Grand Central Partnership, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge, layoff, subcontracting, or other loss of employment because of their support for Local 210, International Brotherhood of Teamsters, AFL-CIO, and/or if they become represented by the Union.

(b) Promising its employees benefits and improvements in their terms and conditions of employment if they withdraw their support for the Union and/or if they do not select the Union as their collective-bargaining representative.

(c) Discharging or refusing to reinstate its employees because of their activities on behalf of or support for the Union, and/or because they give testimony at a National Labor Relations Board hearing.

(d) Contesting its employees' unemployment insurance benefits because a charge was filed on their behalf with the National Labor Relations Board and/or because of their participation in a National Labor Relations Board proceeding.

(e) 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.

¹ On December 31, 1997, the judge issued an erratum correcting and replacing his earlier decision dated December 12, 1997.

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

³ We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container Inc.*, 325 NLRB (1997).

⁴ Chairman Truesdale would reverse the judge's finding that the Respondent violated Sec. 8(a)(4) by opposing Mieses' unemployment compensation claim. The record shows that, while the Respondent gave its asserted reason for Mieses' discharge in response to an inquiry from the state department of labor (DOL), it did not contest the unemployment compensation claim. Although the Respondent referred to Mieses' NLRB charge in responding to Mieses' query about why it had responded to the DOL inquiry the way it did, that reference does not necessarily establish a retaliatory motive. Rather, the Respondent may have simply been indicating that its response to the DOL claim would have to be consistent with its response to the NLRB charge.

⁵ Chabot himself admitted that he told employees that they should wait and see what the Union gained at 34th Street, and see if they got the same benefits, and that they could get a Union in the future, if they felt that they were not treated on an equal level with 34th Street.

(a) Within 14 days from the date of this Order, offer Paco Mieses 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 Paco Mieses 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 this Order, remove from its files any reference to the unlawful discharge of Paco Mieses and within 3 days thereafter notify him 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, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its New York, New York office, copies of the attached notice marked "Appendix."⁶ 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 by it 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 this proceeding, 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 8, 1995.

(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.

(g) IT IS FURTHER ORDERED that all violations alleged in the complaint but not found are dismissed.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discharge, layoff, subcontracting, or other loss of employment because of their support for Local 210, International Brotherhood of Teamsters, AFL-CIO and/or if they become represented by the Union.

WE WILL NOT promise our employees benefits and improvements in their terms and conditions of employment if they withdraw their support for the Union and/or if they do not select the Union as their collective-bargaining representative.

WE WILL NOT discharge or refuse to reinstate our employees because of their activities on behalf of or support for the Union and/or because they give testimony at a National Labor Relations Board hearing.

WE WILL NOT contest our employees' unemployment insurance benefits because a charge was filed on their behalf at the National Labor Relations Board and/or because of their participation in a National Labor Relations Board proceeding.

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 Paco Mieses 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.

WE WILL make Paco Mieses whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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

⁶ 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."

GRAND CENTRAL PARTNERSHIP

Suzanne K. Sullivan, Esq., for the General Counsel.
Richard A. Levin, Esq. (Proskauer, Rose, Goetz & Mendelsohn, L.L.P.), of New York, New York, for the Respondent.
Ira Sturm, Esq. (Manning, Saab, Dealy & Storm), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by Local 210, International Brotherhood of Teamsters, AFL-CIO (the Union or Local 210) in Case 2-CA-28910, 2-CA-28964, and 2-CA-29054, the Regional Director for Region 2 issued a consolidated complaint and notice of hearing on June 28, 1996,¹ alleging that Grand Central Partnership (Respondent) violated Section 8(a)(1) of the Act.

Meanwhile, the Union had filed a petition for an election in Case 2-RC-21622, resulting in an election conducted on January 26, 1996. Thereafter the Union filed timely objections to the conduct of the election, which allege essentially the same conduct included in the unfair labor practice complaint. On August 16, the Region issued a notice of hearing on objections and order consolidating the representation and unfair labor practice cases for hearing before me.

On October 28, a trial was held before me with respect to the above matters in New York, New York.

On December 13, the Regional Director issued a complaint and notice of hearing in Case 2-CA-29826, alleging in substance that Respondent discharged its employee Paco Mieses, because he gave testimony at the hearing, as well as because of activities on behalf of the Union. The General Counsel simultaneously filed a motion to reopen the record and to consolidate Case 2-CA-29826 with the prior cases, which motion was subsequently granted by me on January 6, 1997.

On January 30, 1997, based on request by the Union to withdraw its objections, the General Counsel filed a motion to sever the representation case from the unfair labor practice cases. I granted the motion on February 11, 1997, and remanded the representation case to the Regional Director for further processing.

On March 20, 1997, the trial continued and testimony was taken concerning the discharge of Paco Mieses. On March 27, 1997, the General Counsel filed a motion to amend the complaint to allege that Respondent violated the Act by contesting the unemployment insurance claim of Mieses. I granted the motion to amend, over the objection of Respondent, by Order dated April 9, 1997.

Additional evidence and testimony was presented at the resumption of the trial, which was closed on May 1, 1997.

Briefs have been filed by the General Counsel and Respondent, and have been carefully considered. Based on the entire record I make the following.²

¹ All dates hereinafter are in 1996, unless otherwise indicated.

² While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony. Therefore, any testimony in the record which is inconsistent with my findings is discredited.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a not-for-profit corporation, with an office and place of business in New York, New York (Respondent's facility), where it is and has been engaged in the operation of business improvement district (BID), including the provision of sanitation and security services to retail and wholesale businesses which are directly engaged in interstate commerce.

Annually, Respondent receives revenues in excess of \$50,000 from businesses which are directly engaged in interstate commerce.

It is admitted and I so find that Respondent is and has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

As noted, Respondent is a nonprofit BID which provides services, including sanitation and security services to the businesses located in an area which surrounds Grand Central station in mid-Manhattan.

Respondent's president is Daniel Biederman, who is also the president of two other BID's, the 34th Street partnership (34th Street) and the Bryant Park Restoration Corp. Thomas Gallagher is the vice president of Respondent in charge of sanitation, and holds similar positions at 34th Street and Bryant Park.

William Chabot is the Chief of Sanitation for Respondent, with four supervisors under him, Jesus Cruz, Paul Gallagher, Wade Ferguson, and Paul Rojas, none of whom have any responsibility with respect to the other BID's. The sanitation operation at Respondent consists of approximately 55 employees who perform functions of sweeping the streets and graffiti removal and related tasks.

In September 1995, the Union filed a petition to represent the sanitation employees employed at 34th Street. The Union was subsequently certified as the collective-bargaining representative of the sanitation employees. The record is unclear as to whether bargaining had commenced between 34th Street and the Union, at the time of Respondent's allegedly unlawful statements to employees in November 1995 and January 1996.

Respondent's budget process was described in the testimony of Biederman. According to Biederman, the budget is determined by its board of directors, which after recommendations from the staff, a public hearing, and a report from the finance committee of the board decides at a meeting in April on the budget, effective July 1.

The majority of Respondent's revenues comes from assessments on the individual office buildings in the area, which are paid to the city and in turn sent by the city to Respondent. Once the budget is fixed, according to Biederman it cannot be changed. The only way to raise additional revenues by Respondent, would be to either do added fund raising or run a budget deficit beyond the level allocated by the board.

III. ALLEGED 8(a)(1) VIOLATIONS

A. William Chabot

On or about November 8, 1995, Chabot conducted a meeting of employees during lunchtime at its facility located on Park Avenue and 42d Street. During the course of this meeting, which also covered some work-related matters, Chabot brought

up the subject of the Union. He informed the employees that he knew that they were circulating a petition to get a union, and that he did not think the Union would be a good idea for the employees to have at that moment.

Chabot added that the employees should give Respondent some time and see what the Union achieves in bargaining at 34th Street. Chabot also stated that whatever the Union gets at 34th Street, the employees of Respondent would also get, since Respondent and 34th Street were one company.

The above description of the meeting is based on a compilation of the credited testimony of Mises, employees Edward Martinez, Sean Dancy, Orlando Ortiz, and Chabot. The testimony of the four employees was essentially mutually corroborative and I have credited same over Chabot's assertions where there is a dispute. I note that even Chabot concedes that he told employees (albeit in answer to a question) that they should wait and see what the Union gains at 34th Street, and see if they get the same benefits, and that they could get a union in the future, if they didn't feel that they were not treated on an equal level with 34th Street.

I conclude that the above-described comments of Chabot constitute unlawful threats of futility in violation of Section 8(a)(1) of the Act, since it indicates to them that they would end up no better off than without union representation. *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992); *Hertz Corp.*, 316 NLRB 672, 686 (1995); *E.I. Dupont De Nemours*, 263 NLRB 159, 165 (1982); *Electric Hose & Rubber Co.*, 262 NLRB 186, 215 (1982).

I additionally conclude that the statements made by Chabot are also violative of Section 8(a)(1) as an unlawful promise of benefit that employees would receive the same benefits that the 34th Street employees receive, if they reject union representation. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 522 (1995), *Patrick Industries, Inc.*, 318 NLRB 245, 255 (1995).

B. Jesus Cruz

The General Counsel presented two witnesses, employees Ortiz and Martinez who testified concerning alleged statements that they overheard by Supervisor Jesus Cruz.

According to Martinez, sometime in mid-January 1996, he overheard Cruz say to a new employee at Respondent's facility, that if the employee joined the Union, he would get fired. Martinez did not hear any other part of the conversation, and could not recall the name of the new employee, who was subsequently discharged by Respondent.

Ortiz, who had previously been a supervisor of Respondent, testified that he overheard Cruz speaking to a group of several employees. According to Ortiz the employees were clowning around and laughing with each other, when Cruz told the employees to "listen up," and asked for their attention. Cruz said "this is about the Union. If you vote for the Union and you win, the last hired will be the first fired." Ortiz recalled the names of a few of the employees who were present and whose voices he recognized.

After the discussion, Ortiz further testified that an employee named King whose nickname was "little bit," informed Ortiz that Cruz had told the guys that if he was to vote for the Union the new guys are the ones who are going to lose their jobs. King asked Ortiz if this was true.³ Ortiz replied that he didn't

know anything about that and the employees should make their own decision whether they want the Union or they didn't.

Ortiz also was spoken to by other relatively new employees such as Joseph Garth, ___ "Shampoo," and Shep ___. All these employees asked Ortiz if they were to vote for the Union and the Union were to win, would they lose their jobs. Ortiz responded that he didn't know anything about the Union, and the employees should do what they have to do. Ortiz added that he can't tell them to vote no or yes.

Cruz denied making any such statements to any employees. In fact, Cruz claims that he did not talk to any employees about the possible implications of unionization, and further that he never discussed the Union with any employees.

I credit the mutually corroborative testimony of Ortiz and Martinez and conclude that Cruz made the statements attributed to him by these witnesses. In addition to the fact that Ortiz and Martinez are both current employees of Respondent who are not discriminatees and have no incentive not to testify truthfully, *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992), I was not impressed with the credibility of Cruz.

His testimony was contradicted by his pretrial affidavit concerning whether he had been given any instructions from management concerning statements that he could or should make to the employees about the Union, and more importantly was contradicted by the testimony of Respondent's own witness William Chabot. Thus although Chabot testified to reading an antiunion speech at a Christmas breakfast of employees in the presence of Cruz as well as other supervisors, Cruz curiously claims that he did not recall Chabot making such a speech, or even being told about management's position concerning the Union. Clearly, in my view Cruz was not testifying truthfully when he asserted that he did not recall such comments by Chabot. However, since the witnesses were sequestered he did not know that Chabot had previously testified on Respondent's case to reading such a speech, and Cruz felt that somehow any antiunion statement by management officials might be suspect. While the speech by Chabot at the Christmas breakfast is not alleged to be unlawful, Cruz' insistence on denying knowledge of any antiunion statements reflects poorly on his credibility with respect to the statements attributed to him by Ortiz and Martinez which I have credited as detailed above.

Finally, as to Ortiz' testimony I also rely on his testimony that a number of employees came to him subsequent to Cruz' comments and confirmed what Cruz had said to them. While this testimony is hearsay, I do deem it appropriate to consider such testimony in assessing the credibility of Ortiz, since the testimony was adduced as a result of Respondent's questioning, and it is corroborative of what Ortiz heard directly himself.

Based on these findings, I conclude that Respondent has violated Section 8(a)(1) of the Act by both of the statements made by Cruz and overheard by Martinez and Ortiz. While it is true that neither of these comments were directed at or in the presence of Martinez and Ortiz, they were overheard by these employees and were directed to other employees. Such statement can be violations of the Act. Although based on overheard remarks. *Schwartz Mfg. Co.*, 289 NLRB 874, 889 (1988).

Respondent argues that the statement overheard by Ortiz is not unlawful, since it was merely an accurate description of what would take place if the Union were to propose a seniority system as is the case in most collective-bargaining agreements. Thus Respondent contends that Cruz was merely giving an

³ Although Ortiz was no longer a supervisor at the time, in view of his former supervisory status, employees respected him and came to him for advice.

accurate description of a seniority system, which is within Respondent's 8(c) rights. I do not agree.

Cruz did not mention anything about a seniority system, or otherwise explain why the last employees hired would be the first to lose their jobs. While it is true as Respondent asserts that Ortiz testified that he believed that Cruz was referring to a seniority system, that is not determinative. The test for finding a violation is not dependent on subjective reactions of employees, but on whether the statements have a reasonable tendency to coerce employees. *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995). Here I conclude that the statements of Cruz which have no basis in fact, clearly have a reasonable tendency to coerce employees, and infer that if the Union is successful, that newly hired employees would lose their jobs. *D.J. Electrical Contracting Co.*, 303 NLRB 820, 824 (1991); *C.J.R. Transfer, Inc.*, 298 NLRB 579, 591 (1990).

Accordingly, based on the foregoing I conclude that Respondent violated Section 8(a)(1) of the Act by the statements of Cruz.

C. Thomas Gallagher

Martinez testified that in mid-January 1996, he overheard Vice President Thomas Gallagher tell employee Clive Williamson, "if you get the rest of the West Indian guys to vote against the Union, they will be taken care of." Martinez asserts that he did not hear any other part of the conversation.

Williamson emphatically denied that Gallagher or anyone else from Respondent made any statements to him about how West Indian employees should vote or that anyone made any promises to him concerning West Indian employees voting against the Union.

Gallagher denied having any discussion with Williamson concerning the election or how West Indian employees should vote, and denies making any statements that there would be a benefit if Williamson persuaded West Indian employees to vote no.

Inasmuch as both Williamson and Gallagher credibly deny the statements that Martinez claims that he overheard, I find that the counsel for the General Counsel has not met its burden of proof with respect to this allegation, and shall recommend dismissal of this allegation of the complaint.

D. Daniel Biederman

In early January 1996, Biederman gave a speech to its employees concerning the upcoming union election. Biederman indicated to the employees that he did not believe that voting for the Union would be in their best interests.

During the course of this speech, Biederman described Respondent's budget process to the employees. He explained that annually Respondent's board of directors decides how much money should be assigned for each function, and after that happens the budget is fixed and cannot be changed. He also told them that he is always fighting with the board for higher budgets, but that Respondent is a nonprofit organization and more money does not come in as a result of doing good work.

Biederman added that since the budget is set for the year, money for staff cannot increase. Therefore, Biederman asserted that if the employees received any wage increases as a result of the Union's coming in, some of Respondent's employees would have to be laid off, in order to pay for these increases.

One of the employees asked about the possibility of Respondent bringing in an outside contractor. Biederman replied that it

was possible that an outside contractor could result from having to pay for increases demanded by the Union and if so half of the employees would not be here.

My findings above as to what Biederman said to the employees is based on a compilation of the credited portions of the testimony of Mieses, Martinez, Ortiz, Sean Dancy, and Biederman, as well as written speeches given by Chabot to employees in January 1996. In that regard, while the written speech, which Chabot read to employees was not utilized by Biederman, I find it likely that Biederman would have used similar language in his comments to employees. Thus in Chabot's speeches, it was stated, "if the Union plans to double your wages, it can only mean that we would have to cut half of the jobs here to be able to pay that much money." Further the speech indicates, "if it gets too expensive for Grand Central to provide sanitation, we will have to change what we do. It could mean fewer people working. It could mean having a contractor to do some or all of the work."

Further in the second speech delivered by Chabot, he stated that "the budget here is fixed through next June. That means that if the Union wants major improvements, like higher wages or more expensive benefits, it will mean cuts somewhere else, like fewer men working."

Therefore, I conclude that it is unlikely, as testified by some of the General Counsel's witnesses, that Biederman would simply say that if the Union comes in, Respondent would lay off or subcontract out work. Rather, as I have found above, and indeed consistent with the testimony of other of the General Counsel's witnesses, that Biederman talked about layoffs and subcontracting as a consequence of having to pay for increases demanded by the Union.

The applicable standard for analyzing Biederman's statements was set forth by the Supreme Court in *Gissel Packing*:

[A]n employer is free to communicate to his employees any of his general views about unionization or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionism will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

395 U.S. 525, 618 (1969).

Respondent argues that Biederman's comments fall within the *Gissel* lawful prediction standard, since he was merely predicting "that if the Union were to compel substantial wage and benefit increases, given the Partnership's fixed revenues and budget, the only way to pay such higher wages or benefits would be to reduce the number of workers." See, e.g., *CPP Pinkerton*, 309 NLRB 723, 724 (1992). I cannot agree.

In order to qualify as a lawful prediction, Respondent must demonstrate that its prediction is based on objective facts as to demonstrably probable consequences *beyond its control*, emphasis added. Here nothing in any of Biederman's comments makes any reference to any consequences beyond its control. While Biederman did refer to its budget being fixed for a year by its board of directors, one cannot consider the board of directors to be a third party vis a vis Respondent, nor that the board's control over the budget to be an event beyond Respon-

dent's control. The board of directors is simply part of Respondent's governing structure, and any decisions as to whether or not revenues can be used to pay for wage increases or benefits is clearly within Respondent's control. Thus for this reason alone, I conclude that Biederman's comments do not fall within the *Gissel* standards, and are violative of the Act. *Crown Cork & Seal Co.*, 308 NLRB 445, 459 (1992); *Maremont Corp.*, 294 NLRB 11, 39 (1989); *Crown Cork & Seal Co.*, 253 NLRB 14 (1981). See also *Harrison Steel Castings Co.*, 293 NLRB 1158 (1989), where the Board held that an employer could not lawfully suggest the loss of jobs as a result of costs of a collective-bargaining agreement, "without demonstrating to employees that such a chain of causation would be brought about through forces beyond the Respondent's control. Without more specific, objective data, the statement in question could just as well be taken to suggest that the Respondent might, purportedly on the basis of cost factors that are at least partly within its own control and known only to it, discharge employees in the event they chose to be represented by a collective-bargaining representative. From the employees' perspective, the statement has a tendency to coerce them into disfavoring unionization." *Id.* at 1159. (Footnotes omitted.)

Indeed in *Pinkerton*, supra, as well as the cases cited therein,⁴ the statements of the employers therein were found to be lawful, because they were based on predictions of third-party action (cancellation of contracts by customers), and therefore were protected opinions of events beyond their control, and not threats of reprisal.

Moreover, I also conclude that Respondent has not offered sufficient proof of "objective facts" to convey its belief as to "demonstrably probable consequences," to come within the *Gissel* definition of a lawful prediction. Biederman did not offer any objective facts (other than his statement that its budget was fixed) to establish any demonstrably probable consequences between the Union's possible demands and the lay-off of employees or the subcontracting of work. His comments were "not based on demonstrably probable consequences, but on rank speculation and a desire to fan employees' fears of job loss." *Metalite Corp.*, 308 NLRB 266, 272 (1992). See also *Doffer Electric*, 313 NLRB 1094, 1097 (1997) (employer's statement that it couldn't get work with what it knew the area contract of the Union to be, found not to amount to a sufficiently demonstrable proposition as required in *Gissel*. "Employer is not permitted, under *Gissel*, to jump from the unstated or unproven premise that a Union's wage scale is fixed and immutable to a conclusion that he may have to shutdown in the event of unionization, and convey this ultimate conclusion to employees." *Id.* at 1097.

In my view, Biederman's statement to employees was "tantamount to warning that employees could not have their jobs and a wage increase too, and if they supported the Union for that reason, they had better vote no." This is precisely the type of threat that *Gissel* prohibits. *Somerset Welding & Steel Co.*, 304 NLRB 32, 43 (1991). The message imparted by Biederman's remarks is little different than an assertion that an employer could not afford to pay increases demanded by the Union, and would therefore have to reduce jobs, or to close the plant. Such statements, even though they indicate a good-faith

concern over high labor costs and an inability to compete, are nonetheless unlawful. *Zim's Foodliner, Inc. v NLRB*, 495 F.2d 1131, 1137 (7th Cir. 1974). See also *Bi-Lo Foods*, 303 NLRB 749, 750 (1991) (predictions of job loss fail to provide the necessary objective basis for employers claim).

Finally I also note that in order to qualify as lawful predictions under *Gissel* the statements made by the employer cannot consist of "overstatements he has reason to believe will mislead his employees." *Gissel*, supra at 620. Where an employer makes such statements that are either factually unbalanced *Crown Cork*, supra, 308 NLRB at 461, or which go beyond the objective facts, the employer cannot rely on these comments as based on objective facts, and transforms the remarks into coercive language threatening employees with job loss in retaliation for choosing the Union in violation of Section 8(a)(1) of the Act. *Reeves Bros., Inc.*, 320 NLRB 1082, 1083 (1996).

I conclude that Biederman's comments run afoul of this problem as well, as he gave the employees a misleading and unbalanced view of Respondent's budget process. I note initially that Biederman informed the employees, and repeated at the hearing that Respondent's budget for staff was fixed and could not be increased. However, he did not testify that there was any legal impediment to Respondent requesting additional monies from the board in the interim because of a new and unexpected development, such as the unionization of the employees and possible strike. I find it difficult to believe that the board of director could not if it so chose to authorize Respondent to receive additional sums to pay for union benefits even during the fiscal year.

More importantly, Biederman conceded in his testimony, that Respondent could, even if the board did not authorize additional spending, raise additional revenues by added fund raising or running a budget deficit beyond the level allocated by the board. Thus Biederman conveniently failed to disclose these important facts to the employees, which demonstrate that contrary to his misleading statements to employees, there is no automatic correlation between increases in benefits for employees and loss of jobs (or subcontracting). Rather, Respondent had the option of paying for the increases by additional fund raising or increasing the deficit. Thus, Respondent has misled its employees about the consequences of the union's demands, and his remarks are coercive statements threatening employees with loss of jobs and subcontracting,⁵ in retaliation for choosing the Union and, therefore, violative of Section 8(a)(1) of the Act. *Reeves Bros.*, supra at 1083.⁶

⁵ *MPG Transport, Ltd.*, 489, 492 (1994) (statement that employer could not live with union contract and would have to contract out work unlawfully).

⁶ It is also notable, that *Reeves Bros.*, supra, specifically distinguished *CPP Pinkerton*, supra, cited by Respondent on the ground that the statement made by the employer in *Pinkerton* indicated that based on conversations with a customer there was the possibility not the probability of third-party action. However in *Reeves*, the employer misled the employees by transforming a customer statement indicating the possibility of taking work away, into a more definite statement that the customer would remove business, and as a result employees would work for fewer hours. Similarly, here Respondent misled the employees by indicating that its budget process would automatically result in loss of jobs for its employees if they were to receive wage or benefit increases by choosing to be represented by the Union.

⁴ *Buck Brown Contracting Co.*, 283 NLRB 488 (1987); *Daniel Construction Co.*, 264 NLRB 569, 570-572 (1982)

IV. THE TERMINATION OF PACO MIESES

A. Facts

Mieses was employed by Respondent since April 1991 as a sanitation worker. He to was one of leading adherents for the Union in its organizing in the fall of 1995. In that regard, he circulated the petition that the Union used for its showing of interest, organized meetings with employees, and spoke to employees about the benefits of the Union.

Although there is no direct evidence that any of Respondent's supervisors became aware of any of these activities engaged in by Mieses, both Chabot and Paul Gallagher admitted that they were aware that Mieses was a supporter of the Union.⁷

In October, Mieses was the General Counsel's first witness at the initial day of the trial here, and he furnished testimony with respect to several of the allegations in the complaint (which also encompassed the Union's objections to the election) including testimony concerning allegedly unlawful statements made by Chabot.

After completing his testimony, he remained in the witness room with the General Counsel's other witnesses. In the afternoon, employee Clive Williamson was Respondent's second witness, and he furnished testimony refuting the testimony of Martinez, that Tom Gallagher had promised Williamson that West Indian voters would be "taken care of" if they voted against the Union.

After Williamson testified, he sat down next to Jose Cruz, (one of Respondent's supervisors) in the hearing room. Union Organizer Hill was asked by its attorney to find out the identity of Cruz. Hill then asked Mieses to accompany him to the hearing room. Mieses looked into the hearing room and told Hill that the unidentified individual was Jesus Cruz.

According to Williamson, at that time, Mieses pointed his finger at Williamson. Both Hill and Mieses deny that Mieses pointed his finger at Williamson. At that point, Williamson came over to Mieses and said, "[W]hat? What's the matter?" Mieses responded, "[W]hat,?" and the conversation terminated. The next morning, October 29 at 8 a.m. Chabot met Williamson on the street as Chabot was coming to work. Williamson told Chabot that Mieses and the union representative were pointing at him at the hearing. Chabot told Williamson that he should not be terribly concerned about it.

The next morning October 29, in the locker room, Williamson was approached by employee Santos Harden. Harden said to Williamson, "you better get a bulletproof vest, you hear, money."⁸ Williamson made no reply to Harden, but believed at the time that Harden was serious. Williamson immediately reported Harden's statement to Supervisor Paul Gallagher. Gallagher told Williamson not to worry about it. Gallagher also did not report the threat to Chabot, because according to Gallagher, he did not believe Harden was serious, and that he thought that the comment was made in jest.⁹

After lunch on October 29, Harden approached Williamson and said that he didn't mean anything by his earlier remark, that he has a family just like Williamson, and he would not consider hurting Williamson. At 3:30 p.m., Williamson reported to Gal-

lagher that Harden had apologized to him and said that he did not mean anything by his prior statement.

Chabot was vague and uncertain about his knowledge of the Harden incident. He asserts that he heard about it, but he could not recall from whom or when, but he does remember being told by Williamson that Harden had apologized and said he didn't really mean anything. According to Chabot he did not find out about the Harden incident until after he terminated Mieses,¹⁰ and he did not consider disciplining Harden because he viewed Harden's statement as a "warning" not a "threat," and because Harden had apologized to Williamson.

The next day October 30, at 7 a.m., Williamson confronted Mieses in the area where employees sign in before starting work. Williamson asked Mieses why he was pointing at Williamson after Williamson had testified. Mieses replied that he wasn't pointing at Williamson, and that it was Williamson who came out saying, "[W]hat, what like you wanted to fight." Williamson responded, "if anything happens to me or my family, you guys are responsible."¹¹

Before going out on his route, Mieses stopped by the supervisors' office. Present were Supervisors David Rojas and Paul Gallagher. Mieses addressed himself to Rojas and told him, "David, tell Clive to leave me alone or I'm going to stab the shit out of him." Mieses added that he had been in jail before and he would go there again.¹²

Gallagher then chimed in, "you guys have been going at each other's throat ever since the union stuff started going on. I wish you would leave me out of this." Mieses replied, "Paul, look I got nothing to do with this. I didn't know what you're talking about. I was subpoenaed there just like everyone else." Gallagher responded, "yeah, well, you must have said something for them to subpoena you."

Rojas and Gallagher then instructed Mieses to calm down, stay away from Williamson, and to return to work.¹³

When Chabot arrived for work at 8:15 a.m., Rojas and Gallagher reported to him that Mieses had threatened Williamson. Chabot asked why the threat was made. They informed him

¹⁰ As will be discussed below, Mieses was discharged on October 30.

¹¹ I credit Williamson's version of this discussion as described above. While Mieses asserted that Williamson threatened to "cut his fucking fingers off" during this conversation, which precipitated Mieses' response that "I should stab your ass," I find this testimony not credible. I note particularly, that Mieses as will be described below made no reference to Williamson's alleged threat to him until he was notified of his termination.

¹² Mieses had been in jail two or three times in the past for possession of marijuana and/or cocaine. The record also reveals that a lot of Respondent's employees also served time in jail. Indeed Respondent also participates in a work release program with prisons where it hires employees from prisons to perform work for it.

¹³ The above description of the discussion between Mieses, Gallagher, and Rojas is based on a compilation of the credited portions of the testimony of these three witnesses. While Gallagher denied that he made any reference to the Union during the conversation, his denial was equivocal, as he stated in response to a question from his attorney, "not that I remember no." However, Rojas who testified on behalf of Respondent and supported Gallagher's testimony in certain respects, was not asked about that issue, and therefore gave no corroborating testimony. While Rojas claims that he was not present for the entire conversation, both Mieses and Gallagher assert that he was there for the entire time. Accordingly, I credit Mieses as outlined above as to the discussion about the Union and his testimony at the trial.

⁷ Gallagher also admitted that employee Clive Williamson had informed him that he (Williamson) didn't want any part of the Union.

⁸ Money is a slang word meaning "man."

⁹ However, Gallagher admitted that at the time, Williamson perceived the threat from Harden to be serious. Gallagher also testified that Harden was a "fence sitter" with respect to the Union.

they had not spoken to Williamson about the matter, but that they believed it had something to do with Mieses pointing at Williamson at the hearing. Chabot said to Gallagher and Rojas that this type of conduct cannot be tolerated. Chabot also informed Rojas and Gallagher that he would check the matter out and speak to Williamson and Mieses about the incident.

At around 10 a.m., Chabot called Williamson into his office. Chabot asked what happened between him and Mieses that morning. Williamson related that he had asked Mieses why he was pointing at him at the hearing. Mieses replied that he had not pointed at Williamson, and that he (Mieses) thought Williamson wanted to fight. Williamson related that he informed Chabot that he told Mieses, "if anything happens to me or my family you guys are responsible." Chabot then stated that Mieses had threatened to stab Williamson. Williamson seemed distressed and asked why Mieses wanted to stab him. Chabot advised Williamson to calm down and return to work.

Subsequent to his conversation with Williamson, Chabot testified that he thought the matter over and decided that since Mieses made a very serious threat in an abnormal manner he would be terminated. The abnormal manner referred to by Chabot was the fact that the threat had been made through a supervisor and not directly from Mieses to Williamson.

Therefore, Chabot instructed Gallagher to type a termination letter that he (Chabot) prepared. The letter recites that an NLRB hearing was held on October 28, 1996, regarding charges filed by the Union against Respondent, and that Mieses testified for the Union, and Williamson testified on behalf of Respondent. Further the letter states that Mieses pointed a finger at Williamson after Williamson had testified.

On Wednesday, October 30, 1996, the letter recites that Williamson confronted Mieses and asked why he pointed at him during the hearing. Mieses according to the letter, "became very agitated," and said he didn't point at Williamson.

Mieses then entered the supervisor's office, "seemingly angry" and said to D. Rojas and P. Gallagher, "I've been in jail before-so tell Clive to stay away from me and not bother me or I'll stab the shit out of him. I will."

The letter concludes by stating that "this type of behavior is not acceptable no matter what the provocation." Thus, Mieses' employment is terminated for "threatening a fellow employee with serious injury." The letter was signed by Chabot as well as Gallagher and Rojas.

Chabot read the letter to his attorney, and then decided to call in Mieses. According to Chabot while he had decided to terminate Mieses before speaking to Mieses about the incident, the "decision was not set in cement," but if Mieses admitted making the statements attributed to him by the supervisors, he would be discharged.¹⁴

After lunch, Mieses was called into Chabot's office. Chabot read the letter to Mieses and told him that he could not tolerate this kind of behavior and that Mieses was terminated. Mieses admitted that he had made the threat, but informed Chabot that Williamson had threatened him first and said to Mieses, "I should cut your fucking finger off." Chabot responded that he did not believe that Williamson would say something like that to Mieses. Mieses stated that the discharge was because of the Union. Chabot answered that it had nothing to do with the

Union. Mieses responded yes it did have to do with the Union, because this is what the argument was all about. Mieses then referred to the fact that Williamson had accused Mieses of pointing a finger at him the other day in court.¹⁵

After the meeting with Mieses, Chabot asserts that he then met with Williamson and asked him if in fact he had made the statement attributed to him by Mieses. Williamson denied making such a statement.¹⁶ According to Chabot, if Williamson had admitted making such a threat to Mieses, he might have reversed his decision to terminate Mieses.

Chabot admits, and other witnesses confirm, that verbal threats are commonplace at Respondent's facility, particularly since many of the employees are formerly homeless people. Generally the threats are to kick someone's "ass" or similar statements. Generally when these kinds of statements are made by one employee to another, Chabot will call the participants into his office and try to resolve the dispute and to persuade the employees to shake hands and forget about their confrontation. According to Chabot he is usually successful in working things out in that manner.

Chabot admitted that he has never terminated an employee for making a verbal threat to another employee, and asserts that at most he may have suspended employees for a day or so for such conduct, but he could not recall any specific individuals whom he suspended for verbal threats.

Chabot however testified that he viewed Mieses' threat to stab Williamson as a more serious threat than the normal threats to punch someone, plus the fact that Mieses mentioned that he had been in jail. Additionally as noted, Chabot also claims that he viewed the threat as more serious, because it was made to a supervisor, and not directly to an employee, as is normally the case where there are arguments between employees.

As also noted above, Respondent did not discipline Harden for his statement to Williamson concerning wearing a bullet-proof vest. As also related above, Chabot was not informed about Harden's comments to Williamson until after Harden had apologized to Williamson, which according to Chabot was a major reason why Harden was not fired or even disciplined for such conduct. However, Chabot also testified that even if Mieses had apologized to Williamson, it would not have changed Chabot's mind, and Mieses still would have been terminated.

Respondent introduced evidence of two prior incidents where employees were discharged for in Respondent's view similar conduct to that engaged in by Mieses.

Thus on August 9, 1995, employee Timothy Bracker's employment was ended at Respondent. Bracker, who was 6 foot 3 inches and much heavier than fellow employee Donnell White, engaged in a pushing and shoving match with White over repayment of a loan. As Bracker was being calmed down, he produced a gun that "scattered the locker room." As a result of this incident, a termination letter was prepared for Bracker, summarizing the incident, and stating, "the presence of weapons is not acceptable in the work place." Subsequently, Bracker asked Chabot if he could resign, rather than be terminated. Chabot agreed, and a written resignation was accepted

¹⁴ However, Chabot, when asked by his attorney if there was anything that Mieses could have told him that would have caused him to change his mind, replied, "I don't know what that might have been."

¹⁵ Although Mieses used the word court, he obviously was making reference to the National Labor Relations Board trial.

¹⁶ Williamson did not provide any testimony to corroborate Chabot's assertion that Williamson was asked by Chabot whether he had threatened to cut off Mieses' fingers.

with the statement that “he stated he was going to pursue another line of work.”

On August 23, 1991, Respondent terminated employee George Blount. His termination letter reflects that when he arrived for work he began “flashing his knife” in the office. He was told by Supervisor Cruz to put the knife away as this was not acceptable behavior. The letter further indicates that Cruz and P. Gallagher had told Blount on several previous occasions to “put the knife away.”

However, according to the letter Blount ignored this directive when he proceeded to “play” with the open knife in the locker room by threatening employee Campbell with it and making disparaging remarks about Jamaicans.

Another employee, Ferguson took exception to Blount’s remarks and the knife, and told Blount to “knock it off.” Blount then shouted vindictive remarks to Ferguson, which caused Ferguson to say that he did not need a knife to fight. This exchange resulted in a serious fight between Blount and Ferguson, during which Blount threw Ferguson first onto the porch, and then down the steps.

The letter concludes by stating that although the knife was not used during the struggle, Chabot “felt it was the reason for the intensity of the fight, as Mr. Ferguson felt that he was being seriously menaced.”

Thus Blount’s employment was terminated as a result of this behavior. The letter reflects, “the presence of weapons is not acceptable in the work area. This was a very serious fight and was not playing around.”

Respondent also introduced some evidence of past misconduct by Mieses, which in its view demonstrates Chabot’s perception of Mieses vis a vis Williamson and entered into the decision making. Thus Mieses on May 8, 1995, was suspended for 2 days for his conduct in dealing with a “homeless” woman, in which Respondent asserted that he was abusive toward her by allegedly miming masturbation. The official warning letter from Mieses’ personnel file reflects that Mieses claimed that the woman had spit at him and gestured at him in a disrespectful manner. While Mieses denied that he had mimed masturbation, he admitted that he did grab his groin to show his displeasure. Thus Mieses was counseled regarding behavior while in uniform, and was told that all of the public must be treated in a respectful manner. To reinforce the seriousness of inappropriate behavior, Mieses was suspended for 2 days.

Additionally, Mieses admitted that on another occasion he was sent home by a supervisor for a day for being missing from his route.

While Chabot testified that the incident with the homeless woman does demonstrate to him that Mieses has an excitable personality, and perhaps more likely to carry out a threat, he admitted that when he made his decision to discharge Mieses he did not recall this incident, nor did he have it in his mind, nor did he check Mieses’ personnel file to examine his past record. According to Chabot the sole reason for his decision to discharge Mieses was the threat that he made.

B. Analysis

The record discloses substantial evidence to meet the General Counsel’s burden of establishing that protected conduct engaged in by Mieses was a motivating factor in Respondent’s decision to discharge him. All of the elements necessary to meet the General Counsel’s burden of proof are convincingly present.

Thus Mieses and was one of the leading supporters of the Union, which was then admittedly known by Respondent’s supervisors, and he testified on behalf of the Union at combined unfair labor practice objections hearing on October 28, which could only have further solidified his union support in the minds of Respondent’s officials.

Two days after Mieses gave his testimony, he was discharged. Such timing between the exercise of protected conduct in relation to the discharge is a highly significant indication of discriminatory motivation, and strong evidence of an unlawful motive for the termination. *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 198 (1995). Indeed, timing alone can be sufficient to establish that antiunion animus was a motivating factor in a disciplinary decision. *Sawyer of Napa, Inc.*, 300 NLRB 131, 150 (1990); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

Here however, the General Counsel’s case is supported by much more than suspicious timing, particularly the evidence of animus toward the union activities of its employees. Such animus is demonstrated by the 8(a)(1) violations that I have found above, which included serious violations such as threats of discharge, or layoff of employees, subcontracting work or of futility, as well as promises of benefit to employees that employees would receive the same benefits as employees at 34th Street without the need for the Union. These violations were committed by several of Respondent’s officials, from its first-line supervisor to its president, and including William Chabot the supervisor who made the decision to terminate Mieses.

Moreover, I also note the statements made by Supervisor Gallagher after Mieses made the threat to stab Williamson. Gallagher expressed annoyance with becoming involved in the dispute between Williamson and Mieses by criticizing them for “going at each others throats since the union stuff started going on.” Then Mieses sought to minimize his participation in union activities and his testimony at the hearing by saying he had “nothing to do with this,” and he had been “subpoenaed just like everyone else.” Gallagher’s reply to this comment was quite significant. He stated, “yeah, well you must have said something for them to subpoena you.” This remark by Gallagher while not unlawful, expresses skepticism about Mieses’ alleged attempt to establish his neutrality, and demonstrates that Gallagher knew or at least suspected that Mieses had provided testimony damaging to Respondent’s position at the hearing 2 days before, and that Gallagher was not pleased about that fact. This statement provides further evidence of a link between Mieses’ protected conduct and Respondent’s decision to terminate him.

Having found that the General Counsel has established that a motivating factor in Respondent’s discharge of Mieses was his protected conduct of activities on behalf of the Union and his testimony at the hearing in their favor, the burden shifts to Respondent to establish by a preponderance of the evidence that it would have taken the same action against Mieses, absent his protected activities. *Wright Line*, 251 NLRB 1083, 1089 (1980); *NLRB v. Transportation Management*, 462 U.S. 400, 403 (1983). I conclude that Respondent has fallen short of meeting its burden of proof in this regard. I note initially that Respondent has failed to show that it has ever discharged any employees for the acts of misconduct committed by Mieses, i.e., making verbal threats to another employee. The failure of an employer to show that it has treated employees in the past in a similar manner for engaging in similar misconduct to that of the alleged discriminates, has been held to be an important

defect in the employer meeting its *Wright Line* burden. *Ellicott Square Corp.*, 320 NLRB 762, 775 (1996), enf'd. 104 F.3d 354 (2d Cir. 1996); *New Jersey Bell Telephone Co.*, 308 NLRB 277, 283 (1992); *Aratex Co. Services*, 300 NLRB 115, 116 (1990); *Phillips Industries*, 295 NLRB 717, 718 (1989). "Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *Hicks Oil & Hecks-gas*, 293 NLRB 84, 85 (1989), cited, in *New Jersey Bell*, supra.

Not only has Respondent failed to show that it has terminated employees for making verbal threats, but its treatment of Mieses deviated significantly from how it treated similar instances of verbal threats. Thus the record is undisputed that verbal threats to employees are commonplace occurrences at Respondent's facility, which is not surprising since it employs former "homeless" individuals, as well as employees on prison release programs. It is conceded by Chabot that his normal practice in such cases is to summon the employees involved in the altercation into his office to work the problems out and persuade the employees to shake hands and forget about it.¹⁷ However, Chabot admittedly did not follow his normal practice in this instance, and his alleged reason for not doing so is far from convincing. Chabot explained that since the threat was made through a supervisor rather than directly to the employee, he considered it more serious, and presumably persuaded him not to follow his normal practice and call the employees into his office together to try to work things out.

This purported explanation is unpersuasive, since Chabot was clearly aware that there had in fact been two confrontations directly between Mieses and Williamson, both related to conduct at the National Labor Relations Board hearing, prior to Mieses making the threat. Moreover, at the second confrontation, it was Williamson who provoked Mieses' conduct by starting the argument, accusing Mieses of pointing at him, and threatening Mieses that he would be held responsible if anything happened to Williamson's family. While I need not and do not find that Williamson's provocative conduct justified Mieses' threat to stab him, I do conclude that Mieses' threat was not totally unprovoked, and more importantly was clearly related to the prior confrontations between the employees. Thus Chabot's purported distinction is illusory and inconsequential, and I conclude purely pretextual.

In my view the evidence demonstrates that Chabot did not follow his normal practice with regard to verbal threats, not because he considered it more serious than prior threats or because it was made through a supervisor, but because the threat was made by a union supporter and a witness who testified at the National Labor Relations Board hearing on behalf of/and in favor of the Union, to a nonunion supporter who testified at the hearing on behalf of/and in favor of Respondent, and that the threat was related to an argument that the employees had concerning events at the National Labor Relations Board Trial.

This conclusion is fortified and supported by Respondent's conduct in dealing with the threat made by employee Harden to Williamson on the same day as Mieses' threat. As noted above, Harden informed Williamson that he better get a bullet proof vest, which resulted in Williamson becoming concerned and

reporting Harden's conduct to Gallagher. Yet Gallagher did not, as he did in the case of Mieses' threat, report the incident immediately to Chabot. Gallagher provided no explanation for his failure to do so, and the only explanation that the record supports is the interesting fact that Gallagher considered Harden a "fence sitter," while he knew that Mieses was a union supporter.

Chabot asserts that he decided not to discipline Harden for his remarks to Williamson, because he viewed the statement as a "warning" and not a threat, and that Harden eventually apologized to Mieses. I find these purported explanations for the contrasting treatment of Mieses and Harden, also to be unconvincing. The assertion that Chabot considered Harden's comment to be a warning rather than a threat, I conclude is not believable, since it amounts to distinction without a difference, and I find it hard to imagine that Chabot or any reasonable person would conclude that a statement that someone should wear a bullet proof vest was not a threatening remark. More importantly, while Harden did apologize to Williamson, Respondent did not give Mieses an opportunity to apologize to Williamson¹⁸ and, significantly, Chabot testified that even if Mieses had apologized he still would have been fired.

I, therefore, conclude based on the above analysis, that Respondent's failure to follow its normal practice with respect to verbal threats and its disparate treatment of Mieses vis a vis Harden (as well as other employees in the past who made verbal threats and who were not fired) substantially undermines Respondent's defense. *Paper Mart*, 319 NLRB 9,10 (1995); *Pope Concrete Products, Inc.*, 305 NLRB 989, 990 (1991).

Respondent makes several arguments in response to the above findings that I have made, which I have considered but rejected as detailed below. It argues that in fact Mieses' threat was so serious that it was similar to the two prior incidents where Respondent discharged employees Bracker and Blount. I disagree, and conclude that these incidents involved much more serious transgressions than Mieses' verbal threat. *Allegheny Ludlum Corp.*, 320 NLRB 484, 506 (1995). Thus Bracker was terminated for brandishing a gun which resulting in a physical confrontation, and included a finding by Respondent that all who witnessed the scene (six coworkers and three supervisors), felt menaced by the presence of the gun.

Blount also was terminated for conduct much more serious than a mere verbal threat, which included the "flashing" of a knife as well as severe physical fight wherein the employee threw a much smaller employee onto the porch and then down the steps. Respondent's treatment of Blount is particularly revealing vis a vis Mieses. Not only do I conclude that Blount engaged in far more serious misconduct than Mieses, but Blount's termination letter revealed that he had received several prior warnings from supervisors to cease "flashing" his knife. Here, on the other hand Mieses received no prior warnings by Respondent for making verbal threats. Thus, not only does Respondent's treatment of Blount not demonstrate as it contends, that it discharged an employee for similar conduct to that engaged in by Mieses, but it does demonstrate disparate treatment in that Mieses, unlike Blount was discharged without any

¹⁷ In such cases, he rarely disciplines either of the employees involved, but at most will issue a 1- or 2-day suspension.

¹⁸ Indeed, if Chabot had followed his normal practice of calling the employees into his office together to try to work out the matter, Mieses might well have apologized to Williamson.

prior warnings with respect to the conduct which led to his discharge.

In that regard, Respondent also argues that Mieses was disciplined and suspended for “inappropriate albeit less serious conduct before he engaged in any protected, concerted activity.” I fail to see how those facts help Respondent’s case in any respect. Thus Chabot admitted that these prior incidents had no bearing on his decision to discharge Mieses, and that in fact they were not in his mind at all when he made that decision.

The fact that Respondent previously disciplined Mieses prior to any union activities does not support Respondent’s current action, since admittedly the decision was not based at all on his prior record. In fact if anything, its prior action demonstrates that before his union activities, Respondent only suspended Mieses for misconduct, while in the present case, after his protected conduct, it discharged him for a first offense without a warning. Thus this evidence in my view also serves to undermine Respondent’s defense.

Respondent also argues that Mieses threat was a “calculated threat designed to intimidate Mr. Williamson, and perhaps any others who might dare to testify contrary to the interests of the Union.” It further states that Mieses’ “threat was not an ordinary minor altercation; it was a deliberate, contrived message to an employee who had the audacity to testify against the Union.” These comments in Respondents brief rather than justify Respondent’s conduct as it intends, only serves to reinforce my conclusion set forth above that it was Mieses’ protected conduct that motivated Respondent’s decision to discharge him. Thus, Respondent makes reference to Williamson having testified against the Union and that it viewed Mieses as trying to intimidate Williamson and send a message to an employee who had the audacity to testify against the Union.

These comments demonstrate, consistent with my findings above, that Respondent treated Mieses differently than other employees who engaged in similar conduct, primarily because of the nature of the underlying confrontation between Williamson and Mieses. That is they argued concerning their respective union preferences and their testimony at the National Labor Relations Board hearing. While Respondent may feel that it has some sort of special responsibility to protect its witnesses and its employees who are antiunion, it may not do so by discriminatorily treating prounion witnesses and prounion adherents differently than it treats other employees who make threats in other situations, unrelated to union or protected conduct. That is precisely what the evidence establishes that Respondent has done in the instant case, and such conduct is violative of the Act.

Finally, I conclude that Respondent’s defense is also undermined by its failure to conduct an adequate investigation of Mieses’ conduct, especially its failure to afford him the opportunity to respond to the allegations against him before discharging him. *Paper Mart*, supra at 10; *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1996). Such conduct by Respondent lends support to an inference of unlawful motivation, and shows that Respondent was not truly interested in determining whether misconduct had actually occurred. *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enf. 95 F.3d 681, 685 (8th Cir. 1996).

Here Chabot decided to discharge Mieses before calling him into the office to confront him with the allegations against him, and in fact read him a prepared letter of termination before even asking him for his version of the facts. While Chabot asserted

that he was going to discharge Mieses if he admitted making the threat, I find this testimony unpersuasive and conclude that Mieses was going to be terminated no matter what he said or admitted to at the meeting. Indeed, Chabot admitted that he didn’t know what Mieses could have said that would have changed his mind.

While in fact Mieses did make an assertion that Chabot conceded might have caused him to reverse his decision if confirmed (Mieses’ claim that Williamson threatened to cut off his fingers), Chabot did not postpone his discharge decision, and merely informed Mieses that he did not believe Williamson would make such a remark.

Although Chabot does assert that he did after the discharge ask Williamson about Mieses’ allegation, I note that Williamson did not corroborate Chabot in this respect. In any event, Chabot’s failure to at least postpone the discharge while checking out Mieses’ assertion is further evidence of my conclusion that Chabot was not interested in learning the truth of what happened, but was intent on discharging Mieses as quickly as possible. Indeed Chabot provided no cogent explanation as to why he was in such a hurry to terminate Mieses, or why he discussed the discharge with his attorney and prepared the discharge letter before speaking to Mieses.

The most plausible reason for Chabot’s failure to do so is consistent with my findings above. He was intent on ridding Respondent as soon as possible, of a leading union adherent who not only testified against Respondent at the National Labor Relations Board hearing, but who also had confrontations at the hearing and shortly thereafter with an employee who did not support the Union and who testified for Respondent and against the Union at the hearing.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has failed to meet its burden of establishing that it would have terminated Mieses absent his protected conduct. Therefore, it has violated Section 8(a)(1), (3), and (4) of the Act by its discharge of Mieses. I so find.

V. THE RESPONDENT’S CONTESTING OF MIESES’ UNEMPLOYMENT COMPENSATION CLAIM

A. Facts

Mieses testified that on the day of his termination, he notified Chabot that he was going to apply for unemployment insurance. Chabot responded according to Mieses that he should not worry about it, that he (Chabot) would take care of him and that he (Chabot) was “not out to kill” Mieses. Chabot gave Mieses a card to fill out for unemployment, as well as a copy of Respondent’s termination letter.

Shortly thereafter, Mieses went to the unemployment office to file for benefits. Mieses admitted that he lied to unemployment on his initial application and stated that he was laid off for lack of work, because he thought that he would not receive benefits if he told them he was fired for threatening an employee.

On October 31, 1996, the Union filed a charge with the Region in Case 2–CA–29826 alleging that Respondent violated Section 8(a)(3) and (4) of the Act by discharging Mieses, because he gave testimony on behalf of the Union at the National Labor Relations Board trial on October 28, and because of his activities on behalf of the Union. The charge was served on Respondent on November 4.

According to Mieses he received a call from a Ms. Taylor from the Department of Labor, about 3 weeks after he filed his

initial claim. She informed him that he must appear at the office to investigate his claim, because his Employer had said that he was terminated for threatening to kill a coworker. Thus, Mieses on November 27 went to the office and spoke with Ms. Taylor. At that time he admitted that he had lied previously, but also gave her a copy of the National Labor Relations charge filed on his behalf, as well as his affidavit given in connection with the case, and Respondent's termination letter. Taylor also took a written statement from Mieses, wherein he explained the circumstances of his threat to Williamson, including his assertion that Williamson had threatened him first. He also explained why he had gone to supervision about the matter, and that he had filed unfair labor practice charges against Respondent concerning his discharge. Finally he also conceded in the statement that he checked lack of work on the application, because he "didn't want to put fired," it was his first time filing for benefits, and he thought it would stop him from getting benefits.

Taylor informed Mieses at that time that his case would be investigated further, but she believed that he would be penalized for 1 week, because he had not told the truth when he initially filed his claim.

After this meeting, Mieses asserts that he called Chabot on the phone. Mieses claims that he asked Chabot why Respondent had told the Labor Department that he had threatened to kill a coworker, since Chabot had previously told Mieses that he (Chabot) wasn't out to kill him. (Mieses) Chabot responded according to Mieses, "Paco, what did you want me to do, you went to the NLRB." Mieses further asserts that he replied to Chabot, "what was I supposed to do, take this sitting down?"

Subsequently, Mieses received a document from the Department of Labor, dated December 11. The document reflects that on November 4 Mieses willfully made false statements to obtain benefits, and that his right to receive benefits was reduced by 4 days. It further explained that Mieses had checked "lack of work" on the application as the reason for separation, but he knew that the separation was not for lack of work. This determination was not appealed by either Respondent or Mieses, and he thereafter received benefits, with the exception of the penalty of 1 week.

Chabot testified that he did not recall any discussion with Mieses on the date of discharge concerning whether Mieses would be eligible for unemployment. Chabot claims that he did give as he normally does a piece of paper with a registration number on it to bring to unemployment, but denies that he promised not to oppose Mieses' unemployment. Chabot adds that he doesn't decide unemployment and never tells anyone that they will or will not get unemployment. It is just not his decision and he contends that he has nothing to do with that decision.

Chabot also does not recall a phone conversation with Mieses concerning unemployment, but did testify that during a personal meeting with Mieses, Mieses told Chabot that there was a delay in his receiving unemployment, because of a problem with his green card. Chabot was asked if he opposed Mieses' claim for unemployment because he filed a charge with the National Labor Relations Board? He responded that he did not oppose anyone going for unemployment, and that he never told Mieses that he was going to make it more difficult for him to get unemployment because he filed a charge with the National Labor Relations Board.

Respondent adduced no other evidence or any other witnesses concerning the issue of Mieses' unemployment benefits. Thus since Chabot claimed that he did not make the decision to contest Mieses' claim, Respondent did not produce the person or persons who made the decision, nor any other evidence as to who or why such decision was made.

B. Credibility Resolutions and Analysis

I credit the testimony of Mieses as reflected above, concerning his conversations with Chabot concerning unemployment insurance. I found Mieses to be candid, consistent and believable with respect to such testimony which in my view had the "ring of truth," to it and did not sound to me to be concocted.

Chabot, on the other hand, was rather vague and equivocal in his purported denials. Thus he did not specifically deny that he told Mieses that he should not worry about it, that he (Chabot) would take care of Mieses, or that he was "not out to kill" Mieses while discussing unemployment insurance. Indeed when asked whether he had a discussion with Mieses concerning his eligibility for unemployment, Chabot replied that he did not recall any such discussion, while at the same time admitting that he gave Mieses a form to be taken to unemployment. It is, therefore, logical to conclude which I do, that there was some discussion between them about unemployment, and I therefore credit Mieses' testimony in that regard.

With respect to Mieses' testimony concerning their second conversation, again Chabot was vague and equivocal. He also "did not recall [emphasis added]" a phone conversation with Mieses concerning unemployment, but did recall a face-to-face meeting where the subject was discussed. Once again Chabot failed to specifically deny the significant portions of Lo Mieses' testimony, i.e., that Mieses asked him why Respondent had told the Department of Labor that he had threatened to kill a coworker, since Chabot had previously told him that he (Chabot) "wasn't out to kill" him, and that Chabot replied, "Paco, what did you want me to do, you went to the NLRB." Thus while Chabot did deny telling Mieses that he was going to make it more difficult for him to get unemployment, because he filed a charge with the National Labor Relations Board, that is not a clear denial of Mieses' testimony. Even, if Chabot's "purported" denials coupled with his versions of their conversations, are deemed to be sufficient to constitute clear denials of Mieses' testimony, I do not credit these denials, as I find as detailed, above, that Mieses' version of the conversations was both believable and credible.

Having made these findings, the evidence fully supports the General Counsel's contention that a motivating factor in Respondent's decision to contest Mieses' unemployment insurance claims was his protected conduct of participating in an National Labor Relations Board charge with respect to his discharge.¹⁹

Thus on the date of his termination, Chabot's comments to him, while not an absolute promise by Respondent not to contest his unemployment, clearly can reasonably be construed, which I do, as an assertion by Chabot that Respondent would not stand in his way of obtaining unemployment insurance. Indeed Chabot's statements concerning unemployment, such as that Mieses should not worry about it, that he (Chabot) would

¹⁹ While Mieses did not actually file the charge, it was filed by the Union on his behalf. Thus Mieses was clearly engaged in protected conduct in that regard, and Respondent does not argue otherwise. See *NLRB v. AA Electric*, 405 U.S. 117, 124 (1972).

take care of him, and that he (Chabot) was not “out to kill” Mieses, can only be rationally construed as Chabot telling Mieses that, although he was being terminated, Respondent would not contest his receipt of unemployment insurance benefits.

Subsequent to this conversation, the Union filed its charge asserting that Mieses’ discharge was unlawful, which charge was served on Respondent on November 4. Sometime thereafter, Respondent notified the Department of Labor that Mieses had been discharged for threatening to “kill” a coworker.

In that regard, Respondent argues that there is no evidence that Respondent knew of Mieses’ charge at the time it prepared its response. I disagree. The evidence does disclose that Mieses filed his initial claim on November 4, the same day that the charge was served on Respondent. While the record does not disclose when the Department of Labor sent its form to Respondent to fill out, or when Respondent in fact did respond, it is reasonable to conclude, which I do, that a number of days passed between November 4 and Respondent’s sending in its response.

Moreover, Chabot’s remark to Mieses, during their second conversation, wherein Chabot admitted in effect that Respondent had contested his claim because he went to the National Labor Relations Board, is significant evidence that in fact Respondent knew about the charge when it responded to the Department of Labor.

Chabot’s statement is of course, as noted a substantial admission that the charge was responsible for Respondent’s decision to contest Mieses’ claim. Therefore I conclude that the General Counsel has established that protected conduct of Mieses was a motivating factor in such decision by Respondent.

The burden then shifts to Respondent to establish that it would have taken the same action, absent Mieses’ protected conduct. Since Respondent has adduced absolutely no evidence from any witness as to who, when or why it made the decision to contest Mieses’ claim, it has therefore failed to meet its burden of proof.

Rather, Respondent has made several arguments which I construe as more or less public policy contentions, which it asserts warrant dismissal of this complaint allegation. Thus it contends initially that there is no evidence that it was aware of Mieses’ “lie” to the DOL, and that in any event all it was doing was telling the truth to the DOL by informing the DOL of why it decided to terminate Mieses. Therefore, Respondent asserts that it is “incomprehensible” for the General Counsel to be claiming that Respondent committed an unfair labor practice by not lying to the DOL, as Mieses had previously done.

While these arguments by Respondent do have some surface appeal, in my judgment they do not preclude finding of a violation here. Although it is true that Respondent may not have known what Mieses had told the DOL about his termination, it certainly had to have been aware that telling the DOL that Mieses was terminated for threatening to “kill” a coworker would not be helpful to Mieses in obtaining his unemployment. Indeed, it is notable that Respondent rather than simply telling the truth to the DOL as Respondent contends, exaggerated its purported reason for discharge, by stating that Mieses threatened to “kill” a coworker, while in fact he only threatened to stab Williamson.

More importantly, Respondent could simply have ignored the DOL inquiry and not sent back any response to the DOL request. Respondent argues in that regard that New York Labor Law Section 575(2) compels Respondent to respond or else it

would be subject to a financial penalty by the Commissioner of Labor. However, Respondent has adduced no evidence that it made any decision or took any action based on this section of the law. Indeed, since it adduced no evidence of who or why the decision was made to respond as it did to the DOL, there is no record evidence as to why it simply did not respond to the DOL inquiry.

In this connection, I also note that the failure of Respondent to call the decision maker (i.e., the person or persons who decided on Respondent’s course of action with respect to Mieses’ unemployment claim), to explain why Respondent acted as it did, gives rise to an adverse inference, which I find it appropriate to draw, that such testimony it offered would not have been favorable to Respondent’s case. *United Parcel Service Corp.*, 321 NLRB 300 fn. 1, 308–309 fn. 21 (1996); *Reddy Mix Concrete Co.*, 317 NLRB 1140, 1143 fn. 16 (1995); *Kut Rate Kid & Shop Kwik*, 246 NLRB 107, 121 (1979); *Dorn’s Transportation Co.*, 168 NLRB 457, 460 (1967), *enfd.* in pertinent part 405 F.2d 712, 713 (2d Cir. 1969). Therefore the failure of Respondent to call such witnesses further supports my finding of unlawful motivation.

Respondent also makes another argument in an attempt to give a positive “spin” to Chabot’s remarks. Thus it asserts that even if it knew of Mieses’ charge at the time of its response to the DOL, “then the Partnership would have known that it would have to explain to the Board that Mr. Mieses was discharged because of his threat to stab Mr. Williamson. The Partnership could not, then, present contrary evidence to the local unemployment office concerning the reason for Mr. Mieses’ discharge, even if the Partnership was inclined to conspire with Mr. Mieses to provide consistent, albeit false information to the local unemployment office. Once Mr. Mieses filed his unfair labor practice charge, the Partnership’s hands were tied—it had to tell the truth.” “However, these arguments suffer from several defects. First, as I have indicated above Respondent did not produce the decision maker, so the record contains no evidence that Respondent made its decision, because as the brief asserts, “its hands were tied,” and it could not present “contrary evidence” to the DOL. Second, as also noted above, it could simply have failed to respond to the DOL inquiry, thereby obviating any possible conflict between its defense to the ULP charge and its response to the DOL. Third, such a contention by Respondent, even if found to be supported by record evidence would not be helpful to its defense. Thus Respondent must establish that it would have taken the same action absent Mieses’ protected conduct. That burden cannot be met by the finding urged by Respondent, since it is in fact an admission that the filing of the charge with respect to Mieses’ discharge, caused Respondent to take a different position. Thus it cannot argue that it would have contested the unemployment claim absent Mieses’ protected conduct.

Finally, it must be noted that “the approach to Section 8(a)(4) has generally been a liberal one in order to fully effectuate the section’s remedial purpose.” *AA Electric*, *supra* at 124, cited in *General Services, Inc.*, 229 NLRB 940, 941 (1977). In that connection the Board has found violations of Section 8(a)(4) of the Act in a number of cases similar to the instant situation. *Baddour, Inc.*, 281 NLRB 546, 547 (1986) (violation for employer to cause the stoppage of employee’s workmen’s compensation); *Clark & Hinojasa, Attorneys at Law*, 247 NLRB 710 (1980) (employer’s refusal to pay terminated employee additional salary, which it had promised to do,

because she threatened to complain to the Board, violative of Section 8(a)(4); *Manuel San Juan Co.*, 211 NLRB 812, 818-819 (1974) (refusal to grant severance to employee as required by law of the State because employee filed charge violative of Sec. 8(a)(4) of the Act). See also *General Services*, supra (refusal to rehire supervisor who filed an 8(a)(3) charge which was dismissed because of his supervisory status, because he filed such charge, violative of Section 8(a)(4)).

Accordingly, I conclude based on above described analysis and precedent, that Respondent has violated Section 8(a)(4) of the Act by contesting Mieses' unemployment compensation claim.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with discharge, layoff, subcontracting, or other loss of employment because of their support for the Union and/or if they became represented by the Union, informing or implying to its employees that it would be futile for them to select the Union as their collective-bargaining representative, and by promising its employees' benefits and improvements in their terms and conditions of employment if they withdraw their support from the Union, and/or if they do not select the Union as their collective-bargaining representative, Respondent has violated Section 8(a)(1) of the Act.

4. By discharging and refusing to reinstate its employee Paco Mieses because of his activities on behalf of/ and support of the

Union, and because he testified at a National Labor Relations Board hearing Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

5. By contesting the unemployment insurance benefits of Paco Mieses, because a charge was filed on his behalf by the Union. Respondent has violated Section 8(a)(1) and (4) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not violated the Act in any other manner as alleged in the complaint.

REMEDY

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

Having found that Respondent discriminatorily discharged Paco Mieses, I shall recommend that Respondent offer him immediate and full reinstatement to his former job or a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him. All backpay provided shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed in the manner and amount prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]