

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PRODUCTION AND MAINTENANCE UNION,
LOCAL 101 (INDEPENDENT CULINARY
FOODS, INCORPORATED)

and

Case No. 13-CB-17108-1

COSME CARRASCO, AN INDIVIDUAL

Sylvia L. Taylor and Denise Jackson-Riley, Esqs.
for the General Counsel.

Jorge Sanchez, Esq., (Despres, Schwartz & Geoghegan),
of Chicago, IL, for the Respondent.

DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on March 18, 2003, in Chicago, Illinois. The complaint alleges that Respondent violated Section 8(a)(1)(A) of the Act by threatening an employee and failing to process his grievance to arbitration because of his dissident union activity. Respondent filed an answer denying the essential allegations in the complaint. The parties filed post-hearing briefs, which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Culinary Foods, Inc. (hereafter, the Employer) has an office and place of business located in Chicago, Illinois. In a representative one-year period, it purchased and received, at its Chicago facility, goods valued in excess of \$50,000 directly from points outside Illinois. Accordingly, I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I also find that Respondent (hereafter the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

5 For the last 4 years, the Union has represented the approximately 1000 employees who
work at the Employer's facility. Employee Cosme Carrasco, a member of the Union, was one of
4 refrigeration mechanics at the plant. He worked on the second shift from 1:30 p.m. to 10:00
p.m., Saturday through Wednesday, and was employed from May 28, 1998 until his discharge
10 on May 31, 2002. He claims that he tried to replace the Union with a local of the Operating
Engineers, at least among the refrigeration employees; but there is no evidence that any Union
officer was aware of such activity. Indeed, in the last representation election, in 2001, the Union
won representation rights in a contest with 3 other competing unions, none of which was a local
of the Operating Engineers. Nor does it appear that the local mentioned by Carrasco ever tried
15 to represent employees at the Employer's facility. At some point, in late 2001 or early 2002, the
Union and the Employer reached a new collective bargaining agreement covering all of the unit
employees.

On May 28, 2002, Carrasco began work at his usual time. At about 2 p.m., he went to
20 the employees' cafeteria where Union President Ricardo Casteneda and Union Vice-President
Lewis Burton were meeting with a group of employees.¹ The purpose of the meeting was to
discuss the recently negotiated collective bargaining agreement, but Carrasco was not
scheduled or invited to attend this meeting. He was on work time with no work-related reason to
be in the cafeteria. He nevertheless stopped in the cafeteria and engaged Burton in a
25 discussion about the recent contract. He expressed his dissatisfaction with the contract and
said he would rather be represented by a local of the Operating Engineers. Burton explained
that it was unlikely the refrigeration employees would be split off from the overall unit and that
the Union reached the best possible deal with the Employer. Carrasco persisted, and, after a
repeated version of the above exchange, Burton ended the conversation and turned to leave.
30 Carrasco responded angrily: "[Y]ou're taking my dues, mother fucker, you're going to talk to
me." Burton turned and calmly told Carrasco that he was particularly sensitive to Carrasco's
profane epithet because he had recently lost his mother. Carrasco was unmoved. He said he
did not care and that Burton was "still a mother fucker." Burton responded: "Well, you're a
mother fucker too . . . And we need to take this outside." Carrasco then grabbed Burton's shirt
35 by the collar with both hands and shoved him backwards into a wall. Burton grabbed
Carrasco's hands in a defensive move and the two continued to exchange words until
Casteneda intervened and separated them.²

40 ¹ In parts of the transcript, Casteneda's name is misspelled (As was the surname of Ms.
Taylor, counsel for the General Counsel). Unfortunately, the transcript contained many errors.
Some are so obvious that they do not detract from the essentials of what took place at the
hearing and others do not distort an accurate account of events because the meaning is plain
when the testimony and the exchanges are viewed in context.

45 ² The above is based on the clear, detailed and credible testimony of Burton. Not only was
Burton's version of the incident the most complete, straightforward and reliable of any witness,
but he was essentially corroborated by other witnesses. For example, Casteneda, who candidly
testified he did not hear or observe the entire incident, confirmed that Burton tried to end the
conversation but that Carrasco grabbed Burton and moved him back and forth against a wall
before Casteneda intervened. Indeed, Carrasco did not deny initially calling Burton a "mother
50 fucker" or initiating physical contact with Burton by grabbing his shirt. In all other respects,
including the self-serving assertion that Burton first raised the decibel level of the confrontation,
Carrasco's testimony was not credible. In addition to Carrasco, the General Counsel, who

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The first management official who came on the scene was Production Supervisor Joe Norack. He asked Burton if he was all right because it appeared to him that Burton was “ruffled up.” Burton said he was all right. Norack then asked if Burton wanted to press charges and Burton replied in the negative. According to Norack, the Employer’s policy is that all altercations on company property are investigated and he directed Burton to formally report the incident to responsible officials of the Employer. The applicable company rules provide that immediate discharge may follow even the first of the following offenses: “6. Assaulting another employee, member of management, or visitor, or fighting on the premises at any time . . . 14. Threatening, intimidating, coercing, harassing, or interfering with other employees, management or visitors at any time.” Indeed, the record contains uncontradicted evidence that the Employer is very strict about violence or threats of violence in the workplace. The head of Human Resources, Kathy Hood, told Burton as much when she talked to him shortly after the incident and asked him what had happened. She said the Employer did not allow employees to assault people. She also asked Burton whether he wanted to file charges and he again declined to do so. Burton presented uncontradicted testimony that he has dealt with two grievances from employees of the Employer over discharges involving violence or threats of violence. In both cases, the Employer discharged the employee found to be at fault. In one case, a short-term employee was fired over a threat, and the discharge was apparently upheld notwithstanding the Union’s grievance. In the other, the employee was fired for actual violence, and the Union took the matter through several steps of the grievance procedure before dropping the grievance after learning that a witness who originally supported the employee changed his story.

Carrasco was also called to the Human Resources office to give his version of the incident to Kathy Hood. He reported to the office and met with her at about 3 p.m. One other person was present. Hood said she had received reports of the altercation—she had talked at least with Burton and Casteneda—and told Carrasco, according to his own testimony, that “anytime you put your hands on anybody, it’s against company rules.” She told Carrasco to punch out and to return for a meeting on May 31, after an investigation into the matter. Later, it was determined that Carrasco would work to the end of his shift because he was the only person on duty who could perform his job.

In the meantime, Lydia Mutua, a Human Resources supervisor, was assigned by Hood to investigate the incident further. On May 28, she took statements from employees Jose Vasquez and Adolfo Vences, which confirmed that Carrasco had physically touched Burton. In fact, according to Mutua, Vasquez said that Carrasco was “manhandling” Burton.³

declined to litigate the merits of the grievance for remedial purposes, called 2 other witnesses to the incident. One of the witnesses was Carrasco’s aunt, Amada Diaz, who selectively testified to hearing Burton ask Carrasco to go outside, but said nothing about Carrasco’s epithet, which preceded that statement. She testified that Carrasco grabbed Burton’s shoulders, but could not testify as to what preceded that action. I do not accept her testimony except insofar as it corroborates that of Burton. The other witness called by the General Counsel was Adolfo Vences. He likewise failed to mention the epithet that Carrasco admittedly first uttered, but he selectively testified hearing Burton’s repetition of it and his invitation that Carrasco take the dispute outside. Although not as decisive on the issue as the other witnesses, Vences agreed with them that Carrasco physically touched Burton. Vences’ description of the encounter, however, differed somewhat from that of Carrasco and he selectively left out some of the exchange between the participants. I therefore cannot accept his testimony on what happened to the extent that it differs from that of Burton.

³ On May 30, after learning that Carrasco was permitted to work the remainder of the day on May 28 and fearing that Carrasco was not being punished for his assault, Burton wrote a letter

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On May 31, Carrasco returned to the plant to meet with Hood and his immediate supervisor, Dennis Rymer. Hood said she had completed her investigation and, as a result, Carrasco was being terminated. Shortly thereafter, Carrasco contacted Casteneda about filing a grievance, and, on June 4, the grievance was filed. Casteneda told Carrasco that since he, 5 Casteneda, was a witness to the events that led to Carrasco's discharge, he would not personally be handling the grievance. Instead, the handling of Carrasco's grievance on behalf of the Union was assigned to Union Secretary Charles Campos, who had considerable grievance-handling experience, including representation of employees of the Employer. Campos called Carrasco to inform Carrasco that he was going to handle the grievance. 10 According to Carrasco, Campos said he was going to be "fair and not take sides." In handling the grievance, Campos did not speak to Burton or Casteneda about the matter. Both of these Union officials decided to remain uninvolved in the grievance because they did not want to influence Campos.

Campos arranged with Mutua, the Employer's Step 1 grievance representative, to hold a meeting to discuss the grievance. The meeting was held at the Employer's plant on June 12. Shortly before the meeting, Campos met and talked with Carrasco in the lobby of the Employer's facility; then Campos and Carrasco proceeded to Mutua's office. Mutua essentially took a statement from Carrasco, in which he admitted touching Burton but said that he felt he was defending himself. Neither in this meeting, nor at any other time, did Carrasco mention—to 20 the Union or to the Employer—the name of any witnesses to the altercation who would support the view that he had not touched Burton or that he was not the aggressor. According to Carrasco, at the meeting, he mentioned that he had heard of an earlier altercation involving an employee named Angel Lopez and another unnamed employee, which did not result in Lopez being fired. Carrasco was unable to give details of this altercation or what happened to the other employee and the General Counsel offered nothing further on this point. Campos was identified in Carrasco's statement as repeating and emphasizing Carrasco's assertion that he put his arms up to keep Burton "at bay." In this and other respects, Campos actively participated in the meeting. He asked both Carrasco and Mutua if there were other witnesses to 30 the incident and inquired into its circumstances. After being told that the Employer had specific rules against fighting, Campos asked Carrasco if he was aware of those rules. He then asked Carrasco if he could just have walked away from the confrontation. During the meeting, Carrasco also presented a petition from employees in his support. Mutua was apparently unmoved by the petition and Campos pointed out that it would not help Carrasco in the circumstances. In an attempt to save Carrasco's job, Campos also asked Mutua if the 35 Employer had anger management classes that might be available to employees. That suggestion apparently fell on deaf ears.⁴

Shortly after the meeting of June 12, Mutua also talked to Burton, who denied touching or threatening Carrasco and essentially told Mutua that he was grabbed and pushed by Carrasco. Armed with statements from Carrasco and Burton and the two employee witnesses, 40

to Kathy Hood. In that letter, he reminded her of the Employer's policy of discharging employees engaged in violence and urged that Carrasco not be treated any differently, particularly since many other employees had witnessed the incident. Burton candidly testified as to his reasons for writing the letter. 45

⁴ The above is based on the composite testimony of the participants in the meeting. Carrasco testified, contrary to Campos that Campos did not ask about anger management classes. I reject Carrasco's testimony on this point. Campos was a more reliable witness and his testimony about mentioning anger management classes was supported by a statement he gave to the General Counsel during the investigation of the case. 50

to coerce employees in the exercise of their Section 7 rights. Significantly, Carrasco, not Burton, committed the only assault in the encounter. In these circumstances, the General Counsel has not proved that the Union violated Section 8(b)(1)(A) by threatening violence or otherwise coercing employees because of their dissident union activities.⁵

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Nor did the Union exhibit bad faith in handling the Carrasco grievance over his discharge for assaulting Burton. First of all, the Union properly assigned the grievance to an experienced grievance handler who was also a union officer but was not involved in the incident that was the subject of the grievance. Neither Burton, one of the participants in the incident with Carrasco, nor Casteneda, who separated the two after Carrasco grabbed Burton, participated in the grievance procedure. Indeed, Campos, who handled the grievance, did not even talk to them about the incident. Furthermore, Campos actively participated in the Step 1 grievance meeting and sought to save Carrasco's job by seeking anger management classes for him. Carrasco's obvious culpability as the aggressor in the incident was clear. Carrasco himself never denied touching or grabbing Burton. Nor did he deny initially calling Burton a "mother fucker." Several witnesses gave statements to the Employer confirming Carrasco's misconduct. And the Employer's rules against fighting were clear, even for a first offense. Indeed, Carrasco was told by the head of Human Resources that a violation occurs "anytime you put your hands on anybody." The evidence shows that the Employer was very strict on violence in the workplace and had discharged those it felt culpable in the past. When the Employer predictably rejected the grievance at Step 1, the Union did not reflexively give up. Campos asked the Employer's representative to send him her notes of statements given by other employees in the investigation of the incident. In her testimony, Mutua said this was not regularly done, thus showing that Campos was being unusually deliberate in assessing the strength of his case. After studying the statements and considering the clear violation of the Employer's work rules, Campos reasonably decided not to pursue the matter any further.

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The Union's decision was not based on arbitrary considerations. Indeed Carrasco's alleged dissident union activities were minimal at best and barely even known by Union officials. Carrasco's stealth effort to bring another union into the plant and his solitary objections to the contract were hardly matters that seriously concerned the Union. He was only one of a thousand employees at the plant represented by the Union and its status as bargaining agent was never in doubt, certainly not through any of Carrasco's efforts. In addition, there is no

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⁵ The General Counsel cites no cases for the proposition that an invitation to fight after a provocation amounts to a threat of bodily harm. Contrary to the General Counsel's contention (Br. 9), *Mid-States Metal Products, Inc.*, 156 NLRB 872, 897 (1966) in no way "mirrors the facts" in this case. In that case, a union president repeatedly threatened an employee dissident leader in an effort to stem the flow of union withdrawals during an anti-union campaign. On one occasion, in the plant, on company time, the president told the dissident employee leader, one Dobbins, that "he could beat the hell out of Dobbins." On another occasion, also in the plant, on company time, he said he "would" beat the hell out of him and would do it "now" if Dobbins would "go outside." On the third occasion, outside in the parking lot, during lunch break, he told Dobbins he "would be waiting for you down the road." The judge, whose findings were adopted by the Board, made no distinction between those three separate threats, but only one of them involved an invitation to go outside and that invitation was preceded by a clear threat of bodily harm. Thus, it was not the single invitation to fight that was the violation, but rather the repeated threats of bodily harm. In contrast, here, Burton made no separate threat of bodily harm—not even once. Indeed, it was Carrasco who approached Burton; it was Carrasco who was the provocateur; and it was Carrasco who committed the only assault during the incident. All of these factors distinguish this case from that cited by the General Counsel.

credible record evidence that would establish a causal connection between Carrasco's alleged dissident activities and the Union's decision not to take his grievance to arbitration. Thus, the General Counsel has failed to show by a preponderance of the evidence that the Union failed to take Carrasco's grievance to arbitration because of his alleged dissident activities or for any other arbitrary reason. On the contrary, the evidence shows that the Union acted in good faith at all times during the handling of the grievance. Accordingly, that part of the complaint alleging a violation of the Union's duty of fair representation is dismissed.

The General Counsel's case is based on several faulty premises. The General Counsel alleges that the Union never sought a lesser discipline than discharge for Carrasco's offense. This is based on the discredited testimony of Carrasco that Campos never mentioned anger management at the Step 1 grievance meeting in an attempt to save Carrasco's job. I find that by seeking such a resolution Campos did indeed try to seek a lesser discipline than discharge. But the Employer did not accept Campos's suggestion and the Employer's rule that permitted discharge for a first offense of fighting or assault made Campos's attempt to obtain a lesser penalty a long shot. In these circumstances failing to pursue a lesser penalty through arbitration was not unreasonable. In any event, there is absolutely no evidence that the Union's decision was based on arbitrary considerations. Likewise unavailing is the General Counsel's contention that the Union irresponsibly failed to seek out other witnesses to the incident to counter those relied upon by the Employer. There was no significant factual dispute as to what happened during the May 28 confrontation between Carrasco and Burton. Carrasco himself did not deny grabbing Burton or initially addressing a profane epithet to Burton. Nor did Carrasco suggest the names of witnesses who would have supported the position—that he himself did not take—that he did not grab Burton or hurl the profane epithet. Carrasco attempted to show that he felt threatened by Burton but that was a subjective feeling that could not be corroborated by anyone else. Only the objective circumstances were relevant in assessing fault in this encounter and the objective circumstances did not favor Carrasco. Not only did Carrasco not give any names of possible witnesses either to the Union or the Employer, but the General Counsel, using the investigatory power of the Federal Government, only came up with two witnesses to the incident. One had already been interviewed by the Employer and the other was Carrasco's aunt, who did not exculpate her nephew. In these circumstances, it is unrealistic to expect that a search of witnesses would have saved Carrasco's job. Finally, the General Counsel (Br. 16) seems to argue for a violation simply because of an alleged inherent conflict of interest: If an altercation between a union official and a union dissident results in the discharge of the dissident, according to the General Counsel, the union must pursue any subsequently filed grievance by the dissident to full arbitration. No cases are cited for that remarkable proposition and such a per se violation could not withstand rational analysis.⁶

⁶ The General Counsel also seems to contend that Burton's letter was a demand that the Employer discharge Carrasco in the same sense in which a union arbitrarily enforces a union security clause. That, of course, is not this case. The Union had no authority, by contract or otherwise, to enforce any demand that Carrasco be discharged. Burton's letter was not that kind of demand. It was simply an attempt to point out the natural result of a consistent application of the Employer's policy against assaults. Moreover, Burton was speaking as the person who was assaulted, not as a union representative demanding discharge for unrelated reasons. Thus, it is clear that Burton's letter, even if it could be viewed as a demand, was seeking employer action on the merits, not as a result of union discrimination or arbitrariness. In any event, there is no evidence that the decision to terminate Carrasco was anything but the Employer's alone.

Conclusion of Law

5 The General Counsel has failed to show by a preponderance of the evidence that the Union violated the Act by threatening an employee with violence and failing to take his grievance to arbitration because of his dissident union activities.

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended⁷

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ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. May 5, 2003.

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Robert A. Giannasi
Administrative Law Judge

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⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.