

**Nos. 10-1289 & 10-1312**

---

**UNITED STATES COURT of APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**KIEWIT POWER CONSTRUCTORS CO.,  
Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD  
Respondent/Cross-Petitioner**

---

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR  
ENFORCEMENT FROM  
THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD**

---

**JILL A. GRIFFIN**  
*Supervisory Attorney*

**RENÉE D. McKINNEY**  
*Attorney*

**National Labor Relations Board  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-2949  
(202) 273-2946**

**LAFE E. SOLOMON**  
*Acting General Counsel*

**CELESTE J. MATTINA**  
*Acting Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

**National Labor Relations Board**

---

## TABLE OF CONTENTS

| <b>Headings</b>   | <b>Page(s)</b> |
|---|----------------|
| Statement of subject matter and appellate jurisdiction.....   | 1              |
| Relevant Statutory Provisions.....  | 2              |
| Statement of the issues presented .....   | 2              |
| Statement of the case .....   | 3              |
| Statement of facts.....   | 4              |
| I. The Board’s findings of fact.....  | 4              |
| A. Background: Company operations and organization; the Company break policy allows the electricians to take two daily breaks in the dry shacks away from the dangers of the worksite.....                        | 4              |
| B. The Company suddenly changes the location of breaks for the electricians; a dispute over the breaks erupts; the electricians concertedly resist the change out of concern for their safety .....               | 6              |
| C. The Company disciplines the electricians for continuing to break in the dry shacks; Judd and Bond make intemperate remarks in response to the discipline; the Company decides to terminate Judd and Bond ..... | 9              |
| D. The Company discharges Judd and Bond; the Company later rescinds all of the other electricians’ disciplinary write-ups; .....  | 11             |

| <b>Headings-Cont'd</b>   | <b>Page(s)</b> |
|--|----------------|
| II. The Board's conclusions and order.....   | 12             |
| Summary of argument .....  | 13             |
| Standard of review .....   | 14             |
| Argument .....   | 16             |
| I. Substantial evidence supports the Board's finding that<br>the Company violated Sections 8(a)(1) and (3) of the Act<br>by admittedly discharging employees Brian Judd and William<br>Bond for conduct that occurred during indisputably protected<br>union activity..... | 16             |
| A. An employer violates the Act when it discharges<br>employees for engaging in protected union activity .....   | 16             |
| B. The Company admittedly discharged Judd and Bond<br>exclusively because of their outburst during the May 20<br>discipline meeting involving protected activity .....   | 18             |
| C. Judd and Bond did not forfeit the protection of the<br>Act.....   | 19             |
| 1. The Board reasonably determined that the place of the<br>discussion, which was chosen by the Company,<br>favors protection or, at least, is neutral .....   | 20             |
| 2. The subject matter of the May 20 meeting indisputably<br>favors protection .....  | 23             |
| 3. The nature of the spontaneous outburst, in the context<br>of the protest of the new break policy, favors protection .....   | 25             |
| 4. The outburst was not provoked by Company unfair<br>labor practices .....  | 32             |
| 5. The balance of the <i>Atlantic Steel</i> factors favors protection .....  | 32             |

**Headings-Cont'd**

**Page(s)**

D. The Board's finding of a violation of Section 8(a)(3)  
of the Act is consistent with precedent.....33

Conclusion .....37

Addendum.....38

## TABLE OF AUTHORITIES

|   |                                    |
|---|------------------------------------|
| <i>Acme Die Casting, a Division of Lovejoy Industrial, Inc. v. NLRB</i> ,<br>26 F.3d 162 (D.C. Cir. 1994) ..... | 24                                 |
| <i>Adtranz ABB Daimler-Benz Transport, N.A., Inc. v. NLRB</i> ,<br>253 F.3d 19 (D.C. Cir. 2001) .....           | 17, 31                             |
| * <i>Allied Industrial Workers, AFL-CIO, Local No. 289 v. NLRB</i> ,<br>476 F.2d 868 (D.C. Cir. 1973) .....     | 18, 33                             |
| <i>Aluminum Co. of America</i> ,<br>338 NLRB 20 (2002) .....  | 31, 33                             |
| <i>Aroostook County Regional Ophthalmology Center</i> ,<br>317 NLRB 218 (1995) .....                            | 32, 35                             |
| * <i>Atlantic Steel</i> ,<br>245 NLRB 814 (1979) .....  | 17, 20, 23, 25, 30, 31, 32, 34, 35 |
| <i>Brunswick Food &amp; Drug</i> ,<br>284 NLRB 663 (1987) .....   | 23                                 |
| <i>Caterpillar Tractor Co.</i> ,<br>276 NLRB 1323 (1985) .....  | 17                                 |
| <i>Carleton College v. NLRB</i> ,<br>230 (8th Cir. 2000) .....  | 25                                 |
| <i>Cibao Meat Products</i> ,<br>338 NLRB 934 (2003) .....   | 21                                 |
| <i>Consumers Power Co.</i> ,<br>282 NLRB 130 (1986) .....   | 26                                 |
| <i>Consolidated Edison Co. of New York v. NLRB</i> ,<br>305 U.S. 197 (1938) .....                               | 15                                 |
| <i>DaimlerChrysler Corp.</i> ,<br>344 NLRB 1324 (2005) .....  | 20, 25                             |

## TABLE OF AUTHORITIES

| <b>Cases-Cont'd</b>   | <b>Page(s)</b> |
|---|----------------|
| <i>Fairfax Hospital,</i><br>310 NLRB 299 (1931) .....   | 28             |
| <i>Falcon Plastics Division of B-D Laboratories, Inc. v. NLRB,</i><br>397 F.2d 965 (9th Cir. 1968) .....                              | 15             |
| <i>Felix Industries, Inc.,</i><br>331 NLRB 144 (2000) .....   | 30, 35         |
| <i>Felix Industries, Inc.,</i><br>339 NLRB 195 (2003) .....   | 23             |
| <i>Felix Industries, Inc.,</i><br>251 F.3d 1051 (D.C. Cir. 2001) .....  | 25, 30, 35     |
| <i>Fineberg Packing Co.,</i><br>349 NLRB 294 (2000) .....   | 35             |
| <i>Goya Foods,</i><br>356 NLRB No. 73 (2001) .....  | 35             |
| <i>International Union of Electric, Radio, and Machine Workers,</i><br><i>AFL-CIO v. NLRB,</i><br>434 F.2d 473 (D.C. Cir. 1970) ..... | 15             |
| <i>Laborers' District Council of Georgia and South Carolina v. NLRB,</i><br>501 F.2d 868 (D.C. Cir. 1974) .....                       | 15             |
| <i>Leasco, Inc.,</i><br>289 NLRB 549 (1988) .....   | 28, 29         |
| <i>Media General Operations, Inc. v. NLRB,</i><br>560 F.3d 181 (4th Cir. 2009) .....  | 27, 30         |

## TABLE OF AUTHORITIES

| <b>Cases-Cont'd</b>  | <b>Page(s)</b> |
|--|----------------|
| <i>NLRB v. Illinois Tool Works</i> ,<br>153 (7th Cir. 1946) .....                      | 17             |
| <i>NLRB v. Southwestern Bell Telephone Co.</i> ,<br>694 F.2d 974 (5th Cir. 1982) ..... | 21, 23         |
| * <i>NLRB v. Thor Power Tool Co.</i> ,<br>351 F.2d 584 (7th Cir. 1965). .....          | 17, 18, 33     |
| <i>Noble Metal Processing</i> ,<br>346 NLRB 795 (2006) .....                           | 22             |
| <i>Operating Engineers, Local 470 v. NLRB</i> ,<br>350 F.3d 105 (D.C. Cir. 2003) ..... | 31             |
| <i>Pactiv Corp.</i> ,<br>337 NLRB 898 (2002) .....                                     | 31             |
| <i>Planned Building Services</i> ,<br>330 NLRB 791 (2000) .....                        | 35             |
| <i>Prescott Industrial Products Co.</i> ,<br>205 NLRB 51 (1973) .....                  | 25             |
| <i>Shell Oil Co.</i> ,<br>226 NLRB 1193 (1976) .....                                   | 29             |
| * <i>Stanford Hotel</i> ,<br>344 NLRB 558 (2005) .....                                 | 17, 21, 33, 34 |
| <i>St. Margaret Mercy Healthcare Centers.</i> ,<br>350 NLRB 203 (2007) .....           | 25             |
| <i>Starbucks Coffee Co.</i> ,<br>354 NLRB No. 99 (2009) .....                          | 27             |

**TABLE OF AUTHORITIES**

| <b>Cases-Cont'd</b>  | <b>Page(s)</b> |
|--|----------------|
| <i>Starbucks Coffee Co.,</i><br>355 NLRB No. 135 (2010) .....                      | 26             |
| <i>Success Village Apartments, Inc.,</i><br>347 NLRB 1065 (2006) .....             | 35             |
| <i>Transit Management of Southeastern Louisiana,</i><br>331 NLRB 248 (2000) .....  | 30             |
| <i>Trus Joist MacMillan,</i><br>341 NLRB 369 (2004) .....                          | 27             |
| <i>*Universal Camera Corp. v. NLRB,</i><br>340 U.S. 474 (1951).....                | 14, 15         |
| <i>Vought Corp.,</i><br>273NLRB 1290 (1984) .....                                  | 28             |
| <i>West Virginia Baking Co.,</i><br>299 NLRB 306 (1990) .....                      | 35             |
| <i>Wright Line, a Division of Wright Line, Inc.,</i><br>251 NLRB 1083 (1980) ..... | 34             |

## TABLE OF AUTHORITIES

| <b>Statutes:</b>           | <b>Page(s)</b>                   |
|----------------------------|----------------------------------|
| 29 U.S.C. § 157.....       | 13, 16, 19, 31, 32, 38           |
| 29 U.S.C. § 158(a)(1)..... | 3, 4, 13, 16, 17, 34, 35, 38     |
| 29 U.S.C. § 158(a)(3)..... | 3, 4, 13, 16, 17, 33, 34, 35, 38 |
| 29 U.S.C. § 160(a) .....   | 1                                |
| 29 U.S.C. § 160(e) .....   | 2, 14, 38                        |
| 29 U.S.C. § 160(f).....    | 2, 38-39                         |

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certifies the following:

(A) Parties and Amici: Kiewit Power Constructors Company, the petitioner/cross-respondent herein, was respondent in the case before the Board. The Board is the respondent/cross-petitioner herein, and the Board’s General Counsel was a party in the case before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board’s decision and Order issued on August 27, 2010, and reported at 355 NLRB No. 150.

(C) Related Cases: This case has not previously been before this Court or any other court. Board counsel are unaware of any related cases pending before, or about to be presented before, this Court or any other court.

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**Nos. 10-1289 & 10-1312**

---

**KIEWIT POWER CONSTRUCTORS CO.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF SUBJECT MATTER & APPELLATE JURISDICTION**

This case is before the Court on petition for review from Kiewit Power Constructors Co. (“the Company”) and cross-application from the National Labor Relations Board (“the Board”) to enforce the its Order issued against the Company. The Board had subject matter jurisdiction over this case under Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 151, 160(a), which empowers the Board to prevent unfair labor practices affecting commerce. The Board’s Decision and Order issued on August 27, 2010 and is reported at 355

NLRB No. 150.<sup>1</sup> It is a final order with respect to all parties under Section 10(e) of the Act. 29 U.S.C. § 160(e).

On September 14, 2010, the Company filed a petition for review of the Board's Order, and, on October 14, 2010, the Board filed a cross-application for enforcement. Both the petition for review and the cross-application for enforcement were timely, as the Act imposes no time limit for such filings. This Court has jurisdiction over the petition and cross-application pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f).

### **RELEVANT STATUTORY PROVISIONS**

The relevant statutory provisions are found in the Addendum to this brief.

### **STATEMENT OF THE ISSUE PRESENTED**

In May 2008, the Company announced a change in its break policy at its construction site: the electricians would be required to take their breaks at their work area in the turbine building, rather than in the Company-provided "dry shacks" away from the building. The electricians and their Union objected to the new rule on safety grounds and protested by continuing to break in the dry shacks. The Company fired employees Brian Judd and William Bond, admittedly because

---

<sup>1</sup> "JA" refers to the joint appendix. "Br." refers to the Company's opening brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

of their intemperate remarks to a superintendent during an otherwise protected discussion of the new break-in-place policy. The Board found that the Company committed unfair labor practices when it discharged Judd and Bond for their remarks.

This appeal presents one issue for the Court's consideration: Whether substantial evidence supports the Board's finding that Judd's and Bond's intemperate remarks were not egregious enough to forfeit the Act's protection, and therefore, whether the Board properly concluded that the Company violated Sections 8(a)(1) and (3) of the Act by discharging them for statements made while engaging in protected union activity.

### **STATEMENT OF THE CASE**

Acting on a charge filed by employee Brian Judd, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) and (3) of the Act by discharging Judd and another journeyman electrician, William Bond, because they engaged in protected union activities. Following a hearing, the administrative law judge issued a decision and recommended order dismissing the allegations that the Company had unlawfully fired Judd and Bond. In finding no unlawful discharge, the judge found that the Company had fired the two electricians because of their spontaneous remarks when presented with discipline enforcing a disputed change in the Company's break policy. According

to the judge, the men's remarks were so outrageous as to remove them from the Act's protection.

After considering the General Counsel's exceptions to the judge's decision, the Board issued a Decision and Order, reversing the judge, holding that Judd's and Bond's intemperate conduct, committed in the course of otherwise protected activity, was not so egregious to cost them the protection of the Act. Accordingly, the Board found that the Company violated Section 8(a)(1) and (3) of the Act as alleged. The facts supporting the Board's decision, as well as the Board's Decision and Order, are summarized below.

## **STATEMENT OF FACTS**

### **I. The Board's Findings of Fact**

#### **A. Background: Company Operations and Organization; the Company Break Policy Allows the Electricians to Take Two Daily Breaks in Dry Shacks Away from the Dangers of the Worksite**

The Company is a Delaware corporation, with an office in Overland Park, Kansas. (JA 437; 6, 11.) Beginning in 2007, and through the relevant period in 2008, the Company was engaged as a subcontractor in the design and engineering of a second turbine and related structures for a coal-fired power plant in Weston, Missouri ("the Project"), which was owned and operated by Kansas City Power and Light. (JA 437; 4, 5, 11.) The Company employed electricians, as well as craftpersons working as pipefitters, millwrights, boilermakers, ironworkers,

carpenters, and laborers on the Project. (JA 437, 439; 45-46, 69-70, 72, 268, 330, 348.)

Ron Hutchins managed Kiewit's construction work from the start of the Project. (JA 437; 190.) In May 2008, Ken Gibson was the Discipline Lead for electrical work or the electrical general superintendent; his Lead Electrical Superintendent was Roger Holmes. Ken Watts reported to Holmes as a Field Superintendent. (JA 437-38; 208-09, 263.) Watts began working on the Project as the lead electrical engineer in June 2007, upon his college graduation. He received a promotion to field superintendent in late April or early May 2008, the month before the events at issue occurred. (JA 439; 263.)

The 22 electricians working on the Project in May 2008 were represented by the International Brotherhood of Electrical Workers, Local 124 ("the Union"). (JA 431, 437; 324-25.) Mike Potter, a journeyman electrician, was the Union steward. (JA 438; 46, 136, 267.) Each electrician crew consisted of a working foreman and three or four journeyman electricians, plus apprentices. General Foreman Roger Allen oversaw all four electrical crews. Watts supervised the crews of Foreman Andy Holloway, and two others. (JA 437-38; 208-09.) Brian Judd and William Bond worked as electricians on Foreman Holloway's crew. Judd started working on the Project in December 2007 and Bond started in mid-May 2008. (JA 438; 88-89, 122, 152.)

The Union and the Company were parties to a collective bargaining agreement known as the National Maintenance Agreement (“the Agreement”), which governed their relationship on the Project. (JA 431, 437; 381-400.)

Although the Agreement only provided for one half-hour lunch break at noon, the Company allowed craft employees two additional paid 15-minute breaks on each 10-hour shift: a morning break at 9:30 a.m. and an afternoon break at 3:00 p.m. (JA 438; 192-93, 390-92.)

The crafts typically took their breaks in trailers, provided by the Company for that purpose and known as “dry shacks,” which were located in various places around the site. (JA 431; 69-70, 210, 211.) The electricians’ dry shack was located outside of the turbine building construction area. (JA 431, 438; 44, 87.) As construction of the turbine building progressed to upper-floor locations, the electricians began to leave their work areas in advance of the scheduled break time so that they could spend a full 15 minutes in the dry shacks before returning to work. (JA 431, 438; 44, 110.) This practice resulted in actual down time of 25 to 30 minutes for each break. (JA 431; 44, 59.)

**B. The Company Suddenly Changes the Location of Breaks for the Electricians; a Dispute Over the Breaks Erupts; the Electricians Concertedly Resist the Change Out of Concern for Their Safety**

Project Manager Hutchins became concerned that the electricians’ breaks were too long. (JA 431, 438; 33.) At a May 19, 2008 meeting attended by the

electrical superintendents, engineers, and foremen, Lead Electrical Superintendent Holmes announced that the Company wanted the electricians to take their breaks in the turbine building rather than the dry shacks, a practice referred to as breaking-in-place. (JA 431, 439; 46, 97.) Foreman Holloway objected that breaking in-place was neither sanitary nor safe. (JA 431, 439; 97.) The other foremen and Union Steward Potter agreed with him. (JA 439, 143.) The electricians typically removed their personal protective equipment during breaks, and they were concerned about the presence of fly ash (a byproduct of burning coal) in the air in the turbine building, and the danger of tools and other objects falling down from the floors above.<sup>2</sup> (JA 431, 439; 24, 151-52, 208-09.) If they took their breaks in place, the workers would need to continue to wear their safety equipment. (JA 439; 241.)

Union Steward Potter spoke to Discipline Lead Gibson, stating the Union's opposition to the breaking-in-place policy. But Gibson remained firm, noting that the Company had supplied a few chairs and tables in the turbine building for

---

<sup>2</sup> Bond was familiar with the dangers of fly ash from his military service in Kuwait. (JA 173.) Further, there had been two recent incidents with fly ash on the site: there was a spill of fly ash in a vacuum compressor building on or about May 15 (JA 98-99) and a silo malfunctioned and released a large cloud of fly ash, causing the Company to cease operations until Kansas Power and Light cleaned up the site. (JA 223.) The Company-maintained Materials Data Safety Sheet recommends wearing a respirator, full body coverings, including gloves, and safety glasses or goggles to protect against fly ash. (JA 367-71.)

breaks. Potter responded that the tables and chairs in the turbine building were insufficient accommodation to meet the employees' concerns. (JA 439; 29-30.)

After the meeting but before the morning break, Holloway told his crew that the Company did not want them going to the dry shacks at break time. (JA 431, 439; 98-99.) Holloway's crew, however, decided to continue taking their breaks in the dry shack. (JA 431, 439; 125.) When Watts and Holmes observed the May 19 morning break, they saw that the electricians retired to the dry shacks and were away from work for about 20 to 25 minutes. (JA 439; 332-33.) Watts spoke to the general foreman, Roger Allen, who explained that the workers did not want to break in place because of the amount of fly ash around the area. (JA 439; 274.)

The same day, Potter spoke to other crafts' stewards about when and where they took breaks. He found that they all went to dry shacks. (JA 439; 30-32.) Potter shared his research with Pete Raya, the Union's business representative, who explained that the Company was obliged to provide the workers with a safe, clean place to take breaks and that the electricians should be treated the same as the other crafts. (JA 439; 34.)

On May 20, field superintendent Don Volentine told his two electricians' crews that they could no longer take their breaks in the dry shacks. (JA 439; 46.) Union Steward Potter discussed the new prohibition with Foreman Holloway's

crew, and reiterated the Union's opposition to the break-in-place policy. (JA 439; 45-46.)

Superintendent Watts and Union Steward Potter separately observed the electricians take their morning break in the dry shacks, exceeding the 15-minute break time. (JA 439; 46-47.) In addition to the electricians, Potter also observed other crafts leaving for, and returning from, breaks in their dry shacks. Specifically, about five minutes before break, he saw the electricians as well as the ironworkers, pipefitters, boiler-makers, carpenters, and laborers leave for the dry shacks. (JA 439; 46-47.) At the end of the scheduled break time, he saw the same crafts leaving the dry shacks and walking back to their work sites, after the 15-minute break period had expired. (JA 439; 46-47.)

Watts reported what he had observed to his supervisor, Holmes. The men decided, in accordance with the Company's progressive discipline policy, to issue written oral warnings for each electrician and foreman. (JA 439; 281.) Under the Company's progressive discipline policy, after the first verbal warning, there is a written warning for the second offense, and suspension or termination for a third offense. (JA 431 n.3.)

**C. The Company Disciplines the Electricians for Continuing to Break in the Dry Shacks; Judd and Bond Make Intemperate Remarks in Response to the Discipline; the Company Decides to Terminate Judd and Bond**

At approximately 11:00 a.m. on May 20, Watts set out to distribute the warnings to the electricians at the jobsite where each crew was working. (JA 440; 281.) Potter accompanied him as the electricians' union representative. (JA 440; 281.) As Watts distributed the warnings, Potter told the crew that he and the Union disagreed with management's action. (JA 440; 294.) Some of the workers expressed their disagreement with the new break-in-place policy to Watts. (JA 440; 284.)

When Watts and Potter arrived at the area where Holloway's crew was working, Holloway was present, as were electricians Judd and Bond, and one other crew member. (JA 440; 45.) Watts distributed the warnings and Potter stated the Union's position. (JA 440; 44.) One crewmember asked if the employees would be written up again if they repeated their conduct during the afternoon break. (JA 440; 284.) Watts said that they would. (JA 440; 284.) At this point, according to Watts, Judd responded that he had been out of work for a year, that "it was going to get ugly" if he were terminated, and that Watts had "better bring [his] boxing gloves." (JA 440; 284.) Bond then said that he had been out of work for eight months and it was going to get ugly. (JA 440; 284.) Watts made no response. (JA 432; 43-44, 128.)

After Potter and Watts left Holloway's crew, they did not discuss the remarks made by Judd and Bond. (JA 432; 44, 284.) After delivering warning notices to the final crew, Watts reported Judd's and Bond's comments to Holmes, his supervisor, characterizing their words as a threat. (JA 440; 287, 333.) Holmes, in turn, sought out his supervisor, Gibson, and told him what Watts reported. The two later met with Operations Manager Dale Keech and discussed the matter. (JA 440; 337-38.)

Later that afternoon, Gibson summoned Union steward Potter to his office. (JA 441; 46.) Holmes was present for the conversation. (JA 441; 45.) Gibson told Potter that one of Holloway's crew members had threatened Watts, who said that Watts had better bring his boxing gloves. (JA 441; 45-46.) Potter denied hearing those words said by either Bond or Judd. (JA 441; 46.)

Construction manager Ron Hutchins learned about Judd's and Bond's remarks from Gibson. (JA 441; 214.) Hutchins decided to discharge Bond and Judd the next day. (JA 441; 215, 249, 338.)

**D. The Company Discharges Judd and Bond for Their Remarks; the Company Later Rescinds All of the Other Electricians' Disciplinary Write-ups**

On May 21, Holmes met with Hutchins, Gibson, Union Business Representative Raya, and Potter to discuss the incident from the day before. (JA 441; 338.) The men discussed the break-in-place issue and Hutchins agreed to tour

the jobsite with Raya and examine the conditions. Hutchins told the union representatives that Judd and Bond would be fired for their remarks to Watts. (JA 441; 339.)

Judd and Bond were called into the managers' trailer, and told that they were being fired for insubordination. (JA 441; 342.) The men pled for their jobs, claiming that they had only told Watts that there would be consequences, and were only kidding. (JA 442; 343-44.) Gibson and Holmes refused to discuss the matter with the men and they were discharged. (JA 49, 101, 128.)

Later that morning, Raya made a deal with Hutchins that the Company would rescind the discipline for all of the other electricians, but that Judd's and Bond's discharges would stand. In exchange, the electricians would break in place, and the Company would provide tarps to create a shelter that would make the turbine building safer for breaks. (JA 442; 80, 222, 292, 347.)

## **II. The Board's Conclusions and Order**

On the foregoing facts, the Board (Chairman Liebman and Member Pearce; Member Schaumber dissenting), found the discharges unlawful. In agreement with the administrative law judge, the Board majority found that Judd and Bond were engaged with other electricians and their union steward in a protected union protest of the Company's break-in-place policy and disciplinary action enforcing that policy. (JA 432.) However, contrary to the judge, the Board found that the

Company violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)) by discharging the two discriminatees for their outbursts during the May 20 distribution of discipline, rejecting the judge's conclusion that the outburst was sufficiently egregious to remove the Act's protection. (JA 431.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. (JA 434.) Affirmatively, the Order requires the Company to offer Judd and Bond full reinstatement to their former jobs, or substantially equivalent jobs if their former jobs no longer exist. (JA 434.) The Board also ordered the Company to make Judd and Bond whole for any loss of earnings and other benefits due to the discrimination against them. (JA 434.) In addition, the Order requires the Company to remove from its files any reference to Judd's and Bond's discharges, notify them that it has done so, and not use the discharges against them in any way. (JA 434.) Finally, the Board required the Company to post a remedial notice. (JA 434-35.)

### **SUMMARY OF ARGUMENT**

The primary question before this Court is whether Judd's and Bond's remarks removed them from the Act's protection. As demonstrated below, substantial evidence supports the Board's reasonable conclusion, consistent with

relevant precedent, that these employees remained solidly within the scope of the Act's protection. Briefly, their spontaneous remarks occurred at the location where the employer chose to serve the entire crew with written discipline; the conversation was not witnessed by any employees outside Holloway's crew; and the remarks occurred in the context of an ongoing union protest of the employer's sudden decision to change the break location to a place the electricians believed to be unsafe and unsanitary. The remarks by Judd and Bond were spontaneous, if forceful, oral expressions of the men's understandable dual fears for both their on-the-job safety and the potential of unfair job loss. Contrary to the Company's arguments, the remarks did not carry an unambiguous threat of violence, either in the choice of words or any accompanying conduct. Instead, the remarks were properly interpreted in a manner that emphasized the employees' opposition to the new break-in-place policy. As the Board reasonably held, the only factor disfavoring protection in this case is the lack of provocation in the form of an unfair labor practice. Consequently, the Company's discharge of Judd and Bond, solely because of their protected union activity, was, as the Board found, an unfair labor practice.

### **STANDARD OF REVIEW**

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v.*

*NLRB*, 340 U.S. 474, 477, 488 (1951). Substantial evidence is “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 217 (1938). If there is substantial evidence to support the Board’s decision, the Court must not disturb that decision, even though it might “have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488.

That the Board and the administrative law judge “disagreed on the ultimate result does not mean that the evidence supporting the Board’s decision is less substantial.” *International Union of Elec., Radio and Mach. Workers, AFL-CIO v. NLRB*, 434 F.2d 473, 477 (D.C. Cir. 1970). *See also Laborers’ Dist. Council of Georgia and South Carolina v. NLRB*, 501 F.2d 868, 873 n.16 (D.C. Cir. 1974) (“no special weight need be given to the conclusion of the administrative law judge” when the disagreement between the Board and the judge involves inferences or legal conclusions and does not turn on credibility of witnesses or questions of fact). In a case such as this one, it is “[t]he Board, not the Examiner [who bears] the ultimate responsibility for striking th[e] balance.” *Falcon Plastics Div. of B-D Lab, Inc. v. NLRB*, 397 F.2d 965, 967 (9th Cir. 1968).

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY ADMITTEDLY DISCHARGING EMPLOYEES BRIAN JUDD AND WILLIAM BOND FOR CONDUCT THAT OCCURRED DURING INDISPUTABLY PROTECTED UNION ACTIVITY**

As demonstrated below, Judd's and Bond's participation in the May 20 meeting indisputably constituted protected activity within the meaning of Section 7, the Company admittedly fired the men due to their intemperate comments during that statutorily-protected discussion, and the outbursts were not egregious enough to deny the men from the Act's protection. (JA 433.) Accordingly, the Board reasonably found (JA 434) that the discharges were unfair labor practices in violation of Section 8(a)(1) and (3).

#### **A. An Employer Violates the Act When it Discharges Employees for Engaging in Protected Union Activity**

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the "right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Act implements that guarantee by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7. 29 U.S.C. § 158(a)(1). Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term

or condition of employment to encourage or discourage membership in any labor organization.” Unless the employees have lost the protection of the Act, an employer violates Section 8(a)(3) and (1) if it disciplines them because they participated in union activity that Section 7 protects. *See, e.g., Stanford Hotel*, 344 NLRB 558, 559 (2005) (under *Atlantic Steel* analysis, employer violated Section 8(a)(1) and (3) where employee yelled at hotel owner and used profanity during a meeting with a union representative to determine whether the employee was a statutory supervisor).

An employee engaged in protected activity can, by “opprobrious conduct,” lose the protection of the Act. *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001) (quoting *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)) (internal quotation marks omitted). An employee’s protected concerted activity loses the protection of the Act when his conduct is “so egregious that it exceed[s] the scope of whatever protection it might otherwise have been entitled to under the Act.” *Caterpillar Tractor Co.*, 276 NLRB 1323, 1326 (1985). Yet, it is well established that an employee’s right to engage in concerted activity “may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to maintain order and respect.” *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 816 (7th Cir. 1946)). The Board’s determination of whether an

employee enjoys the Act's protection, unless illogical or arbitrary, ought not to be disturbed. *Allied Indus. Workers, AFL-CIO, Local No. 289 v. NLRB*, 476 F.2d 868, 879 (D.C. Cir. 1973) (citing *Thor Power Tool Co.*, 351 F.2d at 587).

**B. The Company Admittedly Discharged Judd and Bond Exclusively Because of Their Outburst During the May 20 Discipline Meeting Involving Protected Activity**

The record fully supports the Board's finding (JA 432) that Judd and Bond engaged in protected activity. As the administrative law judge stated, "the Act protects frank, spontaneous responses by employees when their employer changes work rules and warns employees for noncompliance especially where, as here, prior discussions have exposed sharp differences of opinion about a particular working condition." (JA 442.)

Judd and Bond were engaged with other electricians and their union steward in a protected union protest of the Company's new break-in-place policy and the disciplinary action enforcing that policy. (JA 432, 442.) The employees were concerned about safety issues involved with breaking in place in the turbine building, including the fly ash at their work areas and the potential for falling debris. The union steward and the union's business representative had made their opposition to the new policy clear to the Company. With the support of their union foreman and the union steward, Holloway's crew decided to continue breaking in the dry shack. (JA 431, 439; 97-99, 125, 143.)

When supervisor Watts came to hand out disciplinary warnings for their continuation of these break practices, Union Steward Potter stated the Union's disagreement with the discipline. The crew members questioned Watts about the discipline and the potential for being discharged for three warnings under the Company's progressive discipline policy. Judd's and Bond's remarks to Watts during this meeting were a continuation of the ongoing union protest against the new break-in-place policy and the discipline that the Company was imposing. (JA 434.) The conversation between Watts and the men thus concerned a matter falling within the protection of Section 7 of the Act. (JA 432.)

The Company admits (Br. 22) that the subject matter of the meeting, involving a work rule and discipline that the Union and the employees were actively opposing, was protected under the Act. The Company also admits that it fired Judd and Bond because of the remarks they made during this meeting. Thus, the only question for this Court is whether Judd's and Bond's conduct was so egregious that it lost the protection of the Act.

### **C. Judd and Bond Did Not Forfeit the Protection of the Act**

In determining whether an employee's conduct was sufficiently egregious to forfeit Section 7 protection, the Board balances two policy concerns under the Act: allowing employees some latitude for impulsive conduct in the course of protected activity and respecting employers' need to maintain order in the workplace. *See*

*DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005). To reach the appropriate balance of interests, the Board weighs four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an unfair labor practice by the employer. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Those factors require the Board to examine the conversation within its appropriate context and considering all the circumstances. *Id.* at 817. As demonstrated below, ample evidence supports the Board's determination (JA 432, 433-34) that, on balance, Judd and Bond did not forfeit the Act's protection and their discharges violated the Act.

**1. The Board reasonably determined that the place of the discussion, which the Company chose, favors protection or is, at least, neutral**

The Company brought disciplinary notices related to the new break-in-place policy to the electricians' work areas in the turbine building, despite its knowledge of the Union and employees' active protest of this change in policy. Union Steward Potter reiterated the Union's protest after the notices were distributed. Judd's and Bond's outbursts occurred after Watts informed the men that the Company would give a second notice that afternoon if the crew continued to their protest by refusal to break in-place, thus raising the potential for a third notice and possible discharge if the protest continued.

Although the Board has generally found that remarks made in private are less disruptive to workplace discipline than those that occur in front of fellow employees,<sup>3</sup> when the employer chooses the location where the confrontation occurs, this factor weighs in favor of protection, not against it. *NLRB v. Southwestern Bell Telephone Co.*, 694 F.2d 974, 978 (5th Cir. 1982) (“Having chosen to argue in front of the other workers, the [c]ompany can hardly be heard to complain about the public nature of the . . . discussion.”). Here, as the Board found (JA 432), the place of the discussion favored protection or at least was neutral, because, although it occurred in an open work area and in front of Holloway’s crew, Superintendent Watts chose to distribute the disciplinary warnings at that location. (JA 440; 45, 279.) As such, the Board reasoned, it was foreseeable that a continued protest from employees would also occur in that setting. (JA 432.)

The Board’s conclusion that the location of the exchange favors protection, or at least is neutral, is consistent with relevant law. The Board and the Courts have recognized that an employer who chooses to announce a change in working conditions in a particular location, cannot claim that an employee should lose protection based solely on the setting. *See, e.g., Cibao Meat Prods.*, 338 NLRB 934, 934 (2003)

---

<sup>3</sup> *See, e.g., Stanford Hotel*, 344 NLRB 558, 558 (2005) (weighing location in favor of protection when outburst occurred away from work area and employee closed door in effort to maintain privacy).

(where employer chose to announce changes in terms and conditions of employment at employee meeting, employee who protested newly-announced changes did not lose protection of the Act based solely on location of the protest in front of other employees), *enforced*, 84 F.App'x 155 (2d Cir. 2004); *Noble Metal Processing, Inc.*, 346 NLRB 795, 796 (2006) (where employer announced impending changes affecting working conditions in an employee meeting, employer could expect that employees would express their views, and employee did not lose protection of the Act for his remarks) (Chairman Battista, concurring).

The Company errs when it argues (Br. 20) that it should not matter who chose the place where the confrontation occurred but “whether the place was an appropriate forum . . . for the type of response that occurred.” In analyzing the location where the conduct occurred, the Board examines whether the outburst would tend to undermine workplace discipline, not whether the forum is appropriate for protest. As the Company readily admits (Br. 21-22), it was well aware of the employees’ protests over the change in break policy. Indeed, it was clear that all the electricians on Holloway’s crew were unified in their opposition to the break-in-place policy as they all chose to continue to break in the dry shacks. (JA 431, 439; 97, 143, 279, 284.) Yet, in the face of this opposition, the Company decided to privilege administrative efficiency over privacy. As the Board found (JA 432), when the Company “chose to distribute the warnings in a group

employee setting in a work area during working time, [it] should reasonably have expected that employees would react and protest on the spot.”

Contrary to the Company’s claims (Br. 20-21), the cases cited by the Board cannot be factually distinguished from the instant case as they all stand for the proposition that when, as here, an employer chooses a location where it can reasonably expect employees will react, it bears the responsibility for the fact that other employees may hear those reactions.<sup>4</sup> Therefore, because the Company chose the time and place to have the encounter, the first *Atlantic Steel* factor favors protection, or at least is neutral.

## **2. The subject matter of the May 20 meeting indisputably favors protection**

When an employee’s outburst occurs during protected activity, the subject matter of the discussion weighs heavily in favor of protection. *Felix Indus., Inc.*, 339 NLRB 195, 196 (2003) (finding it “very significant,” in favor of protection, that employee was engaging in protected activity when he had disputed outburst), *enforced mem.*, 2004 WL 1498151 (D.C. Cir. 2004). The Board conclusively found (JA 432), and the Company concedes (Br. 22), that the subject matter under discussion related to working conditions (including issues of a safe and sanitary

---

<sup>4</sup> See *Brunswick Food & Drug*, 284 NLRB 663, 664-65 (1987), *enforced mem. sub nom. NLRB v. Kroger Co.*, 859 F.2d 927 (11th Cir. 1988); *NLRB v. Southwestern Bell Telephone Co.*, 694 F.2d 974, 977-98 (5th Cir. 1982).

workplace), discipline, and work rules, and thus squarely fell within the area of protected subject matter. *See, e.g., Acme Die Casting, a Div. of Lovejoy Indus., Inc. v. NLRB*, 26 F.3d 162, 168 (D.C. Cir. 1994) (employee schedules, including break times, are terms and conditions of employment). Judd’s and Bond’s remarks “directly related to the electricians’ union-supported protest of the [Company’s] use of discipline to enforce [the new policy] and to working conditions that they reasonably considered to be unsafe and unsanitary.” (JA 432.)

The Company seeks to minimize the significance of this factor by claiming (Br. 22) that it controlled break-related issues. This is irrelevant. The Union and employees’ concern for the safety of their work environment, and discipline for acting on those concerns, squarely falls within the area of heavily protected conduct. Indeed, the Company’s rescission of the other disciplinary warnings and its addition of protective tarps for break areas proves the reasonable nature of the employees’ protests.

When an outburst occurs in the course of concerted protected activity—as is indisputably the case here—an employee’s offensive or insulting language cannot be separated from the underlying discussion, even if that language does not, itself, convey the protected message. Indeed, this Court dismissed an employer’s attempt to “bifurcate” the disputed discussion and “parse” a discharged employee’s words, holding that “the obscenities were intertwined with [the] protected activity—as

they are in every case governed by *Atlantic Steel*.” *Felix Industries v. NLRB*, 251 F.3d 1051, 1054 (D.C. Cir. 2001) (internal quotation omitted). *See also*, *DaimlerChrysler*, 344 NLRB at 1329 (finding a profane outburst protected despite the fact that it was a reaction to supervisor’s remark about scheduling a grievance meeting and not about merits of the grievance itself). Because Judd’s and Bond’s participation in the May 20 meeting was protected, the subject matter of the discussion weighs heavily in favor of protection.

**3. The nature of the spontaneous outburst, in the context of the Union’s protest of the new break policy, favors protection**

In examining whether an employee’s statements made during the course of otherwise protected concerted activity remain protected, the Board draws the line between those situations where an employee “exceeds the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service.” *Prescott Indus. Prods. Co.*, 205 NLRB 51, 51-52 (1973). *See St. Margaret Mercy Healthcare Ctrs.*, 350 NLRB 203, 204-05 (2007) (conduct is protected unless it is “so violent or of such serious character as to render the employee unfit for further service”) (citations omitted), *enforced*, 519 F.3d 373 (7th Cir. 2008); *accord*, *Carleton College v. NLRB*, 230 F.3d 1075, 1081 (8th Cir. 2000) (“Misconduct that

is flagrant or render[s] the employee unfit for employment is unprotected.”) (internal quotation omitted). Ample evidence in the record, interpreted in light of the judge’s uncontested credibility findings, supports the Board’s determination (JA 433) that Judd’s and Bond’s statements, while intemperate, were not that egregious in context. Rather, a number of factors place their verbal outburst on the protected side of the line, including the cases the Company relies on to argue otherwise.

First, as the Board explained (JA 433), Judd’s and Bond’s remarks were “single, brief, and spontaneous reactions” to the discipline Watts promised if the employees continued their protest of the new break-in-place policy. Their reactions came on the heels of a protest of a policy the electricians and their Union considered a threat to their safety. It has long been recognized that disputes, such as this one, over working conditions are among those “most likely to engender ill feelings and strong responses.” *Consumers Power Co.*, 282 NLRB 130, 132 (1986). When Watts advised the crew that their continued opposition would result in disciplinary action that now would threaten their jobs as well, Judd and Bond—who had both been out of work for several months—reacted with spontaneous, although intemperate, remarks.

There is no evidence that the remarks were either premeditated or sustained threats to Watts. *Compare, Starbucks Coffee Co.*, 355 NLRB No. 135 (2010)

(incorporating 354 NLRB No. 99, 2009 WL 3577768, at \*4 (Oct. 30, 2009)) (no protection for employee who followed a high-level manager for almost two city blocks after a union rally, shouting threats, taunts, and profane comments at him); *petition for review pending on other grounds*, Nos. 10-3511 & 10-3783 (2d Cir. Sep. 1, 2010); *Trus Joist MacMillan*, 341 NLRB 369, 371 (2004) (no protection where employee planned and deliberately launched a personal attack on superiors by using profane oral insults). The immediate, spontaneous reaction to Watts' statements materially distinguishes this case from those like *Media General Operations, Inc. v. NLRB*, 560 F.3d 181, 187-88 (4th Cir. 2009), where the employee initiated the meeting and issued insults to his supervisor that were not temporally proximate to the employer's conduct. *Id.* (emphasizing that outburst was not a "spontaneous . . . response to an illegal threat" but occurred during conversation employee initiated during normal work shift neither physically nor temporally connected to employer conduct that ostensibly provoked it).

Second, although the remarks were intemperate, Judd's and Bond's comments were not "the kind of unambiguous physical threat that would render them unfit for service." (JA 433.) As the Board explained, in the context of the dispute over the break-in-place policy, the employees' prediction that things could "get ugly" could reasonably be interpreted as nothing more than a statement that the Company's continued enforcement of its new break-in-place policy would

engender grievances or labor disputes. Similarly, Judd's remark that Watts had "better bring [his] boxing gloves" was better reasonably interpreted as a figure of speech opposing the break-in-place rather than a literal invitation to a physical brawl. *See, e.g., Leasco, Inc.*, 289 NLRB 549, 552 (1988) (employee's statement to supervisor that he was going to "kick [his] ass" made in the course of concerted activity was "a colloquialism that standing alone does not convey a threat of actual physical harm"); *Vought Corp.*, 273 NLRB 1290, 1295 (1984), (employee's statement to supervisor that "I'll have your ass" was no more than a threat to file a grievance or a Board charge or to report the supervisor to higher management), *enforced*, 788 F.2d 1378 (8th Cir. 1986); *Fairfax Hospital*, 310 NLRB 299, 300 (1993) (employee's statement to her supervisor to expect "retaliation" as a result of unlawful enforcement of solicitation and bulletin board rules was inherently ambiguous and could mean that the union would respond in kind to employer's propaganda).

Importantly, there is no evidence that either Judd or Bond accompanied their words with any sort of physical aggression that would suggest a physical confrontation. Neither man made any physical gesture or movement towards Watts. Nor did Watts respond at the time to the remarks, either to the men or to Union Steward Potter who accompanied him as they left Holloway's crew and

continued to the next work area.<sup>5</sup> Indeed, according to Judd, Watts only smiled and shrugged his shoulder in response (JA 128); it was only later in the afternoon that he characterized the words as a threat (JA 440; 333). *See Leasco, Inc.*, 289 NLRB at 552 (employee’s “kick [his] ass” statement to supervisor did not lose protection of the Act where profanity not accompanied by circumstances that suggested threat of actual physical confrontation). In the absence of any evidence suggesting the physical confrontation that the Company assumes, the Board found the ambiguous statement—made in the context of a dispute over unsafe working conditions that had escalated to threats of job loss—was not so egregious as to cost the employees the protection of the Act.

There is no merit to the Company’s assertion (Br. 22-24) that the Board ignored the judge’s credibility findings. Indeed, notwithstanding conflicting record evidence about whether the statements were actually made (JA 440; 98, 125, 130, 158-59, 183), the Board accepted the judge’s version of Judd’s and Bond’s statements. However, the Board found that the evidence did not support the judge’s further characterization that the statements “amounted to an outright threat” of physical violence. (JA 433, 443.) As the Fourth Circuit has explained,

---

<sup>5</sup> Although Watts testified that he perceived the remarks as a personal threat, his subjective perception is not dispositive in determining whether the employees have forfeited the protection of the Act. Rather, as the Board noted (JA 434) “whether the alleged misconduct is so serious that it deprives the employees of the protection of the Act” is an objective question. *Shell Oil Co.*, 226 NLRB 1193, 1196 (1976), *enforced*, 561 F.2d 1196 (5th Cir. 1977).

“the determination of the nature of the outburst is not properly a ‘credibility determination’ made by the [administrative law judge] but a legal conclusion based upon the Board’s inferences from facts in the record.” *Media General Operations, Inc. v. NLRB*, 560 F.3d 181, 185 (4th Cir. 2009). Here, while accepting the credited remarks, the Board reasonably found that the evidence did not support the judge’s claim that the ambiguous statements, made in the context of a significant work protest, could only be interpreted one way.

The Company’s hyperbolic claims (Br. 13, 24, 26) that the Board is seeking to impose rules that shield any insubordination short of actual physical violence is utterly devoid of merit. As this Court recognized, the Board “expressly disavowed” any rule shielding such conduct. *Felix Indus. Inc.*, 251 F.3d at 1055 (citing *Atlantic Steel*, 245 NLRB at 817). Indeed, Board precedent puts a lie to the Company’s contentions that the Board has established such a *per se* rule. *See, e.g., DaimlerChrysler*, 344 NLRB 1324, 1329 (2005) (finding loss of protection for repeatedly loud, profane attack on supervisor); *In re Aluminum Co. of Am.*, 338 NLRB 20, 22 (2002) (no protection for employee’s repeated, sustained, *ad hominem* profanity, which far exceeded that which was common and tolerated in his workplace); *Transit Mgmt. of Southeastern La.*, 331 NLRB 248, 249 (2000) (no protection for employee fired for using abusive language and profanities on three occasions over two days—to another employee, a supervisor, and in a meeting

with superintendent). Instead, the Board conducts a reasoned review, taking into account the context of the incident through analysis of the four *Atlantic Steel* factors.

Likewise, the Board reasonably rejected the Company's claims, repeated to this Court, that its zero-tolerance policy for threats shielded its conduct. The Board here reiterated its recognition of an employer's legitimate need to guard against workplace violence. *See* JA 434; *accord Pactiv Corp.*, 337 NLRB 898, 898 (2002) (employer did not violate Act by calling sheriff in response to employee's unusual and threatening behavior that predated and was exacerbated during organizing campaign), *review denied sub nom. Operating Engineers Local 470 v. NLRB*, 350 F.3d 105 (D.C. Cir. 2003). However, as discussed above, the Board found Judd's and Bond's utterances committed during the course of otherwise protected conduct, while intemperate, were not so unambiguously offensive as to cost them the protection of the Act. The Board (JA 434) committed itself to examining each case on its merits, rather than adopting—as the Company requests—a “*per se* limitation on the Board's traditional protection of Section 7 rights whenever an employer claims concern about violence.”<sup>6</sup>

---

<sup>6</sup> The Company's reliance on some cases (Br. 24-28) that challenge employer workplace rules are inapplicable here as the employer's “zero tolerance” rule is not being challenged. *See Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001) (finding employer's handbook policy prohibiting abusive language was not unlawfully overbroad); *Aroostock County Regional*

**4. The outburst was not provoked by Company unfair labor practices**

Both the Board (JA 433) and the Company (Br. 29) agree that the outburst was not provoked by a company unfair labor practice. Therefore, this factor tends to disfavor protection.

**5. The balance of the *Atlantic Steel* factors favors protection**

In conclusion, substantial evidence in the record supports the Board's determination that, on balance, Judd's and Bond's statements to Watts did not lose the protection of the Act. First, the place of the discussion was chosen by the Company, and therefore tends to favor protection or is neutral. Second, the subject matter of the discussion—break rules, safety issues, and discipline—constituted subject matter protected under Section 7 of the Act. Judd's and Bond's remarks occurred in the course of this concerted union activity. This factor strongly favors protection. Third, the nature of the outburst—intemperate, to be sure, but ambiguous and understandable given the significance of the subject matter, and the potential for discharge if the electricians did not agree to sacrifice their safety for their jobs—tends to favor protection. The fourth factor, that the outburst was not

---

*Ophthalmology Center v. NLRB*, 81 F.3d 209, 213-15 (D.C. Cir. 1996) (finding employer rule restricting employee's discussion of office business and grievances in front of patients was not unlawfully overly broad and additionally finding employees' activity was neither concerted nor protected).

provoked by an unfair labor practice, is the only factor that does not favor protection.

Here, the Board reasonably struck the balance between an employee's right to engage in concerted activity and an employer's right to maintain order and respect. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). Because the line the Board drew between these conflicting rights in this case is neither illogical nor arbitrary, this Court should not disturb it. *Allied Indus. Workers, AFL-CIO Local Union No. 289 v. NLRB*, 476 F.2d 868, 880 (D.C. Cir 1973) (quoting *Thor Power Tool Co.*, 351 F.2d at 587).

**D. The Board's Finding of a Violation of Section 8(a)(3) of the Act Is Consistent with Precedent**

Finally, the Company's claim (Br. 17) that the Board cannot find a violation of Section 8(a)(3) is simply incorrect. It has long been held that, "[w]hen an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford Hotel*, 344 NLRB 558, 558 (2005). Where, as here, the employees are discharged for conduct occurring in the course of otherwise concerted protected union activity, the Board reasonably presumes a causal connection between the employee's *union* conduct and the discipline he receives. *See In re Aluminum Co. of Am.*, 338 NLRB 20, 22

(2002). Thus, as both the judge and the Board found (JA 434, 442) resort to a motive analysis under *Wright Line* is unnecessary.<sup>7</sup>

The Company does not dispute that it discharged Judd and Bond for remarks they made while engaged in an otherwise protected concerted protest with their union against their employer's new break policy. As such, as with all *Atlantic Steel* cases, the employer has admitted that the reason it took an adverse employment action against employees was because of their concerted or union conduct, but alleges that their conduct was so opprobrious that it fell outside of the protection of the Act. Accordingly, the Board properly found that the violation encompassed discrimination against the men's concerted union activity and ran afoul of Section 8(a)(3) and (1).

Therefore, contrary to the Company's claim (Br. 16-17), the Board was not prohibited from finding a violation of Section 8(a)(3). While, as the Company notes (Br. 16), violations of Section 8(a)(1) are common in *Atlantic Steel* cases, this is because many involve concerted activity, rather than the union activity here. Where union activity is involved, and the violation is alleged and proven, the Board has found a Section 8(a)(3) violation. *See, e.g., Stanford Hotel*, 344 NLRB 558, 559 (2005) (using *Atlantic Steel* analysis, employer found to have violated Section 8(a)(1) and (3) where employee engaged in protected conduct during a

---

<sup>7</sup> *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

meeting to discuss whether the employee was a statutory supervisor included in the unit); *Goya Foods*, 356 NLRB No. 73, 2011 WL 112409, at \*\*3-5 (Jan. 5, 2011) (using *Atlantic Steel* analysis, employer found to have violated Section 8(a)(1) and (3) when it suspended an employee who, in the midst of an argument regarding an employee-filed union-decertification petition, refused to follow a supervisor's orders to leave); *Success Village Apartments, Inc.*, 347 NLRB 1065, 1069 (2006) (using *Atlantic Steel* analysis, employer found to have violated Section 8(a)(1) and (3) when it disciplined employee who was shop chairperson for statements made while challenging other employee's disciplinary warning).<sup>8</sup>

Here, the Company violated Section 8(a)(1) and (3) of the Act when it discharged Judd and Bond for their May 20 remarks to Watts. The Board, based on substantial evidence, reasonably determined that Judd's and Bond's remarks

---

<sup>8</sup> It is well-established that the General Counsel controls the theory of the case, not the Board. *See, e.g., Fineberg Packing Co.*, 349 NLRB 294, 298 n.14 (citing *Planned Bldg. Servs.*, 330 NLRB 791, 793 n.13 (2000), and *West Virginia Baking Co.*, 299 NLRB 306 n. 2 (1990), *enforced mem., sub nom Chauffeurs, Teamsters, Warehousemen, and Helpers, Local 175 v. NLRB*, 946 F.2d 1563 (D.C. Cir. 1991)). The Company's assertions (Br. 16) that the Board did not find violations of Section 8(a)(3) in *Felix Industries, Inc.*, 331 NLRB 144 (2000), *enforcement denied*, 251 F.3d 1051 (D.C. Cir. 2001) or *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995), *enforcement granted in part and denied in part*, 81 F.3d 209 (D.C. Cir. 1996), says nothing more than the violations were not alleged. Indeed, in *Aroostook*, there was no union activity and the Court found the employees had not engaged in concerted activity. Here it is undisputed that the employees were engaged in union activity.

occurred in the course of protected union activity, and that their comments did not cause them to lose the protection of the Act.

**CONCLUSION**

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

---

JILL A. GRIFFIN  
*Supervisory Attorney*

---

RENÉE D. MCKINNEY  
*Attorney*

*National Labor Relations Board*  
1099 14th Street, N.W.  
Washington, DC 20570  
(202) 273-2949  
(202) 273-2946

LAFE E. SOLOMON  
*Acting General Counsel*

CELESTE J. MATTINA  
*Acting Deputy General Counsel*

JOHN H. FERGUSON  
*Associate General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

NATIONAL LABOR RELATIONS BOARD

March 2010

**ADDENDUM****RELEVANT STATUTORY AND REGULATORY PROVISIONS****Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:**

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

**Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) provides in relevant part:**

It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .

**Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) provides in relevant part:**

It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

**Section 10(e) of the Act (29 U.S.C. § 160(e)) provides in relevant parts:**

The Board shall have power to petition any court of appeals of the United States. . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. . . .

The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

**Section 10(f) of the Act (29 U.S.C. § 160(f)) provides in relevant part:**

Any person aggrieved by a final order of the Board . . . may obtain a review of such order . . . in the United States Court of Appeals for the

District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

|                                 |                  |
|---------------------------------|------------------|
| KIEWIT POWER CONSTRUCTORS CO.,  | *                |
|                                 | *                |
| Petitioner                      | * Nos. 10-1289,  |
|                                 | * 10-1312        |
| v.                              | *                |
|                                 | *                |
| NATIONAL LABOR RELATIONS BOARD, | * Board Case No. |
|                                 | * 17-CA-24192    |
|                                 | *                |
| Respondent                      | *                |

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,291 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 1st day of March, 2011

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

|                                |                  |
|--------------------------------|------------------|
| KIEWIT POWER CONSTRUCTORS CO., | *                |
|                                | *                |
|                                | *                |
| Petitioner                     | * Nos. 10-1289,  |
| v.                             | * 10-1312        |
|                                | *                |
|                                | * Board Case No. |
| NATIONLA LABOR RELATIONS BOARD | * 17-CA-24192    |
|                                | *                |
| Respondent                     | *                |

**CERTIFICATE OF SERVICE**

I hereby certify that on March 1, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF:

|                                      |                                |
|--------------------------------------|--------------------------------|
| Charles P. Roberts, III              | Kimberly F. Seten              |
| Constangy, Brooks & Smith, LLP       | Constangy, Brooks & Smith, LLP |
| 100 North Cherry Street, Suite 300   | 2600 Grand Avenue, Suite 300   |
| Winston, Salem, North Carolina 27101 | Kansas City, Missouri 64108    |

/s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 1st day of March, 2011