Nos. 10-72728, 10-73125

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLAZA AUTO CENTER, INC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Plaza Auto Center, Inc. ("the Company") for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order against the Company. The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a) (29 U.S.C. § 160(a)) of the National Labor Relations Act, as amended ("the Act," 29 U.S.C. §§ 151, et seq.). The Decision and Order, issued on August 16, 2010,

and reported at 355 NLRB No. 85 (ER 1),[1] is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)).

The Company petitioned for review of the Board's Order on September 8, 2010, and the Board cross-applied for enforcement on October 13. The 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)) because the unfair labor practices occurred in Yuma, Arizona. The appeals were timely filed, as the Act imposes no time limit for such filings.

STATEMENT OF THE ISSUES PRESENTED

During his short tenure with the Company, employee Nick Aguirre embarked on a sustained course of conduct protected under Section 7 of the Act, questioning and challenging several company policies affecting his and fellow employees' terms and conditions of employment, from a lack of breaks, to inadequate bathroom facilities, to an ostensibly unfair and unlawful compensation system. The Company responded unfavorably to his inquiries and ultimately fired him, admittedly because of his profane verbal outburst during an otherwise concerted protected discussion of workplace concerns. The Board found that the

[1] "ER" refers to the Company's Excerpts of Record, filed with its brief, and "SER" refers to the Board's Supplemental Excerpts of Record, filed with this brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Company had committed a number of unfair labor practices both in responding to Aguirre's inquiries and by discharging him. This appeal presents two issues for the Court's consideration:

The first issue is whether the Board is entitled to summary enforcement of its finding that the Company repeatedly violated Section 8(a)(1) by stating that Aguirre could leave his job if he did not like its policies, a finding that the Company failed to challenge before the Board and does not contest in its opening brief to this Court.

The second issue is whether substantial evidence supports the Board's finding that Aguirre's outburst was not egregious enough to forfeit the Act's protection and, consequently, that his discharge for statements made while engaging in concerted protected conduct violated Section 8(a)(1) of the Act.

RELEVANT STATUTORY PROVISIONS

Section 7 of the Act, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, 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):

> It shall be an unfair labor practice for an employer--
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Section 10(e) of the Act, 29 U.S.C. § 160:

> . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. . . .

STATEMENT OF THE CASE

This unfair-labor-practice case came before the Board on a complaint issued by the Board's General Counsel, pursuant to charges filed by former company employee Nick Aguirre. (ER 1 at 6.) Following a hearing, an administrative law judge issued a decision on July 21, 2009, finding that the Company had repeatedly violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively suggesting, in response to Aguirre's concerted protected questioning of company policies, that Aguirre quit his job if he did not like the terms and conditions of employment. (ER 1 at 11, 14.) The judge also dismissed allegations that the Company had otherwise threatened employees and that it had unlawfully fired Aguirre. (ER 1 at 12, 14.) In finding no unlawful discharge, the judge found that the Company had fired Aguirre because of his profane outburst at a meeting regarding his concerted protected complaints about terms and conditions of employment, but held that Aguirre's outburst was so extreme as to remove him from the Act's protection. (ER 1 at 11, 13-14.)

The General Counsel challenged the judge's dismissal of the unlawful-discharge allegation and, on August 16, 2010, the Board issued a Decision and

Order holding that Aguirre's outburst was not egregious enough to cost him statutory protection and therefore finding that the Company's termination of Aguirre violated Section 8(a)(1) of the Act. (ER 1 at 1, 4.) In the absence of exceptions, the Board upheld both the judge's finding of additional Section 8(a)(1) violations, based on the Company's repeated suggestions that Aguirre accept its policies or quit, and her dismissal of the other complaint allegations. (ER 1 at 1-2.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company sells used cars at its facility in Yuma, Arizona. (ER 1 at 1, 6; ER 3 at 44, 95.) Tony Plaza owns the Company, and Barbara Montenegro is its office manager. (ER 1 at 1-2, 7; ER 3 at 43, 46, 241.) Two sales managers, Juan Felix and Gustavo MacGrew, oversee the Company's salesmen, who staff two overlapping shifts each day. (ER 1 at 1, 7; ER 3 at 59, 98, 188, 227.) The salesmen also work the Company's periodic 3-day "tent sales" which, during the relevant period, took place in a Sears parking lot. (ER 1 at 1, 7; ER 3 at 91-92, 98, 233.) Aguirre began working for the Company as a salesman at the end of August 2008. (ER 1 at 1, 7; ER 3 at 90.)

During Aguirre's tenure, the Company paid all of its salesmen strictly commission, with no guaranteed minimum wage or salary.[2] A salesman who did not sell a car during a pay period received no paycheck at all. (ER 1 at 1, 7; ER 3 at 45, 95, 193.) The commission for selling a car depended on the Company's profit on that car, and thus partly on the cost of the vehicle to the Company. (ER 3 at 57, 84, 116-17, 189.) Only Plaza and his managers knew the cost of the cars – salesmen did not have access to that information. (ER 1 at 2; ER 3 at 84, 196.) A "flat list" identified certain hard-to-sell cars and specified commissions for those cars as an incentive for the salesmen to sell them. (ER 1 at 1 & n.4, 7; ER 3 at 49-50, 104.)

B. Aguirre's Concerted Protected Activity: Repeatedly Questioning Company Policies

On his first day with the Company, Aguirre reported to work at a tent sale. (ER 1 at 1, 7; ER 3 at 91.) That day, he asked his coworkers where to find the restroom and they laughed and pointed in various directions. (ER 1 at 1, 7; ER 3 at 93.) Felix indicated that Aguirre should use the facilities in the Sears adjacent to the tent-sale lot, or in a gas station across the street. (ER 1 at 1, 7; ER 3 at 94, 197.)

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[2] Some time after Aguirre's termination, the Industrial Commission of Arizona contacted the Company about minimum-wage violations, and the Company began paying its salesmen a minimum-wage draw. (ER 1 at 7 n.4; ER 3 at 45-46, 61, 253.)

The following Wednesday, Felix and MacGrew held a sales meeting for their staff, as they did most weeks. (ER 1 at 1, 7; ER 3 at 97-98, 192.) At that meeting, Aguirre asked whether the Company gave employees breaks during the tent sales, and Felix responded, "you're always on a break, buddy . . . you just wait for customers all day." (ER 1 at 1, 7; ER 3 at 99.) Felix also stated that if Aguirre did not like the Company's policies, Aguirre could leave at any time. (ER 1 at 1, 7; ER 3 at 99.)

In mid-September, at the Company's next tent sale, Aguirre asked his coworkers about the Company's compensation system, and they informed him that salesmen earned straight commission with no guaranteed minimum. (ER 1 at 1, 7; ER 3 at 94-95, 100.) Aguirre also talked with some other salesmen about how they might alternate restroom breaks but, when he asked Felix if he could take a break, Felix refused. (ER 1 at 1, 7; ER 3 at 100-01.) At that point, Felix repeated his opinion that the salesmen were "always on break."

At the sales meeting following Aguirre's second tent sale, another salesman raised the subject of pay. (ER 1 at 1, 7; ER 3 at 102-03.) In response, MacGrew stated that employees would make money if they did their jobs correctly. (ER 1 at 1, 7; ER 3 at 103.)

At one point, Aguirre sold a car identified on the Company's flat list as carrying a commission of $1000-2000. (ER 1 at 1, 7; ER 3 at 104-05.) To his

surprise, his subsequent paycheck amounted to only $150. And when he showed it to several fellow salesmen, they agreed that his pay was unfairly low. (ER 1 at 1, 7; ER 3 at 105.) When Aguirre confronted Felix about the sum, and pointed out that he had sold the flat-list vehicle, Felix responded that Aguirre had given that car away almost for free. (ER 1 at 1, 7; ER 3 at 116.)

At another sales meeting, company owner Plaza attended and announced that there were scratches on a car, threatening to deduct the repair costs equally from all salesmen's pay unless someone admitted responsibility for the damage. (ER 1 at 1, 7; ER 3 at 53-55, 108, 111, 236.) Aguirre objected, asserting that the cost should be shared not just among the salesmen but by all company employees with access to the damaged car. (ER 1 at 1, 7; ER 3 at 55, 111, 236-37.) At the same meeting, Plaza also raised the issue of employee negativity and declared that he had a stack of applications and could easily hire new employees. (ER 1 at 1, 7-8; ER 3 at 109.) Finally, salesman Oscar Martinez raised the issues of breaks and meals at the meeting, and complained that Felix had been disrespectful when Martinez had broached the subject previously. (ER 1 at 1, 8; ER 3 at 110.) Plaza responded that the Company was working on the break issue and promised to talk to Felix about his attitude. (ER 1 at 1, 8; ER 3 at 111-12.)

Some time in October, Aguirre told Felix that he wanted to know which cars had good commissions because he thought the Company was stealing from him.

(ER 1 at 1, 8; ER 3 at 115-17, 119, 195-96.) Felix invited Aguirre to work elsewhere if he did not trust the Company. (ER 1 at 1, 8 & n.8; ER 3 at 119, 222.) Around that same time, Aguirre contacted Arizona's wage-and-hour agency about the Company's compensation system. (ER 1 at 1, 8; ER 3 at 113, 159.) After talking to the agency, he informed coworkers that the "Labor Commission" had said that employees should receive the minimum wage as a draw against commissions, and told them that he would talk to Office Manager Montenegro about the Company's pay policies after getting more information from the agency. (ER 1 at 1-2, 8; ER 3 at 114-15.)

On the morning of October 28, Aguirre approached Montenegro and asked her whether the Company's salesmen were entitled to a minimum-wage draw. (ER 1 at 2, 8; ER 3 at 120-21, 140, 244.) She responded that the Company did not pay minimum wage, and advised Aguirre that if he wanted a minimum-wage job, the Company's salesman position was not for him. (ER 1 at 2, 8; ER 3 at 121, 140.) Aguirre told Montenegro that he had spoken with a state agency and asked if she could determine whether the salesmen were entitled to a minimum-wage draw, perhaps by asking Plaza. (ER 1 at 2, 8; ER 3 at 140, 245.)

C. The Company Fires Aguirre at a Meeting Where He Was Pursuing Concerted Protected Complaints

The afternoon of October 28, Felix summoned Aguirre to his office – described in the record as "a really small room" – for a meeting with him, Plaza,

and MacGrew ("the October 28 meeting"). (ER 1 at 2, 4, 8; ER 3 at 52, 66, 124.) Shortly before the meeting, Felix had informed Plaza that Aguirre complained about everything and, specifically, wanted to know the cost of cars because he did not trust the Company's calculation of commissions. (ER 1 at 2, 8-9; ER 3 at 47-49.)

At the outset of the meeting, Plaza had no intention of firing Aguirre. (ER 1 at 12; ER 3 at 67, 163.) He opened the October 28 meeting by stating that Aguirre was "talking a lot of negative stuff" that would negatively affect the Company's sales staff, and asking too many questions. (ER 1 at 2, 8 & n.11, 12; ER 3 at 125 166-67.) Aguirre responded that he had questions concerning vehicle cost, commissions, and minimum wage. (ER 1 at 2, 9; ER 3 at 84, 163.) He also asked repeatedly whether Plaza was firing him, to which Plaza responded in the negative. (ER 1 at 9, 12; ER 3 at 201, 230.) Plaza admittedly stated that Aguirre needed to follow company policies and procedures, including its established pay structure, asserted that car salesmen typically do not know vehicle cost, and admonished Aguirre not to complain about compensation. (ER 1 at 2, 9, 12; ER 3 at 84, 164-65.) At least twice, Plaza explicitly declared that if Aguirre did not trust the Company, he need not work for the Company. (ER 1 at 2, 9, 12; ER 3 at 51, 84, 126, 230.)

During the meeting, Aguirre became upset and, in a raised voice, called Plaza a "Fucking mother Fucking," a "Fucking crook," and an "asshole." (ER 1 at 2, 8-9, 12; ER 3 at 67, 128, 145, 147-48, 166.) He further stated that Plaza was stupid, that nobody liked Plaza, and that everyone talked about Plaza behind his back. (ER 1 at 2, 12; ER 3 at 67, 230.) Concurrent with his verbal outburst, Aguirre stood up, pushed his chair aside, and declared that if Plaza fired him, Plaza would regret it. (ER 1 at 2, 12 & n.24; ER 3 at 69, 204, 210, 231, 248.) At that point, Plaza fired Aguirre. (ER 1 at 2, 9; ER 3 at 67-68, 70, 109.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found (ER 1 at 1-2), in agreement with the administrative law judge, that Aguirre's questioning of company policies constituted activity protected under Section 7 of the Act (29 U.S.C. § 157) and that the Company had violated Section 8(a)(1) (29 U.S.C. § 158(a)(1)) by stating, in response to Aguirre's Section 7 activity, that if he disliked his terms and conditions of employment, he could quit his job. The Board further found (ER 1 at 1, 4), contrary to the judge, that the Company violated Section 8(a)(1) by firing Aguirre for his verbal outburst during the October 28 meeting, specifically rejecting the judge's conclusion that the outburst was sufficiently egregious to remove the Act's protection.

To remedy the Company's unfair labor practices, the Board's Order requires the Company to cease and desist from: telling employees that they can quit or leave the Company's employ if they do not like company policies and/or procedures; discharging or otherwise discriminating against any employee because he engaged in concerted protected activity in order to discourage employees from exercising their rights under the Act; and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (ER 1 at 4-5.) The Order also affirmatively mandates that the Company: offer Aguirre full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed; remove from its files any reference to the unlawful discharge and notify Aguirre in writing that this has been done; and post a remedial notice. (ER 1 at 5.)

SUMMARY OF ARGUMENT

The Company has waived any challenge to the Board's resolution of the bulk of this case, and the law governing the few issues subject to appeal is straightforward, as are the underlying facts, which amply support all facets of the Board's decision.

It is factually beyond dispute – and the Company has waived any challenge to the Board's determination – that Aguirre engaged in a course of concerted

protected conduct during his tenure at the Company, that he approached fellow employees, inquired at a state agency, and questioned management about various terms and conditions of employment. The same is true of the Board's further finding that Aguirre's protected conduct culminated in, and included, his participation in the October 28 meeting with Plaza, Felix, and MacGrew.

The Company does not – and cannot – contest the Board's conclusion that it repeatedly violated the Act by responding to Aguirre's protected inquiries with a series of unlawful statements suggesting that he should quit if he did not agree with company policies. Nor does it dispute that two of those unlawful statements occurred during the October 28 meeting. Finally, the Company has waived any challenge to the Board's finding, and in any event admits, that it fired Aguirre exclusively because of his outburst during the protected October 28 meeting.

The only open question before this Court is whether Aguirre's disputed outburst removed him from the Act's protection. As demonstrated below, substantial evidence supports the Board's reasonable conclusion, consistent with relevant precedent, that Aguirre remained solidly within the scope of the Act's protection. Briefly, his outburst occurred: during a private meeting in a closed office, not witnessed by any non-managerial employee; while he was engaged in protected conduct; and in response to Plaza's unlawful provocation. Before the outburst, he had no history of intemperate conduct or inappropriate language use.

And the outburst itself was not beyond the pale – it was a spontaneous, if forceful, verbal expression of Aguirre's understandable frustration in the face of the Company's stonewalling his attempts to discuss protected subjects. Consequently, the Company's termination of Aguirre was, as the Board found, an unfair labor practice.

STANDARD OF REVIEW

In reviewing the Board's Order, this Court will uphold the Board's legal determinations under the Act so long as they are "reasonable and not precluded by Supreme Court precedent."[3] It must also accept as conclusive Board findings of fact that are supported by substantial evidence in the record considered as a whole.[4] Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion."[5]

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[3] *East Bay Auto. Council v. NLRB*, 483 F.3d 628, 633 (9th Cir. 2007) (quotations omitted); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts.") (citation omitted).

Contrary to the Company's assertion (Br. 10), *NLRB v. Buckley Broad. Corp. of Cal.*, 891 F.2d 230, 232 (9th Cir. 1989), does not state that the Court will review the Board's legal determinations *de novo*.

[4] 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord East Bay*, 483 F.3d at 633.

[5] *Universal Camera*, 340 U.S. at 477.

ARGUMENT

I. The Board Is Entitled to Summary Enforcement of Its Conclusion That the Company Violated the Act by Telling Aguirre That He Could Quit If He Did Not Like Company Policies

Section 7 of the Act (29 U.S.C. § 157) confers on employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights.

The Board adopted (ER 1 at 2) the judge's finding (ER 1 at 11) that the Company violated Section 8(a)(1) of the Act on multiple occasions – including twice during the disputed October 28 meeting – by stating, in response to Aguirre's concerted protected questioning of certain terms and conditions of employment, that Aguirre could quit if he did not like company policies.[6] The Company did not protest that unfair-labor-practice finding before either the Board or this Court and has consequently forfeited the right to do so.[7] In any event, the record amply

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[6] As detailed below (Part II.A, pp.17-18), ample evidence supports the Board's determination that Aguirre's inquiries were protected, and the Company has, in any event, waived any challenge to that finding.

[7] *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) ("[T]he Court of Appeals lacks jurisdiction to review objections that were not urged before the Board."); *McKay v. Ingleson*, 558 F.3d 888, 891 n.5 (9th Cir.

supports the Board's finding that the Company made such statements, the Company admits in its brief (Br. 24) to making at least one, and Board precedent supports finding that such statements violate Section 8(a)(1).[8]

II. The Board Reasonably Found that the Company Violated the Act When It Fired Aguirre for Statements during a Protected Discussion

An employer violates Section 8(a)(1) when it discharges an employee because of that employee's participation in concerted protected activity within the meaning of Section 7.[9] As demonstrated below, Aguirre's participation in the October 28 meeting indisputably constituted Section 7 activity, the Company admittedly fired him due to his profane outburst during that statutorily protected discussion, and the disputed outburst was not egregious enough to remove him

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2009) ("Because this argument was not raised clearly and distinctly in the opening brief, it has been waived."); *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1103 n.10 (9th Cir. 2008) ("Section 10(e) of the Act constitutes a jurisdictional bar to this court considering claims not raised before the NLRB.") (citing 29 U.S.C. § 160(e); *Woelke & Romero*).

[8] *See Chinese Daily News*, 346 NLRB 906, 906, 919 (2006) (holding employer violated Section 8(a)(1) by advising employee to quit if not happy with job, in response to employee's protected activities), *enforced mem.*, 224 F. App'x 6 (D.C. Cir. 2007); *McDaniel Ford, Inc.*, 322 NLRB 956, 956 n.1 (1997) (same); *House Calls, Inc.*, 304 NLRB 311, 313 (1991) (same).

[9] *See Stanford Hotel*, 344 NLRB 558, 558-59 (2005); *Felix Indus., Inc.*, 339 NLRB 195, 195, 197 (2003) (*"Felix III"*), *enforced mem.*, 2004 WL 1498151 (D.C. Cir. 2004).

from the Act's protection. Accordingly, the Board reasonably found that Aguirre's termination was an unfair labor practice.

A. Aguirre Engaged in a Course of Concerted Protected Activity, Culminating in His Participation in the October 28 Meeting

The judge found (ER 1 at 10-11) that Aguirre engaged in sustained Section 7 activity during his tenure at the Company. As described above, Aguirre repeatedly approached fellow employees, talked to managers, raised questions at group staff meetings, and inquired with a governmental agency about various concerns related to the Company's terms and conditions of employment, including: inadequate breaks and bathroom facilities at tent sales; compensation of sales staff on a straight commission basis, with no minimum-wage draw; and calculation of commissions, including whether employees should know the Company's vehicle cost, a factor in such calculations. That course of conduct easily satisfies the requirement that, to fall within Section 7, an employee's activity must be both "protected" and "concerted," or seek resolution of work-related concerns of interest to more than just the individual employee propounding them.[10] As the

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[10] *See, e.g.*, *Cibao Meat Prods.*, 338 NLRB 934, 934 (2003) (holding employee engaged in Section 7 activity when he protested newly announced employer policy in front of other employees), *enforced*, 84 F. App'x 155 (2d Cir. 2004); *Compuware Corp.*, 320 NLRB 101, 102-03 (1995) (finding Section 7 activity where employee had series of discussion with other employees about work-related concerns – including long hours and inadequate preparation time – and stated his intent to raise same at meeting with management and client), *enforced*, 134 F.3d 1285 (6th Cir. 1998); *Salisbury Hotel*, 283 NLRB 685, 686-87 (1987) (finding

judge further found (ER 1 at 2, 13), Aguirre's participation in the October 28 meeting, where "the discussion related wholly to [his] protected concerted activity," was part of that statutorily protected course of conduct.

The Company did not except before the Board to the judge's findings of concerted protected conduct generally, or at the October 28 meeting in particular. That failure to present any relevant objections to the Board precludes this Court, under Section 10(e) of the Act (29 U.S.C. § 160(e)), from entertaining any challenge to the Board's subsequent adoption of those findings (ER 1 at 2 & n.5).[11] In any event, as just shown, the Board's uncontested findings of concerted protected activity are amply supported in the record.

B. The Company Admittedly Fired Aguirre Exclusively Because of His Outburst at the October 28 Meeting

As the Company frankly admits (Br. 7, 19, 23, 24), and as substantial evidence in the record demonstrates, it fired Aguirre because – and only because –

Section 7 activity when employee inquired with government agency about whether new break policy was legal and informed management it was not, even though no other employee knew she planned to do so, because inquiry was continuation of employee's concerted protest of new policy in form of complaints to other employees and objections to management). *See also Meyers Indus.*, 281 NLRB 882, 887 (1986) ("[O]ur definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."), *enforced*, 835 F.2d 1481 (D.C. Cir. 1987).

[11] *See Woelke & Romero* and *Friendly Cab Co.*, *supra* note 7.

of his outburst during a concerted protected discussion at the October 28 meeting. Indeed, the Company could not now contest the Board's adoption of the judge's finding to that effect, having waived any challenge to it under Section 10(e) by failing to file a relevant exception before the Board.

As the Board explained (D&O 2 n.5), where an employer has thus indisputably discharged an employee because of statements made in the course of Section 7 activity, a motive analysis, such as the *Wright Line* standard the Company proposes in the alternative (Br. 13-14), is inapplicable.[12] Likewise, comparisons of other employees' sanctions for similar behavior are irrelevant.[13] Instead, as explained below, the relevant issue is whether the statements that provoked the discharge somehow destroyed the employee's Section 7 protection. In other words, the sole question before the Court is whether Aguirre's verbal outburst cost him the protection of the Act.

C. Aguirre Did Not Forfeit Statutory Protection

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 concerted

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[12] *Aluminium Co. of Amer.*, 338 NLRB 20, 21-22 (2002); *Felix Indus., Inc.*, 331 NLRB 144, 146 (2000) (*"Felix I"*), *remanded on other grounds*, 251 F.3d 1051 (D.C. Cir. 2001).

[13] *See, e.g., Felix I*, 331 NLRB at 146.

protected activity and respecting employers' need to maintain order in the workplace.[14] This Court has recognized that, "[i]nitially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed."[15]

To reach the appropriate balance of interests, the Board weighs four factors identified in *Atlantic Steel Company*: (1) the location of the encounter; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether it was, in any way, provoked by an unfair labor practice on the part of the employer.[16] As demonstrated below, ample evidence supports the Board's determination (ER 1 at 4) that all four *Atlantic Steel* factors weigh in favor of Aguirre retaining protection – three of them quite heavily – and, consequently, that Aguirre did not forfeit the Act's protection and his termination violated Section 8(a)(1).

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[14] *See DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005).

[15] *Falcon Plastics v. NLRB*, 397 F.2d 965, 967 (9th Cir. 1968) (internal quotation omitted).

[16] 245 NLRB 814, 816 (1979).

1. The location of Aguirre's outburst – in a private office, away from other employees or customers – strongly favors protection

Aguirre's outburst took place in Felix's private office, separated physically from the work floor. No other salesman or non-management employee saw, heard, or was otherwise aware of it. Nor does the evidence suggest that any other employee learned of the confrontation later, or that it had any effect on their productivity, discipline, or morale. Even Montenegro, who was in the adjoining office during the October 28 meeting, did not witness the outburst: she heard Aguirre's raised voice at one point, but could not understand his words.

The record thus amply supports the Board's finding (ER 1 at 2) that, due to the private nature of the location, the outburst "could not have undermined workplace discipline at the [Company's] facility," and its consequent conclusion that the first *Atlantic Steel* factor favors protection. That conclusion is, moreover, consistent with relevant law. The Board and the courts have long recognized that an employee's outburst is more disruptive to employer discipline and production when it takes place on the work floor or in front of fellow employees – and that, conversely, location militates in favor of protection when an outburst occurs in a more private setting and only management witnesses the incident.[17]

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[17] *Compare Stanford Hotel*, 344 NLRB 558, 558 (2005) (weighing location in favor of protection because outburst occurred away from work area and employee had closed door in effort to maintain privacy, although one coworker inadvertently

The Company cites (Br. 15-16) *Trus Joist MacMillan* for the proposition that the location of Aguirre's outburst favored loss of protection, but its argument is both inaccurate and inapposite.[18] The Board in *Trus Joist* reaffirmed the well-established principle that an outburst is less disruptive when outside the presence of other employees.[19] It then found that, because the employee in that case purposely requested a meeting with multiple managers with the specific intent of humiliating one in front of the others, he deliberately created a different sort of disruption. Consequently, the Board considered location to be a *neutral* factor in that case, weighing neither in favor of, nor against, protection.[20]

In this case, despite the Company's assertions (Br. 6, 15) to the contrary, Aguirre did not request the October 28 meeting at all, much less with the intent to

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overheard), *with Atlantic Steel*, 245 NLRB at 816-17 (finding loss of protection where outburst occurred on production floor); *DaimlerChrysler*, 344 NLRB at 1329 (finding loss of protection where outburst was in front of "quite a few" employees); *Aluminium Co. of Amer.*, 338 NLRB 20, 22 (2002) (weighing against protection the fact that outbursts occurred in front of employees, rather than in meetings with management).

[18] 341 NLRB 369 (2004). The Company also cites *Media General Operations, Inc. v. NLRB*, 560 F.3d 181, 187 n.4 (4th Cir. 2009), which acknowledges Board law that private remarks are less disruptive to workplace discipline before noting that the Board weighed privacy differently in *Trus Joist*, when the employee had initiated the encounter "for the express purpose of making vulgar remarks."

[19] 341 NLRB at 370.

[20] *Id.*

humiliate Plaza in front of Felix and MacGrew. Adopting the judge's findings and credibility resolutions, the Board found (ER 1 at 2, 8, 9) only that Montenegro told Plaza that Aguirre desired a meeting, *not* that Aguirre requested one. The Company does not cite any record evidence to the contrary, much less any evidence suggesting that Aguirre – unlike the employee in *Trus Joist* – requested that Felix and MacGrew also attend the meeting.

In sum, Aguirre's outburst undeniably occurred in "private" – away from all fellow employees and the sales floor. While managers Felix and MacGrew witnessed it, they were there at Plaza's request, not Aguirre's. And there is no evidence the incident undermined company discipline or production. The first *Atlantic Steel* factor thus weighs strongly in favor of protection.

2. The subject matter of the October 28 meeting – Aguirre's protected inquiries regarding company policies – weighs heavily in favor of protection

When an employee's outburst occurs during a concerted protected conversation, the subject matter of the discussion weighs heavily in favor of protection.[21] In this case, as discussed above, the Board conclusively found (ER 1 at 2 & n.5) that Aguirre's participation in the October 28 meeting constituted

[21] *Felix III*, 339 NLRB at 196 (finding it "very significant," in favor of protection, that employee was engaging in protected activity when he had disputed outburst).

Section 7 activity, and that the meeting related to and continued his ongoing course of concerted protected conduct.

The Company's contention that the subject matter weighs against protection is specious. As already explained, the Company has forfeited any arguments contesting the Board's findings of concerted protected conduct – including at the October 28 meeting – which are, in any event, amply supported in the record.[22] For that reason, its reliance on the Fourth Circuit's *Media General Operations, d/b/a Winston-Salem Journal v. NLRB* decision is misplaced.[23] The Court in that case did, as the Company notes (Br. 17, 20), find the employee's outbursts were "devoid of substantive content" and "merely a manifestation of [the employee's] personal sentiments towards his supervisor, not an expression of Union opinion."[24] But its holding was that the employee was on a "personal mission[]," and *not* engaged in concerted protected activity, not that his outburst destroyed his statutory protection.[25]

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[22] Moreover, as discussed in the provocation analysis below, there is no evidence to support the Company's effort (Br. 7, 16-17, 18-19, 20, 23-24) to link Aguirre's outburst specifically to his protected discussion of vehicle cost, as opposed to his other protected inquiries at the meeting.

[23] 394 F.3d 207, 212 (4th Cir. 2005).

[24] *Id.* at 211-12.

[25] *Id.* at 212.

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, the District of Columbia Circuit dismissed an employer's attempt to "bifurcate" the disputed discussion and "parse" a discharged employee's words in *Felix Industries v. NLRB*, holding that "the obscenities were intertwined with [the] protected activity – as they are in every case governed by *Atlantic Steel*."[26] Because Aguirre's participation in the October 28 meeting was protected, the subject matter of the discussion weighs heavily in favor of protection.

3. The nature of Aguirre's spontaneous and isolated verbal expression of frustration favors protection

An employee's statements in the course of concerted protected activity are, as the Board noted (ER 1 at 3), protected unless they are "so violent or of such serious character as to render the employee unfit for further service."[27] Ample

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[26] 251 F.3d 1051, 1054 (D.C. Cir. 2001) ("*Felix II*") (internal quotation omitted). *See also DaimlerChrysler*, 344 NLRB at 1329 (finding fact that profane outburst occurred while employee was investigating grievance weighed in favor of protection despite fact that it was a reaction to supervisor's remark about scheduling meeting and not about merits of underlying grievance).

[27] *See St. Margaret Mercy Healthcare Ctrs.*, 350 NLRB 203, 204-05 (2007) (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

evidence in the record, interpreted in light of the judge's uncontested credibility findings, supports the Board's determination (ER 1 at 3) that Aguirre's disputed statements, while regrettable, were not that egregious in context. Rather, a number of factors place his verbal outburst on the protected end of the spectrum of such incidents and combine to distinguish it from those the Board has found unprotected in the past, including the cases the Company relies on to argue otherwise.

First, as the Board explained (ER 1 at 3 & n.8), Aguirre's outburst was spontaneous.[28] His frustration built up over a period of several weeks, as the Company stonewalled all of his many concerted protected attempts to get information or raise concerns about various working conditions – including with responses now adjudicated to be unlawful. When, at the October 28 meeting, the Company owner himself effectively invited a strong reaction by once again denigrating and unlawfully dismissing Aguirre's concerted protected inquiries out of hand, Aguirre's pent up frustrations understandably burst forth, in an emotional, verbal outburst. The fact that he cursed during an immediate, spontaneous reaction

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flagrant or render[s] the employee unfit for employment is unprotected.") (internal quotation omitted).

[28] *See, e.g.*, *Max Factor & Co.*, 239 NLRB 804, 817 (1978) (finding protection where abusive verbal outburst towards manager "was spontaneous, not the product of a conscious effort to degrade [the manager] or undermine his authority, but was provoked by the unlawful conduct" of the employer), *enforced*, 640 F.2d 197 (9th Cir. 1980).

to Plaza's statements materially distinguishes this case from those, like *Media General*, *Trus Joist*, and *Honda of America Manufacturing*, where employees issued insults after time for reflection, with the intent to disrupt or humiliate, or in the absence of unlawful provocation.[29] Here, as discussed below, the unlawful provocation was temporally proximate to Aguirre's outburst.

Second, this is not a case where profane language was clearly inappropriate in the employer's workplace or under the particular circumstances, a fact which distinguishes it from cases like *Aluminium Company of America*, *Honda*, and *Atlantic Steel*.[30] The Company's assertion (Br. 22) that it once discharged another

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[29] *Media General*, 560 F.3d at 187-88 (emphasizing that outburst was not "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); *Trus Joist*, 341 NLRB at 370 (discussed *supra* at note 18 and in accompanying text); *Honda*, 334 NLRB 746, 747-49 (2001) (finding use of offensive, sexualized language in two successive newsletters could not "be dismissed as impulsive behavior," and distinguishing case where employees used "vulgar and improper statements" during meeting, after provocation).

[30] *Aluminium Co.*, 338 NLRB at 22 (finding employee's outburst unprotected where profanity "far exceeded that which was common and tolerated in his workplace" to extent that two employee witnesses approached management to volunteer that it should not be tolerated); *Honda*, 334 NLRB at 746, 749 (finding vulgarity unprotected where "[o]ne of the [employer's] core operating philosophies is respect for the individual," as manifest in rule barring use of abusive language towards other employees); *Atlantic Steel*, 245 NLRB at 817 (finding loss of protection where obscene outburst took place "in a work setting where such conduct was not normally tolerated"). *See also Stanford Hotel*, 344 NLRB at 559 (finding profane outburst weighed against protection when both employee and employer agreed cursing was inappropriate in hotel and there was no evidence it

employee for conduct allegedly comparable to Aguirre's, but also arguably distinguishable,[31] does not prove that it never tolerated vulgarities. To the contrary, as the Board discussed (ER 1 at 3 & nn. 9 & 10), the record indicates that Felix had used similarly profane language several times when addressing employees, including in MacGrew's presence.

Third, although Aguirre's one outburst included several insults, the incident was isolated (ER 1 at 3 & n.9) – the only time he used such language or had any sort of discipline issue during his entire tenure with the Company. Unlike the employees in the Company's *Sullair P.T.O., Inc. v. NLRB* and *North American Refractories Company* cases (Br. 21, 23),[32] Aguirre did not have a history of

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was a regular occurrence); *Carleton College*, 230 F.3d at 1081 (overturning finding of protection in part because "salty language" occurred during meeting with dean of college that had been called to discuss professional expectations).

[31] It appears from the record that, in the prior incident, the employee insulted Felix at a tent sale in front of another employee. (ER 3 at 205-06.) *Cf. DaimlerChrysler*, 344 NLRB at 1329-30 (weighing brief outburst of repeated profanity aimed at supervisor *in front of* other employees against protection).

[32] *Sullair*, 641 F.2d 500, 502-03 (7th Cir. 1981) (noting, in addition, that outburst occurred "in front of other employees, causing three of them to leave the meeting"); *N. Amer. Refractories*, 331 NLRB 1640, 1642, 2000 WL 1449838, *5-6 (2000) (Employee had prior outbursts in front of coworkers, including calling a supervisor "a dumb asshole," before outburst that destroyed protection.). *See also Aluminium Co.*, 338 NLRB at 22 (noting in support of loss of protection that employee's outbursts were repeated and each was unprovoked); *Transit Mgmt. of Se. La.*, 331 NLRB 248, 249 (2000) (finding no unfair labor practice when employee was fired for using abusive language and profanities on three occasions

profane or disruptive outbursts, and the Company did not rely on past misconduct in addition to his outburst in firing him. Moreover, as the Board noted (ER 1 at 4), Aguirre's comments, while disrespectful, were not – like the disputed statements in *Felix Industries* – expressly insubordinate.[33]

Finally, as the Board emphasized (ER 1 at 3-4), Aguirre's outburst did not contain any threat of physical harm, much less any physical aggression. Although the Board explicitly adopted (ER 1 at 1 n.1) the judge's credibility determinations and underlying factual findings with respect to the October 28 meeting, it found that the credited evidence did not support the judge's further characterization (ER 1 at 3-4) of Aguirre's outburst as "at least physically aggressive if not menacing."[34] And it reasonably declined to speculate or assume (ER 1 at 3 n.7)

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over two days – to another employee, in a conversation with a supervisor, and in a meeting with superintendent – in violation of company rules).

[33] *Felix II*, 251 F.3d at 1054-55 (holding factor three weighed against protection where employee expressly stated he need not listen to supervisor). *See also Carleton College*, 230 F.3d at 1080-82 (emphasizing, in overturning Board's finding of protection, that employee admittedly refused to commit to acting in a professional manner going forward).

[34] *Cf. Media General*, 560 F.3d at 185-86 ("The determination of the nature of the outburst is not properly a 'credibility determination' made by the ALJ but a legal conclusion based upon the Board's inferences from facts in the record. . . . [The judge's] analysis of the application of the law to the fact he found does not qualify as a credibility determination.").

that facts not evident in the record – or even described in the judge's decision – might support some other conclusion.

As the Board detailed (ER 1 at 4) and the Company acknowledges (Br. 3), the only physical movement or arguable threat that the judge found Aguirre made during his outburst occurred when he "rose from his chair, pushed it aside and said that if he was fired, Mr. Plaza would regret it." (ER 1 at 12 n.24.) The record does not clearly indicate – and the judge did not find – that Aguirre moved the chair in a hostile manner. As the Board noted (ER 1 at 4), he may simply not have had room to stand in the confines of Felix's admittedly small, crowded office without moving it.

Aguirre's comment that Plaza would regret firing him did not contain any reference to physical harm. In the context of Aguirre's indisputably nonviolent, non-physical, non-threatening, protected questioning of the Company's policies over the course of his employment – and especially in light of his recent inquiry to a state agency regarding employees' entitlement to a minimum-wage draw – the Board reasonably interpreted (ER 1 at 3) the statement as threatening only legal consequences.

Indeed, the Company opens its brief with a tacit acknowledgement that it shares the same basic understanding (Br. 2) of Aguirre's statement, describing Aguirre's filing of an unfair-labor-practice charge as "[m]aking good on his threat

upon his termination." Even at the time of Aguirre's termination, the Company's focus was, as the Board explained (ER 1 at 4), exclusively on Aguirre's language. Neither Plaza's contemporaneous note in Aguirre's personnel file (SER 1), which he reaffirmed in his testimony (ER 3 at 47), nor the Company's position statement to the Board in response to Aguirre's unfair-labor-practice charge (SER 2-3, ER 3 at 80) support an interpretation of Aguirre's actions as physically menacing. To the contrary, both assert that the Company discharged him for his *statements* to Plaza – or "verbal abuse." Neither even mentions any physical act or threat.

In sum, although Aguirre's outburst comprised multiple profane insults, it did not have any other aggravating element. To the contrary, factors such as privacy and Aguirre's lack of any history of improper conduct mitigated the severity of the incident and, in context, his strong reaction to the Company's unlawful statements was understandable, if unfortunate. The Board's conclusion (ER 1 at 4) that Aguirre's foul language did not render him unfit for further service is amply supported in the record and consistent with precedent.

4. The Company's unlawful provocation heavily favors protection

Substantial evidence supports the Board's finding (ER 1 at 2, 13) that the Company provoked Aguirre's outburst, militating strongly in favor of protection. As the Board and the judge outlined, Plaza twice responded to Aguirre's protected inquiries at the October 28 meeting with unlawful statements suggesting that

Aguirre quit. And those statements have been conclusively adjudicated to be unfair labor practices – they are not, as the Company implies (Br. 24) merely "alleged" here for the Court's due consideration.

Also at the October 28 meeting, Plaza censured Aguirre's concerted protected conduct during his tenure with the Company as "negative." (ER 1 at 13; ER 3 at 125, 166.) That comment served to reinforce the impression already created by the Company's two (conclusively adjudicated) unlawful statements before the meeting and Plaza's unlawful statements at the meeting, reiterating the message that the Company would not willingly entertain, much less address, Aguirre's protected inquiries. (ER 1 at 13.)

Factually, there is no evidence in the record to support the Company's oft-repeated assertion (Br. 23-24; *see also* Br. 7, 16-17, 18-19, 20) that "Aguirre's outburst was entirely and directly provoked by Plaza's lawful statement that Plaza would not disclose information regarding the price of cars." The Company cites only to the judge's description of the meeting (ER 1 at 8-9), which does not purport to set forth the precise sequence of comments but does repeatedly (from the perspectives of different witnesses) describe Aguirre's outburst immediately after describing Plaza's unlawful suggestion that Aguirre quit if he did not like the Company's policies. And the fact remains, regardless of the precise order of the

discussion, Aguirre's outburst was temporally proximate to Plaza's two unlawfully provocative statements, indisputably made during the very same meeting.

Legally, when an employer commits an unfair labor practice – much less two – during a protected conversation, thereby inciting or contributing to an employee's anger, frustration, and consequent outburst, the Board will find unlawful provocation.[35] Indeed, this case presents a classic example of such provocation. Accordingly – and notwithstanding the Company's insinuation (Br. 24) to the contrary – both the judge (ER 1 at 13) and dissenting Member Schaumber (ER 1 at 5) agreed with the Board majority's unremarkable determination (ER 1 at 2) that Plaza unlawfully provoked Aguirre and, consequently, that the fourth *Atlantic Steel* factor weighs in favor of protection.

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

In conclusion, substantial evidence in the record supports the Board's reasonable determination that all four of the *Atlantic Steel* factors favor protection in this case. Aguirre's outburst, while profane, was a single, spontaneous, verbal

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[35] *See, e.g.*, *Stanford Hotel*, 344 NLRB at 559 (finding employer's unlawful threat provoked outburst and weighed in favor of protection). *See also Media General*, 560 F.3d at 188 (stressing that unprotected employee outburst was in response to *lawful* employer conduct and noting that "the Board has extended much greater latitude to employees who are reacting to patently unlawful actions by their employers"). *Cf. Max Factor*, 239 NLRB at 817 (emphasizing unlawful provocation in finding no loss of protection).

expression of frustration in response to the Company's unlawful statements and general refusal to address his concerted protected inquiries. It occurred in a private office, unseen by any coworker, and unaccompanied by any physical threat or harm, or insubordination.

Moreover, as the Board explicitly found (ER 1 at 4 n.12), the *Atlantic Steel* balance would favor protection even if, as the Company argues, the third factor – the nature of Aguirre's outburst – weighed against that result. The Board has often found that employees retain protection under *Atlantic Steel* through a balancing of factors favoring and disfavoring such a result rather than because every factor supports protection.[36] Here, as the Board described, location, subject matter, and provocation so clearly favor protection that the nature of the outburst alone – which was offensive but not violent – would not alone destroy the Act's protection *even if* the Court disagrees with the Board's assessment of that factor. As the Board emphasized (ER 1 at 4 n.12), the key elements of this case – Aguirre's lack of prior improper conduct, the Company's consistent stonewalling of his efforts to

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[36] *See, e.g.*, *Stanford Hotel*, 344 NLRB at 559 (finding employee retained protection even though nature of outburst disfavored that result); *Felix III*, 339 NLRB at 196 (according nature of outburst "considerable weight towards losing the Act's protection" but determining that alone was "insufficient to overcome the other factors [subject matter and provocation] weighing against" loss of protection), *enforced*, 2004 WL 1498151 (D.C. Cir. 2004). *Cf. Felix II*, 251 F.3d 1051 (holding two factors favored protection, one disfavored it, and one was neutral, and remanding to Board to determine whether balance favored protection or not).

raise protected workplace concerns, and Plaza's direct, unlawful provocation of the outburst – strongly favor protection. Aguirre did not forfeit his statutory protection through cursing alone, nor can his colorful language justify the Company's unlawful reaction to his concerted protected activities.

STATEMENT OF RELATED CASES

Board counsel is not aware of any related cases.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing in full the Board's Order in this matter.

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February 2011
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