

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**GREYHOUND LINES, INC,**

**and**

**LOUIS LITTLE, an Individual**

**CASE NO. 08-CA- 181769**

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**GREYHOUND LINES, INC.'s BRIEF IN SUPPORT OF EXCEPTIONS TO THE  
DECISION OF ADMINISTRATIVE LAW JUDGE THOMAS RANDAZZO**

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**TABLE OF CONTENTS**

	<b>PAGE</b>
I. STATEMENT OF THE CASE.....	1
II. QUESTIONS PRESENTED.....	2
III. RELEVANT FACTS .....	2
A. The Parties .....	2
B. Greyhound’s Cleveland Terminal.....	4
C. Job Duties of Driver Operators .....	4
D. Heben Assists a Driver With Her Departure.....	5
E. Little Delays Young’s Departure in Order to Have Her Accompany Him in an Unnecessary Confrontation with Heben .....	6
F. Little was terminated because of his abusive tirade and disruption to Greyhound operations.....	11
IV. ARGUMENT .....	13
A. The ALJ erred in Finding Louis Little was Engaged in Protected Concerted Activity when he confronted Heben.....	13
B. The ALJ Misapplied Atlantic Steel to Err in Finding Little's Belligerent Conduct to be Protected .....	16
1. Factor 1: Location of Discussion .....	18
2. Factor 2: Subject Matter of the Discussion.....	21
3. Factor 3: Nature of the Outburst .....	21
4. Factor 4: Provocation .....	23
C. Louis Little was lawfully terminated for gross insubordination and for interfering with business operations .....	24
V. CONCLUSION.....	26

## TABLE OF AUTHORITIES

	PAGE
<b>Cases</b>	
<i>Aluminum Co.</i> , 338 NLRB 20 (2002) .....	22
<i>Atlantic Steel Co.</i> , 245 NLRB 814 (1979) .....	<i>passim</i>
<i>Carolina Freight Carriers</i> , 295 NLRB 1080 (1989) .....	13
<i>Cellco Partnership</i> , 349 NLRB 640 (2007) .....	17, 19
<i>Copper River of Boiling Springs, LLC</i> , 360 NLRB No. 60 (February 28, 2014) .....	26
<i>DaimlerChrysler Corp.</i> , 344 NLRB 1324 (2005) .....	14, 17, 22
<i>Davis Electric Contractors, Inc.</i> , 216 NLRB 102 (1975) .....	14, 15
<i>Felix Indus., Inc. v. N.L.R.B.</i> , 251 F.3d 1051 (D.C. Cir. 2001) .....	16
<i>Fibracan Corp.</i> , 259 NLRB 161 (1981) .....	22
<i>Flex Frac Logistics</i> , 360 NLRB No. 120 (May 30, 2014) .....	25
<i>Food Services of America, Inc.</i> , 360 NLRB No. 123 (May 30, 2014) .....	25, 26
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004) .....	17
<i>New Process Gear</i> , 249 NLRB 1102, 1109 (1980) .....	17
<i>NLRB v. Electrical Workers Local 1229 (Jefferson Standard)</i> , 346 U.S. 464 (1953) .....	13

**TABLE OF AUTHORITIES**  
(CONTINUED)

	<b>PAGE</b>
<i>Nynex Corp.</i> , 338 NLRB 659 (2002) .....	13
<i>Piper Realty Co.</i> , 313 NLRB 1289 (1994) .....	17
<i>Postal Service</i> , 364 NLRB No. 62 (2016) .....	20
<i>Sprint/United Mgmt. Co.</i> , 339 NLRB 1012 (2003) .....	17
<i>Starbucks Coffee Co.</i> , 354 NLRB No. 99, slip op. (2009).....	22
<i>Trus Joist MacMillan</i> , 341 NLRB 369 (2004) .....	17
<i>Trus Joist Macmillan</i> , 341 NLRB No. 45, slip op. (2004).....	18
<i>Washington Adventist Hospital</i> , 291 NLRB 95 and 102-103 (1988) .....	13
<i>Waste Management of Arizona</i> , 345 NLRB 1339 (2005) .....	17
 <b>Statutes</b>	
National Labor Relations Act .....	1
 <b>Other Authorities</b>	
355 NLRB No. 135 (2010) .....	22
357 NLRB No. 409 (2011) .....	25

## **I. STATEMENT OF THE CASE**

This case involves Respondent Greyhound Lines Inc.'s ("Greyhound" or "Company") right to maintain civility and order in the workplace. Greyhound lawfully terminated Charging Party Louis Little because he engaged in an explosive, profane public outburst towards Manager of Customer Experience Jon Heben. It is undisputed that Little repeatedly yelled "FUCK YOU" and "FUCK GREYHOUND" while standing immediately next to the door of a bus that was loaded with Greyhound customers. Heben repeatedly instructed Little to stop cursing at him, but Little defied Heben and instead escalated his abusive conduct until he became physically violent. Portions of Little's tirade were recorded by a security camera, and the video evidence shows Little screaming and violently gesturing mere inches from Heben's face. The video also shows Little menacingly swinging his arms and on one stroke, striking Heben in the stomach.

Administrative Law Judge Thomas Randazzo ("ALJ") erroneously found that Little's egregious, despicable conduct was protected by the National Labor Relations Act ("Act"). Little's conduct was in stark contrast to the Act's purpose and was not in any way protected. Little deliberately interrupted Greyhound operations when he pulled a driver (who was already very late) from her bus so she could join Little in the confrontation. The incident was not a grievance meeting, it did not involve any legitimate dispute over employment conditions, and it was solely the result of Little's loss of control. The incident was not caused by, and never meant to address any type of emergency or time sensitive employment issue.

Mr. Little's status as a Union steward does not in any way protect him from the consequences of his misconduct. In other circumstances where protected conduct has been involved, unlike here, the Board has repeatedly ruled that egregious public, profane, violent and disruptive conduct such as Little's loses protection of the Act. Little's aggressive conduct went far beyond the casual use of curse words, as he engaged in intolerable acts of intimidation and

insubordination. Little's tirade was entirely unprovoked and was a selfish, extreme overreaction to Heben's instruction for Little to stop cursing occurring in the immediate presence of Greyhound customers who were forced to witness it.

The reasons for Little's discharge, gross insubordination and interfering with production, are common, well recognized grounds for discharge not only in Greyhound's, but every industry. Nothing about the verbiage used in the rules, or the rhetoric in the General Counsel's case, warrants setting aside the appropriate discharge that occurred here. No reasonable employee in Greyhound's employ would, or could, reasonably believe that conduct such as demonstrated by Little could result in any outcome other than termination of the offender.

## **II. QUESTIONS PRESENTED**

Whether the ALJ erred in finding (1) "Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by discharging employee Louis Little on July 13, 2016, because of his engagement in union and protected concerted activities," and (2) "Respondent has engaged in unfair labor practices... in violation of Section 8(a)(1) of the Act for also discharging Little on the basis of, and pursuant to, unlawfully maintained and/or enforced conduct rules or policies." (D 43:10-14).

## **III. RELEVANT FACTS**

### **A. The Parties**

Greyhound Lines, Inc., ("Greyhound" or Company") is an intercity bus common carrier serving cities across North America, including Cleveland, Ohio. Greyhound operates terminals where passengers can purchase tickets and board buses to travel throughout the country. Greyhound buses operate on fixed schedules, which mandate that each bus must depart from the terminal at a predetermined time in order to ensure passengers arrive at their destination on time.

The Greyhound terminal in Cleveland is located at 1465 Chester Ave, Cleveland, Ohio (“Cleveland Terminal”). Several classifications of employees work out of the Cleveland Terminal including Driver Operators (“Drivers”), maintenance employees, mechanics, baggage handlers, and ticket agents. Amalgamated Transit Union, Local 1700 (“Union”) is the exclusive collective bargaining agent for Drivers and other employees working out of the Cleveland Terminal. The Company and the Union are parties to a Collective Bargaining Agreement (“CBA”) effective April 1, 2013 through March 31, 2018. (JX 1).

Drivers working out of the Cleveland Terminal report to Driver Supervisors Eric Collins and Harold Duncan. (Lytle 38-39; Little 149). Driver Supervisors report to Jimmie Lytle, Area Manager of Driver Operations and Safety (“Area Manager”). (Lytle 37; Heben 513). Lytle oversees Driver Operations throughout Ohio and parts of Michigan. (Lytle 37-38).

Jon Heben is the Manager of Customer Experience in the Cleveland facility. (Heben 508, 513). Heben is a licensed attorney and has held various positions for Greyhound. Heben worked for Greyhound from 2010-2012, left Greyhound to practice law from 2012 through 2015, and returned to the Company in January 2016. (Heben 509-10). In his current role, Heben oversees terminal operations, which includes customer service and maintenance functions. Although Heben does not directly supervise the Drivers at the Cleveland Terminal, his primary job duty is to ensure that every bus departs the facility as close to the scheduled time as possible. (Heben 514). This includes making sure Drivers report to the facility with enough time to prepare for on-time departure, and then making sure Drivers are prepared to depart on-time. (Heben 514).

Charging Party Louis Little worked as a Driver and was a Union steward at the Cleveland Terminal until he was terminated on July 13, 2016. (JX 3).

## **B. Greyhound's Cleveland Terminal**

When departing passengers arrive at the Cleveland Terminal and go through the main entrance, they enter into the lobby and waiting area, where passengers purchase tickets and wait to board buses. When a bus is ready for boarding, the Driver or another member of the staff line up passengers in the Terminal to prepare for boarding. Passengers then exit the Terminal through a set of double doors leading into a small area known as the "Vestibule." Passengers go through the Vestibule, exiting through another set of double doors, and then onto the Platform (or "loading dock") where they board onto a bus. (Heben 536-37; 594). Arriving passengers reverse this flow through the facility. The Cleveland Terminal also has offices for certain managers and a Drivers Room, where Drivers check-in and receive schedules.

## **C. Job Duties of Driver Operators**

Drivers working out of the Cleveland Terminal receive a copy of and are expected to follow the Greyhound Driver's Rulebook ("Rulebook") which includes a series a work rules and guidance to help Drivers do their jobs. (JX 2). In addition to the Rulebook, Drivers receive training, including "refresher training" on an as-needed basis. (Lytle 42-43). Drivers also are required to comply with U. S. Department of Transportation laws and regulations, which include maintaining a log book to keep records of their drive time. (Lytle 41; Heben 512).

Drivers are required to report at the Terminal at least 30 minutes prior to their scheduled departure times. (Heben 515). During this period, Drivers "pretrip" the bus, which includes identifying and locating the bus they will be driving, inspecting the bus, pulling passenger tickets and boarding the passengers. (Heben 518-19). There are three ways Drivers can find their assigned buses: by asking a manager; calling the Company's "Operations Support Center"; or checking the Company's computer system. (Lytle 45-46; Heben 520-21; Young 263). After the assigned bus is identified, Drivers conduct an inspection of the bus, which includes inspecting

the tires, coolant levels, brakes, interior and exterior lights, bathroom, and other aspects of the bus. (Heben 521). After the inspection, Drivers pull tickets and board the passengers. (Heben 515).

Drivers generally have a regularly scheduled route, which is selected through a bidding process. Drivers who do not have a regular scheduled route are on the “extra board,” meaning they are on-call to work as needed. (Heben 516).

Making sure buses depart on-time is critical to Greyhound’s business. Late departures are the most common customer complaint. (JX3). When customers choose to travel on a Greyhound bus, they expect to arrive at their destination on schedule. (Heben 517-18). When a bus departs late, it can cause a chain reaction of late buses and missed connections, ultimately resulting in very dissatisfied customers. (Heben 518). As with airlines, customers often have connections through cities that are not their final destination. For example, a customer may be traveling from Cleveland to Charlotte, which may require first going to Columbus and then changing buses to arrive in Charlotte. When a bus is late, the customer may miss a connection and may have to wait a day or more until catching the appropriate bus. (Heben 518).

#### **D. Heben Assists a Driver With Her Departure**

Danielle Young was a Driver working out of the Cleveland Terminal who understood the importance of on-time departures and took pride in the fact that she never caused a late departure. (Young 288-89).

On June 24, Young was called into work to cover a route scheduled to depart from Cleveland at 2:00 p.m. to go to Buffalo, New York. Young arrived at the Cleveland Station at about 1:30 p.m. When she arrived, she went into the Drivers’ room and signed in, but was unable to find her bus assignment on the computer. (Young 263). Rather than immediately contacting the Operations Support Center or asking a Supervisor for a bus assignment, Young

filled out her DOT log and conversed with reports clerk Renee Ramsey and Driver Sherry Campbell in the Drivers Room. Young told Ramsey and Campbell about an accident she saw on Interstate 90 on her way into work. (Young 263-64). By 1:55 p.m., Young still had not located her bus assignment. (Young 264).

Just five minutes before Young's scheduled departure time, Ramsey told Young "you've got to get out of here." (Young 264). When Ramsey told Young that she was going to start lining up the passengers for Young's route, Young responded "I don't even have a bus." (Young 264). Shortly thereafter, Heben came into the Drivers Room, saw that Young was upset, and asked her what was wrong. Young told Heben about personal problems she was having and that she was concerned about the traffic she saw on I-90, and was looking for an alternative route. (Heben 524; Young 264-65). Heben, Ramsey, and Campbell discussed alternatives and then Heben gave Young directions and reminded her that she "needed to go." (Young 265, 267; Heben 525-26). Young told Heben that she did not yet have a bus. Heben responded telling her "Let's find you a bus." (Young 265; Heben 526). Heben and Young left the Drivers' Room and found an available bus. (Young 265-66). Young said she was concerned because Mechanic Ron Mazur had been inspecting the bus earlier, but Mazur assured Young that it was cleared for the trip. (Young 266; Heben 528-29). Young immediately began pretripping the bus for the 2:00 p.m. departure.

**E. Little Delays Young's Departure in Order to Have Her Accompany Him in an Unnecessary Confrontation with Heben**

At approximately 2:35 p.m., Heben left his office and saw Louis Little arriving at the terminal after finishing his route. (Heben 532; Little 168). As Little was getting off the bus, Little asked Heben if Young was still there. (Heben 533). When Heben confirmed Young was still there, Little said that he wanted to give her directions. (Heben 533). Given that Heben had

already given Young directions anticipating the traffic; Young was already 35 minutes late departing; and Little still had to unload his passengers, Heben asked Little to give him the directions to avoid further delay. (Heben 533). Little suggested the same detour that Heben had provided to Young earlier, but Heben relayed Little's suggestion anyway. (Heben 533-34). By the time Heben went to talk with Young, passengers had already boarded the bus and were waiting to depart. (Heben 535). Heben gave Young his personal phone number and told her to call him if she got lost or ran into any problems. (Heben 534).

Shortly thereafter, Little approached Young on her bus. Young told Little that Heben kept telling her that she needed to go. Despite the fact that the bus was already nearly 45 minutes behind schedule, Little further delayed the departure when he told Young "go put your stuff down and come on." (Young 317).

Heben was leaving the Platform and entering the Vestibule when he heard Little shout his name. (Heben 538). Little and Young approached Heben in the Vestibule, a public area where passengers pass before boarding and after unboarding buses. Little was very aggressive, standing about a foot from Heben and yelling "I want to ask you a question - why are you harassing this Driver?" (Heben 540). Little, who weighed 345 lbs. and was much taller than Heben, refused to explain his accusation of "harassment." (Heben 540; Little 620; RX 3). This was the first time Little ever approached Heben about alleged mistreatment or harassment of Young or any other employees.

Attempting to prevent further unnecessary delay, Heben first said that Young should be on her bus and ready to depart. (Little 172). Heben then asked Little about his accusation, and Little responded by shouting "**Fuck Greyhound! It's Greyhound's fucking responsibility to have a fucking bus for the Driver.**" (Heben 541; Little 175). Heben told Little to stop cursing,

and said “I’m not going to talk to you when you’re cursing at me.” (Heben 541; Little 175-76). Little screamed “**Fuck you! I’ll say whatever the fuck I want to say.**” (Heben 541; Little 176). Heben raised his hand to his chest, briefly pointed at Little and again asked Little to stop cursing at him. (Heben 541; Little 176). Little testified that because Heben pointed at him, the confrontation had become personal and no longer was a supervisor / employee interaction. (Little 175). Little continued shouting “**Fuck you!**” at Heben, and did so approximately 10 times. (Little 174-75, 179; Heben 542). Heben never cursed at Little, and repeatedly asked Little to stop cursing. (Heben 542). Throughout Little’s explosive tirade, Heben’s arms remained at his sides as he attempted to reason with Little. (RX 3; Heben 544). Little never explained why he thought Heben had been harassing Young, and never raised concerns Heben about harassing any other employees. (Heben 542).

Little’s explosive confrontation in the Vestibule obviously was not a grievance meeting. (Young 315-16). Little did not express any issue in dispute, he did not refer to the labor agreement, and never proposed a resolution – he just created the confrontation for reasons known only to him, and then demanded to know why Heben was “harassing” Young, when in fact it was he who was preventing Young from departing with her bus filled with passengers. He then repeatedly shouted profanities at Heben in a manner that even he acknowledged was personal and not related to Greyhound business. (Heben 543). Despite Little’s behavior, Heben remained calm and reminded Young that she needed to go because her bus was already loaded. (Heben 543). Heben was about to leave to Vestibule and enter the Terminal when instructed Little to stop cursing at him. (Young 272; Little 175). Little responded to Heben's instruction by shouting "fuck you!" (Little 175). Little told Young to come with him, and they went onto the Platform. Heben followed Little and Young, and again instructed Young to depart and instructed

Little to stop cursing at him. (Little 175).

When they got out onto the Platform, Young, Little, and Heben were walking immediately next to the bus full of passengers, and in an area that is under video surveillance. (RX 3). Heben was still concerned about the fact that Young's bus was 45 minutes late and he wanted to make certain that she was prepared to depart. Knowing they were next to a bus that was full of passengers, Little continued shouting "**Fuck you!**" at Heben, and Heben told Little "I'm giving you a direct order to stop cursing at me." (Little 250; Heben 546-47). Little stepped towards Heben, standing just a few inches from Heben's face, and yelled "**Fuck you! I'll say whatever the fuck I want to say to you!**" (Heben 547; RX 3 at 14:45:51). Little continued yelling at Heben, and although Little was only a few inches away from Heben, Little continued aggressively moving towards Heben as Heben stepped back away from Little. (RX 3 at 14:45:53). As he continued to curse at Heben, Little began swinging his right arm in a downward motion. (RX 3 at 14:45:59). Heben's arms remained at his side throughout the exchange, and Young stood several feet behind Little and next to the bus full of passengers that she was to drive to Buffalo. *Id.* Little extended his index finger, pointed at Heben's face, and then thrust his hand downward and across his body, without making contact with Heben. (RX 3 at 14:46:00). Little raised his hand for a second time, his index finger was extended at first, but as he swung his arm Little balled his right hand into a fist and thrust his fist downward, delivering a glancing blow to Heben's abdomen. (RX 3 at 14:46:03). Heben immediately brought his right hand up to the left side of his abdomen where he had been struck. (RX 3 at 14:46:04).



(RX 3 at 14:46:03).

Incredibly, Young testified that Little did not make contact with Heben, yet the surveillance video clearly shows Young was standing directly behind Little at the time contact was made, and her point of view was plainly and obviously obstructed. (RX 3 at 14:46:03). Despite this conclusive evidence, the ALJ relied on Young's testimony to find Little did not make contact with Heben. (D 14:1-4).

Immediately after striking Heben, Little stepped backwards, away from Heben, apparently realizing what he had just done. (RX 3 at 14:46:04). Shocked by Little's behavior, Heben told Little "You just struck me!" (Heben 549). Little turned back towards Heben, yelling "**Fuck you!** I didn't strike you, I never fucking touched you. **You're a fucking liar!**," and continued aggressively swinging his arms downwards and towards Heben. (Heben 549; RX 3 at 14:46:07). As Heben began to turn away from Little, Little stepped towards Heben and continued to scream and curse at Heben, and repeatedly called him "a fucking liar." (RX 3 at

14:46:11; Heben 579). Heben then walked away from Little, towards the Vestibule to go back to his office. (Heben 549). Little took a few steps in the opposite direction, but quickly turned around and continued pointing, violently swinging his arms, and screaming “Fuck you!” at Heben. (RX 3 at 14:46:11 – 14:46:17).

**F. Little was terminated because of his abusive tirade and disruption to Greyhound operations**

After the altercation, Heben asked Greyhound security to call the police. (Heben 582). Heben filed a police report, detailing Little’s aggression, including his belief that the glancing blow was intentional. (RX 4). Heben detailed the incident and Little’s conduct in an email to Area Manager Jimmie Lytle. (RX 10).

Heben began collecting witness statements regarding the incident. He collected statements from employees who were present on the Platform around the time of Little’s outburst, including Young, Melvin Flowers, Marlon Jackson, and Zephaniah Lawson. (RX 9; GCX 12, 14, 15; Heben 603-05). Heben also collected statements from Sherry Campbell and Renee Ramsey because they were present in the Drivers Room when Heben gave Young directions to avoid the accident and assigned a bus to Young. (GCX 17; Heben 605).

Later, Lytle was contacted by Little and Union Vice President Herman Green by phone. Throughout the conversation, Green continued to use profanity, and Lytle repeatedly asked Green to stop cursing. (Green 404). Demonstrating that Greyhound does not condone such language in the workplace, Lytle directly told Green that he would stop the meeting if he continued to curse.

Lytle reviewed the witness statements, the video that plainly showed the aggressive, violent conduct, the police report, and Heben’s email. (Lytle 66-67, 89-90). Lytle held an investigatory interview on July 1 with Little and Union representative Tyrone Neal. During the

interview, Little admitted to cursing at Heben, and stated that he believed he had a right to express himself in any manner he chose, even in a public area in the presence of customers. (GCX 30). From Little's perspective, once Heben pointed at him, Heben was no longer a supervisor. (GCX 30; Little 179). Little told Lytle "I can curse as much as I want. You don't tell me how to talk." (GCX 30).

After the investigatory meeting, Little called Lytle on July 3, and told him that other employees had complained about Heben. Little went to the station and played two voicemails he received from Drivers. One of the voicemails was from Young, but she does not complain about Heben. (Lytle 499-500). Lytle considered all of the information Little provided to him, and further considered that information in connection with the evidence he reviewed concerning the incident with Heben. As a result, he concluded that serious violations of Greyhound were established, and he rejected the unsubstantiated claim by Little regarding alleged unfairness by Heben. Lytle's conclusion was that Little created an unnecessary confrontation with Heben in an effort to prevent Heben from trying to assist Young, or other drivers in the future, to depart on time with their scheduled routes. Little's effort in short, was not for any legitimate purpose and was conducted in a manner that could not be tolerated in a passenger terminal, or in any Greyhound work area.

On July 13, 2016, Lytle terminated Little, and issued his "Form 6" letter detailing the reasons for the termination. (Little 144; JX 3).

#### IV. ARGUMENT

##### A. The ALJ erred in Finding Louis Little was Engaged in Protected Concerted Activity when he confronted Heben

*(Exceptions Nos. 1-5)*

Little was not engaged in protected activity when he disrupted and delayed Greyhound's operations by instructing a Driver – who was already 45 minutes late to depart – to get off of her fully loaded bus to watch Little confront Heben. The Company had just cause to discharge Little and his termination was entirely unrelated to any protected concerted activity. Section 10(c) of the Act provides that “[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.”

While Section 7 is broadly construed by the Board, its reach is not unlimited. The Supreme Court pointed out in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, that the Act “seeks to strengthen, rather than weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.” 346 U.S. 464, 472 (1953). Activity is not protected if carried out in a manner that is abusive or unjustifiably disruptive of an employer's operations. *Nynex Corp.*, 338 NLRB 659 (2002) (citing *Carolina Freight Carriers*, 295 NLRB 1080 (1989) (employer lawfully discharged employee who, insisting on contractual entitlement to 6 hours' pay, persistently challenged supervisor's direct order to clock out.); *Washington Adventist Hospital*, 291 NLRB 95, 95 fn.1 and 102-103 (1988) (finding that employee lost the protection of the Act where he took over company computer system to communicate otherwise protected message to coworkers). It is well-settled that employees who engage in deliberate "slowdowns" of work or encourage others to do so are engaged in activities not protected by the Act, and their discipline

for such activity does not violate the Act. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1324 (2005) citing *Davis Electric Contractors, Inc.*, 216 NLRB 102 (1975).

The ALJ stretched the record and made assertions cut from whole cloth to reach the conclusion that Little was engaged in protected activity when he surprised Heben with his belligerent outburst. Little's confrontation was not a grievance meeting or a "pre-grievance conversation" (whatever that might mean), as the ALJ described it. (D 7:1-3). No grievances were ever filed in response to the complaints Little allegedly received about Heben, and Little admitted that he did not view Heben as a supervisor at the time of his explosive outburst. (GCX 30; Little 179). Young was scheduled to depart at 2:00 p.m. At approximately 2:45 p.m., Young finished pretripping her bus, received directions to avoid the traffic accident, and she and her passengers were ready to depart. Little unilaterally chose to remove Young from her job duties and confront Heben, without regard to the needs of the business or Heben's availability to meet.

Without citation or support from the record, the ALJ found that Little "asked" to meet with Heben, and repeatedly asserted that Heben "agreed" to such meeting, despite testimony from both Little and Young to the contrary. (D 24:14-15; 39:23-25; see Young 268; Little 170). Young described how Little initiated this confrontation:

"Mr. Little told me to put my stuff down and we will go talk to Jon. And I said, 'My bus is loaded and I'm signed out.' He said, 'Are you all right to drive?' He said, 'We're going to talk to Jon.' He approached Jon..." (Young 268).

In fact, rather than consenting to meet with Little and Young at that time, Heben urged Young to continue with her job duties because she was so late to depart at the outset of the discussion. According to Little's own testimony, Little "told Jon that [he] wanted to talk to [Heben] about the way he had -- his behavior towards Ms. Young..." and in response, Heben "denied that he was doing anything to Ms. Young" and immediately reminded them that

"[Young] should have been on the bus and gone." (Little 172).

Not only did the ALJ misconstrue the context of confrontation as an agreed upon meeting, he took liberties with the purpose and content of the confrontation. In concluding Little engaged in protected activity, the ALJ asserted "Little's actions sought to bring to management's attention the complaints from Young and other female employees<sup>1</sup> about Heben's demeaning and disrespectful treatment toward them." (D 20:5-7). First, Little only mentioned the complaints of "other female employees" after he was terminated, and never addressed such complaints on June 24 with Heben. In addition, Little was not bringing Heben's actions to "management's attention." Little confronted Heben. The ALJ's decision suggests that Little was working with management in an effort to improve working conditions. In fact, Little was picking a fight with Heben because Little believed Heben yelled at Young when he was trying to get her to depart in a timely manner. Little admitted, in that confrontation, he did not consider Heben to be a supervisor, therefore dispelling any suggestion that the confrontation was protected as a grievance meeting or for the purpose of improving working conditions. (Little 179; GCX 30). Little engaged in this explosive outburst without ever asking Young what Heben said to her, when he said it, or why he may have said it. (Little 170). Little pursued this confrontation without having bothered to ask Young anything about her interactions with Heben, other than the fact that she believed Heben yelled at her. *Id.* Little admitted that he did not characterize Heben's treatment of Young as "harassment."<sup>2</sup> (Little 241).

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<sup>1</sup> There was testimony at the hearing that two other employees, Carolyn Hargrove or Darnita Manigault, also made complaints about Heben to Louis Little. The ALJ needlessly references complaints about Heben by "other female employees" numerous times in the decision. The fact that the ALJ specifies the complaints were by "female employees" erroneously and misleadingly suggests that Heben mistreated female employees due to their gender. The record contains no evidence of gender-based discrimination or mistreatment and there were no allegations to this effect.

<sup>2</sup> At hearing, Heben testified that Little initiated the confrontation by yelling "why are you harassing this Driver," but Little denied using the term "harassment" to describe Heben's actions towards Young. (Little 241).

Contrary to assertions by ALJ, there is no evidence whatsoever that Little initiated the June 24 confrontation to address the complaints of "other female employees," Carolyn Hargrove or Darnita Manigault. The testimony of Hargrove and Manigault did not support the any of the allegations in the Complaint because Little never engaged in protected activity on their behalf. In fact, that testimony illustrates why the incident here was not and could not have been protected – while the General Counsel attempted to show other employees claimed they had been “harassed” by Heben, not one of the alleged incidents or issues were raised by Little during his challenge to Heben.

Ultimately, the incident here had nothing to do with any kind of substantive discussion or disagreement. Little chose to confront Heben to show him who was the “boss” in this area and to attempt to prevent Heben from doing his job, both by preventing him from assisting Young to leave on time and to discourage him from assisting drivers in the future. Little attempted to intimidate and cow Heben into inaction by repeatedly shouting “Fuck you” at Heben and called Heben a “fucking liar.” The subject matter transformed into personal attacks, with no relation to any legitimate workplace issue.

**B. The ALJ Misapplied *Atlantic Steel* to Err in Finding Little's Belligerent Conduct to be Protected**

*(Exceptions Nos. 6-16)*

Perhaps the most fundamental error in the ALJ's decision is the narrow focus on whether Little purposefully struck Heben. Little's extreme and offensive conduct lost protection of the Act, regardless whether Little purposefully physically assaulted Heben. Little admitted, and many others testified, that Little repeatedly shouted "fuck you" and "fuck greyhound" at his manager and in front of bus loaded with Greyhound customers. *Felix Indus., Inc. v. N.L.R.B.*, 251 F.3d 1051 (D.C. Cir. 2001) (holding that threats or physical violence did not need to

accompany an employee's obscene comments to his supervisor, in the course of a private telephone conversation between them over overtime pay, to weigh against according it protection). Video evidence conclusively demonstrates that throughout Little's outburst, he wildly and aggressively swung his arms toward Heben, who was standing just inches away. (RX 3).

“Generally, in order to determine whether concerted activity retains the protection of the Act, it is necessary to balance the right of employees to engage in protected concerted activities with the right of an employer to maintain order and control.” *Sprint/United Mgmt. Co.*, 339 NLRB 1012, 1017 (2003) (citing *New Process Gear*, 249 NLRB 1102, 1109 (1980)). The Board has consistently held that “even when an employee is engaged in protected activity, he or she may lose the protection of the Act by virtue of profane and insubordinate comments.” *Cellco Partnership*, 349 NLRB 640, 642 (2007) (use of terms “bitch” and “fucking supervisors” rendered otherwise protected activity unprotected); *Trus Joist MacMillan*, 341 NLRB 369, 372 (2004) (use of terms “prostitute” and “lying bastard” rendered otherwise protected activity unprotected); *Piper Realty Co.*, 313 NLRB 1289, 1289-90 (1994) (use of terms “balls,” “fucking with his job” and “fucking asshole” rendered otherwise protected activity unprotected); *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005) (employee's outburst lost protection of the Act when he called his supervisor an “asshole,” stated “Bullshit, I want this meeting now,” “fuck this shit,” and said he did not “have to put up with this bullshit”); *Waste Management of Arizona*, 345 NLRB 1339 (2005) (loss of protection where profanity-laced outburst occurred in dispatch area in front of other employees, with employee repeatedly refusing instruction to move into supervisor's office); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 & fn. 12 (2004) (“The use of abusive and profane language may be sufficiently egregious to deprive an employee

of the protection of the Act even if used during the course of Section 7 activity.”).

Where an employee engages in indefensible or abusive misconduct during otherwise protected activity, the employee forfeits the Act's protection. Whether the Act's protection is lost depends on a balancing of four factors: (1) the place of the discussion between the employee and the employer; (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 employer's unfair labor practice. See *Atlantic Steel Co.*, 245 NLRB 814 (1979); see also *Trus Joist Macmillan*, 341 NLRB No. 45, slip op. at 3 (2004) (applying *Atlantic Steel* factors to find employee use of profanity and lewd gestures removed statutory protection).

All four *Atlantic Steel* factors weigh in favor of loss of protection here, and support Greyhound's decision to terminate Little. Incredibly, the ALJ erroneously found each of the *Atlantic Steel* factors favored protection for Little's conduct.

#### **1. Factor 1: Location of Discussion**

Perhaps the most glaring error in the decision is that ALJ found the first *Atlantic Steel* factor, location of discussion, favored protection, despite the fact that Little's outburst occurred in a public, open place, just a few feet from a bus loaded with Greyhound customers. See RX 3. In *Atlantic Steel Co.*, the Board ruled that actions taken in locations where they can be witnessed by third-parties, especially customers, are less likely to be protected than private complaints to management which are not intended to create a scene or spectacle. 245 NLRB at 817. It was undisputed that Little's conduct could be observed by a bus loaded with customers. (Little 251; Young 270-73; Heben 594-95). The surveillance video demonstrated that Little was standing immediately adjacent to the loaded bus at the time of the incident. RX 3.

The ALJ erroneously stated that "the record is devoid of evidence establishing that passengers on the bus witnessed or heard the incident." (D 23:30-31). It was undisputed that the

bus in the video was loaded with passengers and was 45 minutes late to depart to Buffalo. The surveillance video demonstrates that Little's outburst took place just a few steps from the bus, and immediately outside of the bus's windows. The ALJ's contention that the record does not demonstrate that the outburst was witnessed by Greyhound customers is absolute nonsense as there was no dispute that customers were inside the bus on the surveillance video. Little's outburst took place in a public location in the presence of other employees and in front of paying customers, and therefore lost protection of the Act. See *Verizon Wireless*, 349 NLRB 640, 642-643 (2007)(outburst in office cubicle adjacent to other employees' cubicles; protection lost),

The ALJ found that Heben "chose" the location of Little's belligerent conduct. Little's confrontation with Heben began on the Platform, when he called out to Heben as Heben was entering the Vestibule. The confrontation moved into the Vestibule because Heben was entering the Vestibule as Little and Young approached him. Like the Platform, the Vestibule is open to the public and frequented by customers, who are required to walk through the Vestibule when boarding a bus, and when getting off of a bus.

Importantly, Little drew Heben out onto the Platform when he repeatedly shouted "fuck you" at his supervisor, in response to Heben's instruction to stop cursing. Little testified that when he was in the Vestibule with Heben, Heben repeatedly asked him to stop cursing. (Little 174-75). At the end of the discussion in the Vestibule, Heben "had his hand on the door going into the Terminal" and told Little "you don't have to cuss at me." (Young 272). Little responded by shouting "fuck you" and directed Young to go on to the Platform. (Little 175). Rather than continuing into the Terminal, Heben had no choice but to address Little's belligerent and insubordinate behavior, and to make sure Young would not be further delayed. Little testified that when Heben walked out of the Vestibule and on to the Platform, Heben "came out yelling

that [Young] needed to get on the bus and leave" and continued to instruct Little to stop cursing at him. (Little 176-77).

Contrary to the video evidence, the ALJ also notes that "Heben was the one who pursued Little onto the platform and continued to point his finger at him" to suggest that Greyhound selected the location for Little's obscene behavior. (D 23: 46-47). The surveillance video plainly shows the interaction between Little and Heben while on the Platform – Heben never "points his finger at [Little]." (RX 3).

Throughout the decision, the ALJ relied on *Postal Service*, 364 NLRB No. 62 (2016) for the proposition that an employee's use of profanity does not necessarily lose protection of the Act. In that case, an employee received discipline for her conduct in a grievance meeting, where the Board was quick to point out the meeting took place in a break room, away from other employees "[i]n order to ensure privacy." *Id.* slip at 4. The Board found the first factor favored protection because "there [was] no evidence that anyone else was within earshot of heir discussion" and therefore, "the discussion could not have disrupted the work of others or undermined [the manager's] authority in the eyes of other employees." slip at 12. Unlike in *Postal Service*, Little's outburst was not a grievance meeting, but was overheard by numerous employees who provided written statements. (RX 9; GCX 12, 14, 15). Little's conduct unquestionably could have undermined Heben's authority in the eyes of Young and the other employees in the area. Most importantly, Little's outburst occurred in front of a busload of paying customers.

Thus, the ALJ erred by failing to find first factor weighs very heavily in favor of losing the protection of the Act.

## **2. Factor 2: Subject Matter of the Discussion**

The second *Atlantic Steel* factor addresses the subject matter of the discussion. Here, the incident was unprotected because Little's diatribe was simply and directly profane, and the exchange with Heben was limited to the inappropriateness of that content.

Contrary to the ALJ's assertion, there is no evidence on the record that suggests Little addressed Heben's actions towards Carolyn Hargrove or Darnita Manigault on June 24, 2016. The testimony of Hargrove and Manigault did not support the any of the allegations in the Complaint because Little never engaged in protected activity on their behalf. In fact, that testimony illustrates why the incident here was not and could not have been protected – while the General Counsel attempted to show other employees claimed they had been “harassed” by Heben, not one of the alleged incidents or issues were raised by Little during his challenge to Heben.

Ultimately, the incident here had nothing to do with any kind of substantive discussion or disagreement. Little chose to confront Heben to show him who was the “boss” in this area and to attempt to prevent Heben from doing his job, both by preventing him from assisting Young to leave on time and to discourage him from assisting drivers in the future. Little attempted to intimidate and cow Heben into inaction by repeatedly shouting “Fuck you” at Heben and called Heben a “fucking liar.” The subject matter transformed into personal attacks, with no relation to any legitimate workplace issue.

## **3. Factor 3: Nature of the Outburst**

Little repeatedly shouted "fuck you" at a supervisor and aggressively swung his arms while standing over Heben just a few inches from his face. The nature of Little's outburst was intolerable, particularly when viewed in light of the context and subject matter. Here, Little's outburst began as a loud string of profanities, including egregious personal attacks, and then

turned into wild gesticulations that resulted in a blow to Heben's abdomen. Such behavior was not the type of conduct "normally tolerated" in Greyhound's or any workplace. *See Atlantic Steel Co.*, 245 NLRB at 817; *Fibracan Corp.*, 259 NLRB 161, 161 (1981) (employee's "repeated and blatant" use of profane language against the supervisor amounted to insubordination in meetings between employees and management).

The ALJ erred by relying on evidence that certain employees have cursed while on duty. The evidence is in no way comparable or even relevant to what occurred here. Little was not terminated for merely cursing; he repeatedly shouted "Fuck you" at a supervisor, called the supervisor a "fucking liar," and yelled "Fuck Greyhound" in front of a bus full of Greyhound customers and in the presence of other employees. *DaimlerChrysler*, 344 NLRB 1324, 1330 (2005) (profane tirade was not protected even though profanity was common in the workplace, because there was no evidence that "such language was common, much less tolerated, when used repeatedly in a loud ad hominem attack on a supervisor that other workers overheard."); *Aluminum Co.*, 338 NLRB 20, 22 (2002) (despite some degree of profanity was "quite common" and tolerated, profane tirade was not protected where there was no evidence that the "degree and manner in which [the employee] used profanity was common or accepted."). See also *Starbucks Coffee Co.*, 354 NLRB No. 99, slip op. at 3 (2009), adopted in 355 NLRB No. 135 (2010) (deliberate, intimidating nature of employee's behavior favored a loss of protection). Further, the ALJ's erroneous assertion that managers used profane language on a "daily basis" at Greyhound was based on testimony that Marshay Gibbons cursed while she was a manager – but she was terminated in 2011, more than 5 years before the Little's profane outburst. (Gibbons 449).

General Counsel also presented evidence of long ago physical altercations in the workplace, all of which either resulted in termination or are easily distinguished from the present

case. In fact, there is no evidence of another employee physically attacking a manager at Greyhound - ever. More than 20 years ago, Jimmie Lytle was terminated from his job as a Driver because he was involved in an altercation with a customer. (Lytle 57 – 61; 118-19). Similarly, two other Drivers, Boswell and Turner were terminated due to altercations with customers. (Lytle 113, 115, 123, 124; RX 1; RX 2). Lytle and Boswell were ultimately reinstated through the grievance and arbitration procedure, which has been suspended at the Union's insistence in this case.

The nature of Little's outburst was extreme, deliberate, provocative and intolerable. Young complained that she felt pressured because Heben had been urging her to depart from the Cleveland Terminal on time. No part of Heben's conduct was harassing; to the contrary, it was his job to assist her in departing the terminal, and that is what he did. Little claimed that he had previously received other complaints about Heben prior to the tirade but he did not even claim that he ever raised any of those with Heben. Little did not raise them with other members of Greyhound management either. Little's outburst was entirely inappropriate, especially in light of the fact that the outburst occurred in front of so many customers. No profane and excessive outburst could be thought of as retaining the protection of the Act given the circumstances.

#### **4. Factor 4: Provocation**

Finally, the fourth *Atlantic Steel* factor is inapplicable to this case. Here the outburst was completely unprovoked. No injustice or unfair labor practice was committed at any relevant time which would prompt such a reaction. Heben's conduct toward Little was reasonable and measured; and his conduct toward Young that Little claims he found objectionable, was professional *assistance* to her, not harassment.

The ALJ suggests that Little's conduct was acceptable and protected because it was "provoked" by Heben when he instructed Little to stop cursing at him and tried to make sure

Young would be departing on the bus to Buffalo. The ALJ erred by finding that Heben provoked Little by "yelling and pointing his finger" at Young and Heben. (D 28:37-38).

The only evidence that Heben was "pointing" at Young was when Heben instructed her to depart the facility with her long-delayed loaded bus. According to Young, Heben told her "you have to go" and pointed at her, and then pointed towards her loaded bus. (Young 276). In addition, Young testified that there was "no yelling" until Heben and Little were on the Platform, where Little yelled at Heben. (Young 273).

In direct contradiction to the video evidence and without any supporting evidence whatsoever, the ALJ erroneously found Heben pointed at Little and Young while on the Platform. (D 20:1). The surveillance video shows the confrontation while on the Platform where Heben never points his finger at anyone. (RX 3). The surveillance video clearly demonstrates Little is the aggressor in the confrontation, and he repeatedly steps towards Heben and towers over him, yelling and wildly gesticulating.

Further, the ALJ erred by finding Heben provoked Little by following Little and Young on to the Platform. In truth, it was Little who provoked Heben to go out on the Platform by ignoring Heben's instruction to stop cursing at him, and shouting "fuck you" at Heben as Little and Young exited the Vestibule. (Young 272; Little 175). Heben responded to Little's blatant insubordination by repeating his instruction to stop cursing on the Platform.

**C. Louis Little was lawfully terminated for gross insubordination and for interfering with business operations**

*(Exceptions 5, 16, 17)*

The ALJ erred by finding that Little's termination was based solely under the Hostility rule or the Personal Conduct/Courtesy rules. Little's termination letter makes clear that he was terminated because of his grossly insubordinate conduct and his disruption of Greyhound's

operations.

In *Continental Group*,<sup>3</sup> the Board established that discipline pursuant to an unlawfully overbroad rule is unlawful only if the employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7, and the discipline could therefore chill employees from exercising similar conduct that constitutes concerted protected activity. 357 NLRB 409, 410 (2011). “Nevertheless, an employer will avoid liability . . . if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than violation of the rule, was the reason for the discipline.” 357 NLRB at 412; *Food Services of America, Inc.*, 360 NLRB No. 123 (May 30, 2014) (despite the arguable connection between an employee's conduct and Section 7 rights, the employer's reliance on an overbroad confidentiality rule in discharging the employee for egregious conduct would not chill employees in the exercise of their Section 7 rights and thus did not run afoul of *Continental Group*).

Little's conduct was so egregious that it could not be protected concerted activity, and did not implicate the concerns underlying Section 7. “[T]o the extent other employees were aware of the events at all, they would understand that the Respondent had discharged [Charging Party] on account of [his] gross misconduct, not because of the Respondent's application of its overbroad rule, and that any chilling impact on the exercise of their Section 7 rights would be minimal.” *Flex Frac Logistics*, 360 NLRB No. 120 (May 30, 2014).

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<sup>3</sup> In the hearing, General Counsel amended Paragraph 7(f) of the Complaint to add the allegation that Greyhound violated Section 8(a)(1) by terminating Little under the Hostility and Personal Conduct policies. (Tr. 18) General Counsel's last minute amendment requires the application of *Continental Group* to the present case. Although General Counsel may argue that *Continental Group, Inc.*, does not apply in this case because it was not raised as an affirmative defense, General Counsel cited the *Continental Group* in her opening statement as applicable to this case. (Tr. 15). Although the principles of *Continental Group* were not asserted as an affirmative defense, General Counsel clearly anticipated responding to this defense at the hearing as a result of the amendment to the Complaint, and this issue was fully litigated.

Further, Little's termination was not based solely the Hostility and Personal Conduct/Courtesy rules, but also because his conduct amounted to gross insubordination and he interfered with production. *See Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (February 28, 2014) ("Even assuming [charging party's] outburst was protected conduct or conduct that otherwise implicated concerns underlying Sec. 7 of the Act, the Respondent established that it validly discharged her for interfering with its operations.").

The ALJ plainly and clearly erred in finding that there is "absolutely no basis in the record" that Little disrupted and delayed Greyhound's operations. (D 20:14-16). The record is replete with instances in which Heben instructed Young to continue working and Little's conduct further delayed Young's departure. (See e.g. Young 265, 267; Heben 525-26, 543; Little 172). Little's interference with production is cited in his termination letter, which states "[r]ather than assisting Operator Young to get her schedule on the road, you delayed the passengers further by taking Young with you to confront Manager Heben." Interference with production alone, regardless of the work rules at issue, is reason enough to terminate Little. *See Food Servs. of Am.*, 360 NLRB No. 123 (May 30, 2014) (termination was lawful despite being based on overbroad confidentiality provision because employee interfered with production when he transferred emails to a personal account).

## **V. CONCLUSION**

Louis Little was lawfully terminated because of his profoundly inappropriate conduct on June 24, 2016. Accordingly, and for all of the above reasons, the ALJ's findings and conclusions are without merit and must be reversed, and the Complaint dismissed in its entirety.

Respectfully submitted,

*/s/ Jeffrey Seidle*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of October, 2017, a copy of the foregoing was electronically filed and served via U.S. mail upon the following:

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