

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

UNITED PARCEL SERVICE, INC.

and

Case 18-CA-193426

MARK DAVID HAM

David Stolzberg, Esq.
for the General Counsel.
Bradley Bakker, Esq.
for the Respondent.

DECISION

INTRODUCTION¹

ANDREW S. GOLLIN, Administrative Law Judge. This case was tried on November 14-15, 2017,² in Coralville, Iowa. The amended complaint alleges the United Parcel Service, Inc. (Respondent) unlawfully threatened and later disciplined driver/union steward Mark David Ham. The alleged threat followed a February 16 disciplinary meeting Ham attended as a steward in which supervisors disciplined another driver/union steward for methods violations. The discipline was unexpected, and Ham reacted by loudly saying, "You've got to be fucking kidding me. This is fucking bullshit." He added, "You are fucking with a union steward." Respondent's Business Manager John Henson was present and told Ham to calm down, and that he could not speak to them that way. Ham replied that as a steward he has the right to say whatever he needed to say, as long as he was not threatening them. At the end of the meeting, Ham stated that he and the other steward would be filing charges with the National Labor Relations Board (Board). Henson responded that he viewed that as a threat.

On February 17, Ham attended a labor-management meeting to discuss outstanding grievances. At the meeting, Respondent's Labor Relations Manager Randy Ervin said he understood that Ham had been "loud and abusive" towards management during the disciplinary meeting the previous day, and that Ham cannot treat management that way. Ervin gave Ham a copy of Respondent's "Professional Conduct and Anti-Harassment Policy" to review and sign. Ervin stated he understood it was Ham's job to represent the union, but it was his job to make sure that Ham does it in a professional, respectful manner. Ervin later warned Ham that "this is progressive discipline" and if Ham acted in an unprofessional manner toward management in the future, he would receive progressive discipline, up to and including discharge.

¹ Abbreviations in this decision are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibit; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

² All dates refer to 2017, unless otherwise stated.

Two months later, Business Manager Henson informed drivers that if they made separate or unscheduled restroom stops during their routes they needed to record that time as a break. On April 27, Ham challenged Henson about this break policy during a one-on-one conversation. Ham said the break policy was not right and that he was tired of Henson “treating employees like shit.” Ham then left Henson’s office. From outside the office door, Ham turned, looked at Henson and stated that he did not appreciate having to work overtime that day when he had requested to only work an 8-hour shift. According to Henson, Ham gave Henson a “death stare” for a few seconds before walking away. On May 1, Henson held a meeting and issued Ham a written warning. Henson informed Ham that his conduct on April 27 made him feel intimidated and harassed, in violation of Respondent’s Professional Conduct and Anti-Harassment Policy.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) on February 17, when Randy Ervin threatened Ham with unspecified reprisals if he continued to engage in union activity and/or file charges with the Board. The General Counsel further alleges that Respondent violated Section 8(a)(1) and (3) of the Act on May 1, when John Henson disciplined Ham because he engaged in protected concerted and union activities on April 27, including raising concerns about the new break policy. Respondent denies the alleged violations and raises several affirmative defenses, including that the allegations should be deferred. Respondent contends Ham’s behavior on February 16 and April 27 lost the protection of the Act because he abusively cursed and yelled at supervisors in a manner completely uncalled for or warranted, refused to calm down and cease cursing at supervisors as requested, and acted menacingly toward Henson.

Based upon my review of the evidence and the applicable law, I find that deferral is not appropriate, and that Respondent committed the violations as alleged.

STATEMENT OF THE CASE

On February 21, Ham filed an unfair labor practice charge against Respondent, which was docketed as Case 18-CA-193426. Ham filed three amended charges in Case 18-CA-193426 on March 23, June 14, and July 18, respectively. On August 15, following an investigation, the Regional Director for Region 18, on behalf of the General Counsel, issued a complaint alleging Respondent violated Section 8(a)(1) of the Act on February 17, when Randy Ervin threatened unspecified reprisals if employees [Ham] continued to engage in union activity, and violated Section 8(a)(1) and (3) of the Act on May 1, when John Henson disciplined Ham because of his protected concerted and union activities, including raising concerns about the new break policy. On August 28, Respondent filed its answer and defenses to the complaint. On November 9, the Regional Director for Region 18 issued an amended complaint, modifying the first allegation to state that Respondent violated Section 8(a)(1) of the Act on February 17, when Ervin threatened unspecified reprisals if employees [Ham] continued to engage in union activity and/or file charges with the Board. On November 10, Respondent filed its answer and defenses to the amended complaint.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and the General Counsel filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing

briefs and my observations and assessments of the credibility of the witnesses, I make the following findings of fact,³ conclusions of law, and recommendations

FINDINGS OF FACT⁴

A. Jurisdiction and Labor Organization Status

5 Respondent, an Ohio corporation with headquarters located in Atlanta, Georgia and an
office and place of business in Coralville, Iowa, Respondent's facility, is engaged in the delivery
of packages throughout the United States and the world. During the calendar year ending
December 31, 2016, Respondent purchased and received at its Coralville, Iowa facility goods
10 valued in excess of \$50,000 directly from points outside the State of Iowa. Respondent admits,
and I find, that it has been an employer engaged in commerce within the meaning of Section
2(2), (6), and (7) of the Act. Based on the foregoing, I find this dispute affects commerce and
that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

 Respondent admits, and I find, that the International Brotherhood of Teamsters, Local
238 (Union), is a labor organization within the meaning of Section 2(5) of the Act.

15 **B. Respondent's Operations and Drivers**

 Respondent operates a customer center in Coralville, Iowa, where it employs drivers,
loaders, unloaders, porters, washers, and clerks. Business Manager John Henson is the
highest-ranking official at the Coralville center. Adam Miller is one of two On-Road Supervisors
20 responsible for overseeing the package car drivers. The term "package car" refers to the trucks,
vans, and other vehicles used to pick up and deliver packages to and from customers.
Depending on the season, there are approximately 35-45 package car drivers working out of
the Coralville center.⁵

25 Respondent expects its drivers to perform their routes in a safe, professional, and
efficient manner. To that end, Respondent has established methods, known as the "340
methods," addressing each step in the pick-up and delivery process. These methods include,

³ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

⁴ The following factual summary is a compilation of the credible and uncontradicted testimony. To the extent there is a key dispute in testimony, I have assessed the witnesses' credibility considering a variety of factors, including: the context of the witness' testimony, the witness' demeanor, corroboration or the lack thereof, the weight of the respective evidence, established or admitted facts, and inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.*, 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, *supra* at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *revd. on other grounds* 340 U.S. 474 (1951). Finally, I have carefully considered but discredited testimony in contradiction to my factual findings.

⁵ Each package car driver has a Delivery Information Acquisition Device ("DIAD"), which is a hand-held device used for navigation, tracking orders, scanning packages, obtaining customer signatures, and inputting timecard information (e.g., breaks, meal periods, etc.). The DIAD also can be used for communication between the center and driver. The DIAD is about a 12x6 inches. (Tr. 421).

but are not limited to, pre-trip inspections, planning stops in advance, parking and turning off the vehicle, movement within the vehicle, exiting the vehicle, loading, storing and unloading packages, interaction with customers, and tasks to perform upon returning to the center. (Tr. 41, 232, 358).

5 Respondent also uses telematics to monitor and collect data on drivers and their movements while out performing their routes. (Tr. 357-358). For example, Respondent monitors the speed and location of the vehicle, the amount of time the vehicle spends idling before heading into traffic, and how long the bulkhead door (the door between the cabin and package storage area in the back of the vehicle) is open. Respondent has expectations for how long each step should take. Respondent also has expectations for how long drivers should take to complete their routes, and it tracks whether they perform under, at, or over those set times.

10 Respondent conducts a yearly safe work methods observation for each driver, which is referred to as an annual ride. (Tr. 361-362). A supervisor will accompany a driver on his/her route for a certain number of stops to observe whether the driver is in compliance with certain key observable methods. (Tr. 362-363). The supervisor will then review the results of the annual ride with the driver.

20 In addition to performance expectations, Respondent has policies regarding how employees are to conduct themselves while at work. The Professional Conduct and Anti-Harassment Policy prohibits harassment on the basis of race, sex, national origin, disability, sexual orientation, gender identity, veteran/military status, pregnancy, age, or religion. (Jt. Exh. 10). The policy also prohibits unprofessional and discourteous actions, even if those actions do not constitute unlawful harassment, including derogatory or other inappropriate remarks, slurs, threats or jokes, as well as inappropriate visual and nonverbal objects or conduct. Any employee who witnesses or is subject to objectionable comments or conduct is to report it, and Respondent will investigate. Violations of the policy may result in disciplinary action.

30 **C. Collective-Bargaining Agreements and Protected Activity**

The Union represents the drivers, loaders, unloaders, porters, washers, and clerks working at the Coralville center. The employees are covered by the National Master United Parcel Service Agreement ("Master Agreement"), and the Teamsters Central Region and United Parcel Service Supplemental Agreement to the National Master United Parcel Service Agreement ("Supplemental Agreement"). (Jt. Exhs. 1 and 2). Both agreements are dated August 1, 2013 through July 31, 2018.

40 Article 4 of the Master Agreement addresses "Stewards" and states in pertinent part:

Recognizing the importance of the role of the Union Steward in resolving problems or disputes between the Employer and its employees, the Employer reaffirms its commitment to the active involvement of union stewards in such processes in accordance with the terms of this Article.

45 . . .
The Employer recognizes the employee's right to be given requested representation by a Steward, or the designated alternate, at such time as the employee reasonably contemplates disciplinary action. The Employer also recognizes the steward's right to be given requested representation by another Steward, or the designated alternate, at such time as the Steward reasonably contemplates disciplinary action. When requested by the Union or the employee,

there shall be a steward present whenever the Employer meets with an employee concerning grievances or discipline or investigatory interviews. In such cases, the meeting shall not be continued until the steward or alternate steward is present.

5
(Jt. Exh. 1, pgs 12-14).

Article 21 of the Master Agreement addresses "Union Activity." It states in pertinent part:

10 Any employee member of the Union acting in any official capacity whatsoever shall not be discriminated against for acts as such officer of the Union so long as such acts do not interfere with the conduct of the Employer's business, nor shall there be any discrimination against any employee because of union membership or activities.

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(Jt. Exh. 1, pg. 66).

Article 36 of the Master Agreement addresses "Non Discrimination." It states in pertinent part:

20 The Employer and the Union agree not to discriminate against any individual . . . because of such individual's race, color, religion, sex, sexual orientation, national origin, physical disability, veteran status or age in violation of any federal or state law, or engage in any other discriminatory acts prohibited by law . . .

25
(Jt. Exh. 1, pgs. 127-128).

Article 37(a) of the Master Agreement addresses "Management Employee Relations." It states in pertinent part:

30 The Employer shall not in any way intimidate, harass, coerce or overly supervise any employee in the performance of his or her duties. The Employer shall not retaliate against employees for exercising rights under this Agreement . . . The Employer will treat employees with dignity and respect at all times ... Employees will also treat each other as well as the Employer with dignity and respect.

35
(Jt. Exh. 1, page 128).

D. Alleged Unfair Labor Practices

40
1. Background

45 On February 6, On-Road Supervisor Adam Miller asked driver/union steward Mark David Ham to stay after the morning Pre-work Communication Meeting ("PCM") to attend a meeting with Dennis Peer, another driver/union steward.⁶ Ham agreed to attend. Miller, Peer, Ham, and Business Manager John Henson met following the PCM at the customer counter area. Miller began by saying he wanted to discuss the amount of time Peer's bulkhead door was open and

⁶ Miller had been monitoring Peer, in part, because Peer was exceeding the allotted time set for him to complete his routes. (Tr. 121-122).

the amount of time that his truck idled before moving into traffic. Miller went on to say he knew from past observations that Peer's bulkhead door was open for an extended period of time. Peer responded that was "bullshit." (Tr. 233). As far as idle time and pulling out into traffic, Peer explained that he delivers on some very busy streets, and he has to wait for traffic to clear. At the end, Ham asked whether these issues were going to lead to discipline, and Miller responded it would not. (Tr. 45; 234).⁷

The following day, on February 7, there was another meeting with the same participants at the same location. Henson began by pointing out that there had been a reduction in the amount of time Peer's bulkhead door was open the prior day, which was good, and Henson asked Peer how he was able to do it. Peer explained it was because he took more packages out through the back door, rather than through the bulkhead door. Henson asked why he would do that. Peer responded so he would not have sit through another meeting about why his bulkhead door was open too long. (Tr. 236). Henson replied that was not proper procedure, and Peer should go back to taking packages out through the bulkhead door. At the end of this meeting, Ham again asked whether this was going to lead to discipline. Miller responded that it would not. (Tr. 47).

On February 8, the four met again at the same location. Miller began by stating he had pulled Peer's records from the day before and noticed Peer had two deliveries that were close together, and Miller asked Peer why instead of making both deliveries from one location Peer moved the truck to each location. (Tr. 238-239). Peer explained that because of parking on the street, he was not able to make multiple deliveries from that spot. But Peer added that if Miller looked at the rest of his day he would see that there were several occasions in which he made multiple deliveries from one spot. (Tr. 239). Miller nodded and said nothing else. Ham again asked if this would lead to discipline, and Miller said it would not. (Tr. 49).

On February 9, there was a fourth meeting with the same individuals at the same location. Henson began by stating that he had made some changes to the way that Peer's truck was being loaded, and Henson asked Peer if he noticed any difference. Peer responded he had not. Peer referenced back to one of their earlier conversations that week when he told Henson that to reduce the amount of time his bulkhead door was open, he was no longer taking time throughout the day to sort out the packages in his truck. Peer also stated to reduce his idle time, he waited to start his truck until traffic was clear and he could pull straight out onto the road. (Tr. 241). Henson responded those were not the proper procedures, and Peer should go back to doing steps the way he had been. Henson also stated he was not asking Peer to be perfect; he just wanted to see improvement. At the end of the meeting, Ham asked if this would result in discipline, and Henson said it would not. (Tr. 51).

On February 10, Miller informed Peer that he would be conducting Peer's annual ride that day. Miller later accompanied Peer for the ride. Following the ride, Peer and Miller spoke and Miller identified two items where he wanted to see improvement on from Peer. There was no indication that Peer would be disciplined for these items. Peer later had a conversation with Ham about his conversation with Miller after the ride. (Tr. 55).

On February 13, Ham saw Miller, and Miller said that Dennis Peer was going to need a steward when they reviewed his ride. Ham told Miller that he would attend the review with Peer

⁷ Peer received no discipline for using profanity during this conversation. (Tr. 233-234).

as a steward. On February 15, after the PCM, Ham asked John Henson if they were going to meet that day to go over Peer's annual ride. Henson said they would meet the next day.

2. February 16 disciplinary meeting

On February 16, Henson, Miller, Peer, and Ham met to go over Peer's annual ride. Henson directed the group into the customer clerk's office, which is behind the customer counter area. The clerk's office is approximately 15x8 feet, with a wooden door. It contains shelves for packages, a chair, and a desk with a computer. The four entered the office and closed the door. Ham leaned up against the wall facing the door. Peer stood near the desk. Miller was inside the office facing Peer. Henson stood near Miller, with his back against the door. They were all about 3 or 4 feet from one another.⁸

Miller began the meeting by going through his checklist from Peer's annual ride, noting that Peer had several methods violations.⁹ Miller informed Peer that because of the violations Respondent was issuing him a warning letter. Miller then handed Peer a copy of the letter. Ham, who had been quiet up to this point, said in a loud voice, "You've got to be fucking kidding me. This is fucking bullshit." He then said, "You guys can't fucking do this. You are fucking with a shop steward."¹⁰ Henson, in a louder voice, told Ham to calm down and he could not talk that way to them. Ham responded he could say whatever he needed to say as a union steward, as long as he was not threatening them. Ham eventually calmed down. (Tr. 369, 493). Henson then explained that Peer was receiving the warning because he continued to have methods violations after receiving training earlier in the month. Ham stated this was not right and he and Peer were going to file charges with the Board. (Jt. Exh. 3). Henson asked Ham why he always threatens to file charges with the Board. Ham answered that it was not a threat, and Henson responded that he was taking it as a threat. (Jt. Exh. 3). Ham asked for a copy of all the paperwork given to Peer. Henson and Ham then left and made a copy of the paperwork at a nearby copier. That was the end of the meeting.

Later that day, Henson and Miller each prepared a statement regarding what occurred during the meeting. Also, Henson called Respondent's Labor Relations Manager Randy Ervin to tell him what happened and to ask how he should handle the situation. Ervin, who was scheduled to be at the Coralville center the following day for a local level grievance meeting, told Henson that they would talk about it more in the morning. Ervin explained to Henson that

⁸ Ham, Peer, Miller, and Henson testified about this meeting, and the record contains the statements Miller and Henson each prepared following the meeting. (Jt. Exhs. 3 and 4). Although Miller acknowledged he had limited recollection of the meeting, the four had similar recollections of the critical aspects of what was said. However, I give greater weight to Henson's written statement that was prepared closer in time to the event and contains greater detail about what was said. (Jt. Exh. 3).

⁹ Peer had 39 methods violations out of 40 stops. Henson clarified that Peer did not commit 39 different violations; he committed the same one or two violations at 39 of the 40 stops. (Tr. 363-364).

¹⁰ Henson testified Ham's hands were going every which way, his face was red, and the veins in Ham's neck were bulging out. (Tr. 368). None of the other witnesses, including Adam Miller, recalled this. There also is no mention of Ham's hand gestures, facial color, etc. in Henson's written statement. (Jt. Exh. 3). Based on my observations at the hearing, Ham's face reddened and the veins in his neck became more visible when he spoke for more than a few minutes, regardless of the subject matter. Both became more pronounced when he spoke more emphatically. He also maintained a serious or solemn expression throughout the hearing, and he regularly spoke at above what I considered normal conversational volume. And while he occasionally spoke with his hands, he did not do so excessively. I therefore credit that Ham demonstrated all of these, except for the hand gestures, during the February 17 conversation.

he normally would remind the employee of Respondent's Professional Conduct and Anti-Harassment Policy and have the employee sign a copy of Policy.¹¹

3. February 17 grievance meeting

Respondent and the Union meet approximately every 6 weeks to discuss lower-level grievances. The parties were scheduled to meet and met for this purpose on February 17. The meeting occurred in the upstairs conference room at the Coralville facility. John Henson, Randy Ervin, and an area human resource manager, Michael Arndt, attended for Respondent. Ham, Peer, and business agents George Mika, Rob Walton, and Dave Miller attended for the Union. During the meeting, the parties went through and discussed outstanding grievances.

At the end of those discussions, Ervin asked Ham to stay behind because he wanted to talk to him.¹² Peer left. Everyone else remained. Ervin began by saying that he wanted to talk to Ham about what happened during the disciplinary meeting the day before. Ervin said he understood Ham had been "loud and abusive" towards management. (Tr. 533). Ervin did not specify what he meant by "loud and abusive." He only said to Ham that he cannot talk that way to management. Ervin told Ham he understood that it was Ham's job to represent the Union, but it was Ervin's job to make sure that Ham does it in a professional, respectful manner. Ervin did not explain further. Ervin then slid a copy of Respondent's Professional Conduct and Anti-Harassment Policy across the table and told Ham to review and sign it.¹³ (Tr. 533). Ham initially refused to sign the Policy, stating he did not have to because he was acting in his capacity as a union steward during the meeting.¹⁴ (Tr. 170-171). The Union representatives asked for a brief recess, and they and Ham left the room to speak. The four of them returned to the conference room after a few moments. Ham said he would sign the Policy.¹⁵ Ervin asked

¹¹ Respondent introduced evidence that it has requested employees (including supervisors and managers) to sign or re-sign its Professional Conduct and Anti-Harassment Policy because they made offensive or threatening statements or engaged in offensive or threatening conduct. (R. Exhs. 3-9).

¹² Ham, Ervin, Henson, Arndt, Mika and Dave Miller each testified about this February 17 meeting. Miller, Mika, Henson, and Arndt had limited or incomplete recollection of the meeting. Arndt left for part of the meeting. Based on my observations, Ervin and Ham had clearer recollections. With the exception of one statement, discussed below, Ervin and Ham had similar recollections of what was said. However, I find that Ervin had a clearer, consistent recollection, which is largely corroborated by the other witnesses. As a result, to the extent that there is a conflict, I credit Ervin regarding what was said during this meeting.

¹³ George Mika testified that at some point Ham mentioned filing charges with the Board, and Henson or Ervin said, "We're sick and tired of you threatening us with NLRB charges. We consider that as harassment from you, and we're now asking you to sign the Anti-Harassment Form." (Tr. 296-297). I do not credit these statements were made during this meeting, because Mika repeatedly acknowledged not having a clear recollection of the events, and no other witnesses corroborated this statement.

¹⁴ Ham testified that when Ervin gave him a copy of the Policy to sign, Ervin said, "If you don't sign that form, I will do everything in my power to make sure something comes out of this." (Tr. 71). I do not credit Ham that Ervin made this particular statement, largely because it was uncorroborated. The other witnesses either denied or could not recall the statement being made. I do not believe it is a statement they all would have forgotten, or that Ham and the union agents would have responded to it with silence.

¹⁵ Ham testified that after he signed the Policy, Ervin told him that "I needed to stop being the instigator and that I write – most of my grievances are worthless, and that I write more grievances than anyone else in his district." (Tr. 73). I do not credit Ham that Ervin made these statements during this meeting. To begin with, the statements were not corroborated by any of the other witnesses present for the meeting. Additionally, the statements are inconsistent with the overall context of the meeting. This portion of the meeting was to discuss Respondent's view of Ham's conduct and statements during the meeting the day before about the decision to discipline Peer. There was no mention during this part of the meeting, or at

Ham if he would like to read through the policy first, and Ham said, “Nope, I know what it says.” (Tr. 534). At some point during this exchange, Ervin told Ham, “this is progressive discipline, and once we’ve covered this with you, if you don’t act in a professional manner with our management team, we will follow progressive discipline up to and including discharge.” (Tr. 556–557).¹⁶ That was the end of the meeting. There was no grievance filed over this event.

4. April 27 conversations regarding restroom break policy

In around April, an issue arose over drivers stopping to use the restroom while performing their routes. Henson informed Dennis Peer and other drivers that if they made a separate or unscheduled stop to use the restroom, they would need to clock out on break. Peer later informed Ham about what Henson had been saying. (Tr. 78–79). On April 27, during a meeting, Ham raised the restroom break policy with Henson. Ham told Henson he was wrong about the restroom policy, and that he (Ham) had contacted OSHA to get information. Henson then asked Ham why he had to take everything to an extreme. Ham replied, “I’m not taking it to extreme. I just have a bunch of people that are wanting to know what’s going on with the restroom policy.” (Tr. 77). Henson said he would check with Randy Ervin about it.

Later that day, Henson contacted Ham on his DIAD and told him to come to his office after he completed his route. At around 5 pm, Ham arrived at Henson’s office. It was just the two of them. Henson’s office is about 8x8 feet. Henson, who has an L-shaped desk, was sitting behind his desk and Ham was standing at the other side of the desk, a few feet away, near the wall. Henson recalled that Ham may have had his DIAD in one of his hands. Henson began by telling Ham that he had spoken with Ervin about the issue of the breaks and confirmed that drivers would need to clock out on break if they make a separate or unscheduled stop to use the restroom while performing their routes. Ham responded “that’s not right.” Henson told him that if he did not agree with him, then he could file a grievance. Ham replied, “I don’t want to file a grievance, I’ll take care of it a different way.” Henson then asked Ham, “Why don’t you want to file a grievance?” Ham again said, “I don’t want to file a grievance. I want to take care of it a different way.” Ham added, “I’m tired of you treating people like shit.”¹⁷ (Tr. 82–83) (Tr. 384). Henson then told Ham to leave his office.¹⁸ Ham then walked out into the open area outside of Henson’s office, near the stairway. He turned and said to Henson, “By the way, thanks for not [granting] another eight-hour request today, this is the fifth one in a row that I’ve not received. Are you retaliating against me because I’m a union steward?”¹⁹ (Tr. 84–85). Henson responded that it was not intentional. After Ham said this, he “just kind of stared [at Henson] ... for two or

the meeting the day before, about the filing of grievances. That being said, as stated below, I credit that Ervin did criticize the number and type of grievances Ham filed during other conversations. I simply do not credit that Ervin made these statements during this particular conversation.

¹⁶ The Policy states any violation “may be subject to termination or other disciplinary action.” (Jt. Exh. 10).

¹⁷ Henson testified that when Ham spoke he made an up-down chopping motion with his forearm, and that he did so each time he was trying to make a point. (Tr. 423–424).

¹⁸ Henson testified that he was concerned for his safety because there was no way out of his office except going through Ham. Henson said one minute Ham was calm, and the next minute “he’s yelling and out of control . . .” (Tr. 386). Henson did not specify how he believed Ham was “out of control.”

¹⁹ Article 37(b) of the Master Agreement sets forth the procedure when a package car driver wants to be relieved from performing overtime (i.e., working beyond their 8-hour day). Under the procedure, the driver must submit a written request no later than the start of his/her shift on the fifth (5th) calendar day preceding the day being requested, and Respondent needs to approve or disapprove the request by the end of the employee’s next working day. (Jt. Exh. 1, pgs. 128–129).

three seconds.” Henson described it as “a death stare.” (Tr. 387). Ham then walked down the stairs and left for the day.²⁰

5 Following the conversation, Henson called Ervin and others about what occurred. Henson testified that he reported that Ham “kind of went off the rails again.” (Tr. 389). After speaking with Ervin, Henson prepared a “Progressive Discipline Letter Request Form and Fact Sheet” and sent it to Ervin. (Jt. Exh. 11). The document goes through the exchange from Henson’s perspective. In it Henson states Ham was “very unprofessional” and that “[t]his is not the first time Mark has blown up.” Henson also attached a copy of the statement he prepared following the February 16 disciplinary meeting and a copy of the Professional Conduct and Anti-Harassment Policy that Ham signed on February 17. (Jt. Exhs. 3 and 10).

5. May 1 disciplinary meeting

15 On May 1, Henson held a meeting with Ham, Adam Miller, and alternate steward Erik Emerson to discuss Ham’s conduct on April 27. Henson read Respondent’s Professional Conduct and Anti-Harassment Policy out loud and told Ham that he felt intimidated and harassed by Ham’s conduct. Henson also gave Ham a written warning letter. (Jt. Exh 6). The letter states that on April 27, Ham displayed “unprofessional behavior in the workplace” and such behavior is “unacceptable and will not be tolerated.” The letter goes on to warn that 20 “should you be involved in another incident of this type in the future further disciplinary action could be taken without prior notice.” There was no grievance filed over this warning.²¹

DISCUSSION AND ANALYSIS

25

A. Deferral to Parties’ Grievance Arbitration Procedure

Prior to addressing the merits, a threshold issue is whether the allegations should be deferred to the parties’ grievance-arbitration procedure. See *United Technologies Corp.*, 268 30 NLRB 557 (1984); *Collyer Insulated Wire*, 192 NLRB 837 (1971). The Board has “considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act.” *Wonder Bread*, 343 NLRB 55, 55 (2004). The Board has held pre-arbitral deferral is appropriate where: (1) the parties’ dispute arises within the confines of a long and productive collective-bargaining relationship; (2) there is no claim of animosity to employees’ exercise of Section 7 rights; (3) the parties’ agreement provides for arbitration in a broad range of disputes; 35 (4) the parties’ arbitration clause clearly encompasses the dispute at issue; (5) the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the

²⁰ In response to a leading question in which Respondent’s counsel asked about Ham’s eyes and what did he do with his body, Henson replied that Ham leaned forward a little bit, chest was poked out, and his eyes “looked like there was just pure madness and hate in there.” (Tr. 386). When asked to physically describe Ham, Henson said he looked angry. When probed further, Henson replied, “Like I said, we just, we just had an issue with the breaks that he disagreed with me on, so his face was still red.” (Tr. 388).

²¹ George Mika and Dave Miller testified the parties have an unwritten practice that the Union does not grieve warning letters at the local level. Instead, the warnings are considered automatically protested and, if the employee later receives progressive discipline, the Union can raise the warning as part of any grievance filed over the subsequent discipline. (Tr. 324–325, 463–464). Miller, however, acknowledged that nothing precludes the Union from grieving a warning letter. (Tr. 465). Ervin did not dispute this unwritten practice, but stated that a grievance could have been filed. (Tr. 557–558).

dispute is well suited to resolution by arbitration. See *United Technologies*, 268 NLRB at 558; *Collyer Insulated Wire*, supra at 842.²²

5 Having considered the arguments and the factual record, I find the second, fourth, fifth, and sixth factors do not support deferral.²³ As for the second factor, I find claims of animosity toward Ham for exercising his Section 7 rights. Respondent allegedly threatened Ham with unspecified reprisals because of his behavior while acting as a union steward during the Peer disciplinary meeting, and later issued him a written warning after he challenged the break policy and objected to having his contractual request not to work overtime denied. See *Mobil Oil*
 10 *Exploration & Producing*, 325 NLRB 176, 177–178 (1997) (deferral is not appropriate when the precipitating event leading to an adverse action is the employee’s protected activity), enfd. 200 F.3d 230 (5th Cir. 1999); *Nissan Motor Corp.*, 226 NLRB 397, 397 fn. 1 (1976) (the very nature of a case dictates non-deferral when it involves discipline of a steward for performing contractual duties). See also *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at
 15 2–3 (2015) (no deferral because dispute involved the alleged discipline and discharge of a union steward for activity related to processing a grievance, and thus demonstrated a sufficient degree of hostility to make deferral inappropriate). Compare to *Babcock & Wilcox, Nuclear Operations Group, Inc.*, 363 NLRB No. 50 (2015) (single allegation that employer unlawfully issued warning letter to a union steward for engaging in protected union activity did not, by itself, establish employer animosity to employees’ exercise of protected statutory rights); and *Clarkson*
 20 *Industries*, 312 NLRB 349, 352 & fn. 16 (1993) (finding that allegations of an unlawful threat and an unlawful disciplinary warning were “not so egregious as to render the use of the arbitration machinery uncompromising or futile”). In this case, however, the evidence of animosity is not limited to these two events. The record reflects that Respondent’s supervisors and managers
 25 have expressed general irritation and frustration toward Ham’s performance as a steward. Henson characterized Ham as “pushy” “kind of arrogant” and “like he runs the business . . . , not us.” (Tr. 374–375). Union agent Dave Miller testified that Ervin commented to him that “there are too many grievances coming out of the Coralville center and that [Ham] is soliciting them all.” Ervin also commented to Miller that a lot of Ham’s grievances are “frivolous.” (Tr. 474–
 30 475). Ervin made these statements approximately a half a dozen times between February and April. (Tr. 475). Based on the foregoing, I find the claims of animosity do not favor deferral.

As for the fourth factor, there is an issue as to whether the parties’ arbitration clause clearly encompasses the dispute. In *Clarkson Industries*, supra at 351, the Board considered
 35 whether alleged violations of Section 8(a)(1) and (3) should be deferred to arbitration. That case involved a warning issued to a shop steward and an alleged threat to hold that steward to a higher standard of conduct than that demanded of other employees. In that case, the shop steward was arguably covered by contract language prohibiting discrimination on the basis of union membership or activity. However, the arbitration provision provided that the arbitrator

²² In *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1138–1139 (2014), the Board articulated a new deferral standard and held that it will not defer Section 8(a)(3) or 8(a)(1) allegations to the arbitral process “unless the parties have explicitly authorized the arbitrator to decide the unfair labor practice issue, either in the collective-bargaining agreement or by agreement of the parties in a particular case.” The Board held this new standard would apply prospectively, and not to contracts existing at the time of its decision (December 15, 2014). *Id.* at 13–14. The agreements at issue were effective as of August 1, 2013; therefore, the Board’s pre-*Babcock & Wilcox* standard applies.

²³ In its post-hearing brief, Respondent’s deferral arguments focus solely on the warning letter issued to Ham on May 1. It does not address deferral of the February 17 threat of unspecified reprisals for continuing to engage in union activities and/or file charges with the Board is appropriate for deferral. For the reasons stated below, I conclude that deferral is not appropriate for either allegation.

“shall not have the right or authority to subtract to or alter any provision of this Contract, nor may the arbitrator make any recommendations for future actions by the company or the Union.” The Board found that this provision would prevent an arbitrator from imposing the functional equivalent of a “cease and desist” remedy, which is directed at future actions. The arbitrator would be, therefore, precluded from fashioning an appropriate remedy for the alleged unlawful threat and, as the Board held, deferral was not warranted. In the present case, the parties’ grievance arbitration procedure contains similar language. Article 8, Section 6 of the Master Agreement states that: “The arbitrator shall have the authority to apply the provisions of this Agreement and to render a decision on any grievance coming before him/her but shall not have the authority to amend or modify this Agreement or to establish new terms or conditions of employment.” (Jt. Exh. 1, pg. 25). Under *Clarkson Industries*, I conclude that deferral of the alleged 8(a)(1) threat of unspecified reprisals would be inappropriate.

As for the fifth factor, Respondent has not expressed a willingness to utilize arbitration to resolve the dispute because it has not agreed to waive the contractual time limits for filing the grievance(s). As stated in *United Technologies*, 268 NLRB at 560, the Board has not “deferred cases to arbitration in an indiscriminate manner.” Rather, the Board has required that certain conditions be satisfied before deferral is appropriate. *Id.* One critical requirement is that the party seeking deferral agrees to waive any contractual time limitations. *Id.* The reason for this requirement is to ensure that the arbitration process remains focused on the merits of the dispute and is not distracted by arguments over the timeliness of the grievance under the collective-bargaining agreement. *Id.* There has been no grievance(s) filed covering the alleged unfair labor practices at issue, and both collective-bargaining agreements require that a grievance be filed within 5–10 days, depending on the alleged infraction. At the hearing, I raised with Respondent’s counsel the issue of whether Respondent had provided the General Counsel or the Region with the necessary assurances to allow the matter to be deferred. Respondent’s counsel stated he planned to file a motion at the close of evidence providing such assurances, or that those assurances would be provided through testimony. (Tr. 22–23). Respondent never filed a motion. Nor did Respondent give assurances in its post-hearing brief that it would waive timeliness arguments and process the grievance(s) through the grievance-arbitration procedure. Respondent’s only witness to testify on this issue was Randy Ervin, and, contrary to Respondent’s assertion, I find Ervin’s testimony fell well short of a clear waiver of the timeliness arguments.²⁴ Under the circumstances, I find Respondent has failed to give the

²⁴ Ervin testified as follows about whether Respondent would agree to waive any timeliness arguments:

Q. Would, would the Labor Department at UPS have been willing to grieve this warning letter or would they currently be willing to grieve this warning letter --

....

A: I think at the time they sure could have put in a grievance for the warning letter, absolutely. The contract’s specific in that you need to grieve things within five days unless it’s a payroll issue, or discipline, and that can be up to ten days.

A. So at this point the Company would probably take a stance that it’s untimely, but we would still visit that.

Q. And has that timeliness issue been agreed to be waived by UPS and the Union before?

A: I guess I’m not understanding the question, sorry.

Q. Can the Union -- can the Union and UPS agree to waive that timeliness to hear issues as necessary?

A. We could, we normally don’t, we take what’s called a [point] of order --

Q. Okay.

necessary assurances that the grievance(s), once filed, would proceed to arbitration on the merits. See *Union Electric Co.*, 214 NLRB 320, 321 (1974).

5 As for the sixth factor, I find the allegations, particularly those regarding the February 17
 alleged threat, are not well-suited to resolution through arbitration. The Board considers an
 issue to be well-suited to arbitral resolution when “the meaning of a contract provision is at the
 heart of the dispute.” *San Juan Bautista Medical Center*, 356 NLRB 736, 737 (2011). Deferral is
 not appropriate, by contrast, where no interpretation of the contract is pertinent to Respondent’s
 contentions regarding its failure to comply with a particular contract provision. *Id.* citing
 10 *Struthers Wells Corp.*, 245 NLRB 1170, 1171 fn. 4 (1979). For example, deferral is
 inappropriate where the dispute turns upon interpretation of the Act, or of other statutory
 provisions incorporated into the agreement. The Master Agreement prohibits discrimination for
 union activity (Article 21) and broadly prohibits “any other discriminatory acts prohibited by law”
 (Article 36). However, the meaning(s) of these contractual provisions are not at the heart of the
 15 dispute. The dispute centers on whether Respondent unlawfully threatened and later disciplined
 Ham because of his statutorily protected activities, including threatening him with unspecified
 consequences after he indicated his intent to file charges with the Board. It is an unfair labor
 practice for an employer to discipline or threaten to discipline an employee for filing a charge or
 expressing intent to file a charge with the Board.²⁵ See *OPW Fueling Components*, 343 NLRB
 20 1034 (2004); *Grand Rapids Die Casting Corp.*, 279 NLRB 662 (1986); *Lustrelon, Inc.*, 289
 NLRB 378, 383 (1988); and *Premier Rubber Co.*, 272 NLRB 466 (1984). Resolution of
 questions concerning access to Board processes has always been solely within the Board’s
 province to decide. See *Filmation Associates*, 227 NLRB 1721 (1977); *McKinley Transport*, 219
 NLRB 1148 (1975); and *Kansas Meat Packers*, 198 NLRB 543 (1972). In light of the foregoing, I
 25 find Respondent’s alleged threat of reprisals based upon Ham’s conduct during the disciplinary
 meeting in which he threatened to file charges with the Board is not appropriate for deferral.

Moreover, the Board has consistently held that it will not defer one issue if it is closely
 related to another issue that is not deferrable. See *Clarkson Industries*, *supra* at 352 (citing
 30 *Everlock Fastening Systems*, 308 NLRB 1018, 1019 fn. 8 (1992); *15th Avenue Iron Works*, 301
 NLRB 878, 879 (1991) *enfd.* 964 F.2d 1336 (2d Cir. 1992)). See also *International Harvester
 Co.*, 271 NLRB 647 (1984). Although the May 1 discipline is not alleged to be in violation of
 Section 8(a)(4), that discipline is tied, in part, to Ham’s earlier conduct during the February 16
 disciplinary meeting in which he threatened to file charges with the Board. Evidence that the
 35 two events are tied together is reflected in Henson’s testimony about his conversation with Ervin
 about the April 27 exchange in which he described Ham as “off the rails again.” Also, when
 Henson prepared the Progressive Discipline Letter Request Form and Fact Sheet for the April
 27 exchange, he noted that “[t]his is not the first time Mark has blown up” and Henson attached
 his typed statement about the February 16 disciplinary meeting and a copy of the Professional
 40 Conduct and Anti-Harassment Policy that Ham signed on February 17. I conclude that deferring
 the allegations over the May 1 discipline, but not the allegations over the February 17 threats, is
 inappropriate because this evidence indicates they are closely related, and deferral of one but

A. -- and if that point of order is upheld, then the case is dismissed at the state level. If
 that point of order is upheld, then the case goes away.

Q: Okay.

(Tr. 559–560).

²⁵ Section 8(a)(4) provides that it is an unfair labor practice for an employer “to discharge or otherwise
 discriminate against an employee because he has filed charges or given testimony under the Act.”

not the other would result in precisely the sort of “piecemeal” approach disfavored by the Board. I, therefore, find it is not appropriate to defer either allegation.

B. Threat of Unspecified Reprisals

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The amended complaint alleges that Labor Relations Manager Randy Ervin violated Section 8(a)(1) of the Act when he threatened Ham during the February 17 meeting with unspecified reprisals if he continued to engage in union activity and/or file charges with the Board. The General Counsel argues that Ervin specifically threatened Ham with unspecified reprisals when he gave Ham a copy of Respondent’s Professional Conduct and Anti-Harassment Policy to sign and said that if he did not sign it he (Ervin) would do “everything in his power to make sure something comes out of it.” As stated above, I do not credit that Ervin made this particular statement. However, I do credit Ervin’s admission that after giving Ham the Policy to sign, he warned Ham that “this is progressive discipline, and once we’ve covered this with you, if you don’t act in a professional manner with our management team, we will follow progressive discipline up to and including discharge.”

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Section 8(a)(1) prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. An employer violates Section 8(a)(1) by directing employees to cease their protected concerted or union activities, and further violates Section 8(a)(1) by threatening employees with unspecified reprisals if they do not comply with the directive to cease such activities. See *NC-DSH, LLP*, 363 NLRB No. 185 (2016). It also is a violation of Section 8(a)(1) for an employer to threaten an employee with discipline, including discharge, if they file charges with the Board. See *OPW Fueling Components*, supra; *Grand Rapids Die Casting Corp.*, supra. In deciding whether an employer has made a threat in violation of this prohibition, the Board applies an objective standard of whether the statement would reasonably tend to interfere with, restrain, or coerce an employee in the exercise of their statutory rights, regardless of the motivation for the statement or its actual effect. See *Divi Carina Bay Resort*, 356 NLRB 316, 320 (2010), enf. 451 Fed. Appx. 143 (3d Cir. 2011); *Miller Electric Pump & Plumbing*, 334 NLRB 824, 824 (2001). The Board considers the totality of the circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

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I conclude that under the totality of the circumstances telling Ham to sign the Policy and threatening progressive discipline if he continued to engage in the same sort of conduct he engaged in during the Peer disciplinary meeting violate Section 8(a)(1). Ervin began by accusing Ham of being “loud and abusive” toward management during the meeting, and that he could not treat management that way. Ervin, however, never specified how Ham was “abusive” toward management. Later, Ervin said it was his job to make sure Ham performs his steward job “in a professional, respectful manner.” He again failed to specify what that meant. It is reasonable for an employee to conclude that Respondent viewed Ham’s behavior during the Peer disciplinary meeting—including him being an advocate for Peer, protesting the discipline, and threatening to file charges with the Board—as unprofessional and disrespectful toward management, in violation of the Policy, and that such conduct would result in discipline, up to and including discharge. Such statements and conduct under these circumstances has a reasonable tendency to interfere with, restrain, or coerce an employee, particularly a steward, in the exercise of his/her Section 7 rights, as well as his/her representational duties, in violation of Section 8(a)(1).

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Respondent defends that Ervin acted lawfully in reprimanding Ham and having him sign the Policy because Ham was unprofessional and disrespectful toward management during the Peer disciplinary meeting. Specifically, Respondent contends Ham abusively cursed and yelled

at Henson and Miller in a manner completely uncalled for or warranted, refused to calm down and cease cursing at supervisors as requested, and that such conduct is inappropriate and subject to discipline.²⁶ When an employee is disciplined for conduct that is part of the res gestae of protected concerted activity, the question is whether the conduct is sufficiently egregious or opprobrious to remove it from the protection of the Act. See *Public Service Co. of New Mexico*, 364 NLRB No. 86 (2016); and *Stanford Hotel*, 344 NLRB 558, 558 (2005). When an employee engages in abusive or indefensible misconduct during activity that is otherwise protected, the employee forfeits the Act's protection. See *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005). The Board, however, has held that the standard is high for forfeiting the protection of the Act, stating that there must be egregious or offensive conduct to lose the Act's protection. *Consolidated Diesel*, 332 NLRB 1019, 1020 (2000) (citations omitted), enfd. 263 F.3d 345 (4th Cir. 2001); see also *Trus Joist Macmillan*, 341 NLRB 369, 371 (2004).

The Board has historically given some leeway to union stewards when they are representing employees in the context of a grievance meeting or other similar setting. See *Union Fork & Hoe Co.*, 241 NLRB 907 (1979); and *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). Union stewards are considered to stand upon equal footing with management with regard to addressing and resolving labor disputes. *United States Postal Service*, 251 NLRB 252, 252 (1980). It is well established, however, that although union stewards enjoy protections under the Act when acting in a representational capacity and such employees are permitted some leeway for impulsive behavior when engaged in protected activity, that leeway is balanced against "an employer's right to maintain order and respect." *Piper Realty*, 313 NLRB 1289, 1290 (1994); *Tampa Tribune*, 351 NLRB 1324, 1325-1326 (2007). To determine whether an employee loses the Act's protection, the Board balances the following four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814 (1979). In assessing whether the employee's conduct removed the protections of the Act, the asserted impropriety "cannot be considered in a vacuum" nor "separated from what led up to it." *NLRB v. Thor Power Tool, Co.*, 351 F.2d 584, 586 (7th Cir. 1965); *Emarco, Inc.*, 284 NLRB 832, 834 (1987).

I conclude that Ham was engaged in protected concerted and union activity during the February 16 Peer disciplinary meeting. He was present in his capacity as a union steward and acting in that capacity when he protested Respondent's decision to discipline Peer, arguing that the discipline was unfair and potentially retaliatory because of Peer's status as a steward. Ham also was engaged in statutorily protected activity when he threatened that he and Peer were going to file charges with the Board. The issue, therefore, is whether he lost the protection of the Act in the course of engaging in this statutorily protected activity. For the reasons stated below, I conclude that Ham did not lose the Act's protection.

The first *Atlantic Steel* factor is the place of the discussion. In evaluating the place of the discussion, the Board considers the circumstances, such as whether it occurred in the work area, occurred during work time, was observed by other employees or customers, caused a

²⁶ The amended complaint does not allege that Ervin's statements constitute unlawful discipline. However, as stated, Ervin considered having Ham sign the Policy as "progressive discipline" and warned that if Ham failed to act in a professional, respectful manner toward management in the future, he would receive progressive discipline, up to and including discharge. It is unclear what meaning Ervin's statements have under Respondent's progressive discipline policy, because that policy was not introduced into evidence.

5 disruption in the employer's operations, and/or undermined workplace discipline. See generally, *Kiewit Power Constructors Co.*, 355 NLRB 708 (2010) enf. 652 F.3d 22 (D.C. Cir. 2011) (favored protection where employer determined the location by distributing warnings in a work area during work time, and in front of other employees); *Datwyler Rubber & Plastics, Inc.*, 350
 10 NLRB 669, 670 (2007) (favored protection where discussion took place away from customary work area); *Noble Metal Processing, Inc.*, 346 NLRB 795, 800 (2006) (favored protection where outburst occurred during meeting held away from work area causing no disruption to the work process); *DaimlerChrysler Corp.*, supra at 1329 (did not favor protection where disruption occurred in a work area and was overheard by other employees); and *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322, fn. 20, 1323 (favored protection when confrontation was not overheard by patients or non-employees). Ham's comments were made during a closed-door disciplinary meeting in the customer counter clerk's office—a location selected by management. There is no evidence the comments made during this meeting were overheard by anyone else, or that they affected others in the performance of their work.²⁷ I, therefore, conclude the first factor favors protection.

20 The second *Atlantic Steel* factor is the subject matter of the discussion. This meeting was to discuss Peer's annual ride and the resulting written warning for his methods violations. Article 4 of the Master Agreement provides for a steward to be present and to actively participate in such meetings. As previously stated when Ham spoke up at this disciplinary meeting, he was speaking in his capacity as a union steward and as an advocate for a fellow bargaining unit driver and steward. His statements directly related to his views as to whether the discipline was appropriate, and to challenge whether it was retaliatory because Peer is a steward. I conclude this factor also favors protection.

25 The third *Atlantic Steel* factor is the nature of the outburst. The Board recognizes that discipline and disputes over working conditions are the type of topics most likely to cause ill feelings and strong responses. *Kiewit Power Constructors Co.*, supra at 710 (2010). In assessing whether an employee's offending statements or conduct during otherwise protected activity loses the protection of the Act, the Board has held that a line "is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those
 30 flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Prescott Industrial Products Co.*, 205 NLRB 51, 51-52 (1973). The Board has repeatedly held that loud, strong, profane, and foul language or what is normally considered discourteous conduct, while engaged in protected activity, does not alone justify discipline. See *Postal Service*, 364 NLRB No. 62, slip op. at 3 (2016).²⁸ See also *Goya*

²⁷ There is no evidence that this exchange was heard by anyone else. Ham has told Henson and Adam Miller that others could hear meetings that occur downstairs and, therefore, Ham asked for meetings with employees to be in the upstairs offices. (Tr. 211; 369:15-370:7, 503:18-505:3). Respondent decided to hold this particular meeting downstairs in the customer clerk's office. (Tr. 408-410).

²⁸ In *Postal Service*, 364 NLRB No. 62 (2016), the Board addressed a similar but more egregious situation. The steward became confrontational in the course of advocating for a fellow employee and told the supervisor she was "being an ass" and used other profanity. Id., slip op. at 2. As the meeting ended, the employee stood up, stepped toward the supervisor, shook her finger at the supervisor and screamed, "I can say anything I want. I can swear if I want. I can do anything I want." Id. When the supervisor began to disagree, the employee took another step towards the supervisor and loudly repeated she could say and do whatever she wanted, and added that the supervisor could not stop her. The Board found the steward did not lose the protection of the Act during this confrontation and the discipline issued, in part, as a result of this conduct violated the Act.

5 *Foods, Inc.*, 356 NLRB 476, 481 (2011); *Alcoa, Inc.*, 352 NLRB 1222, 1225 (2008) (employee acting in his union representational capacity, who called a supervisor an “egotistical fucker,” did not lose the protection of the Act); *Tampa Tribune*, supra (employee who told two supervisors that the employer’s vice president was a “stupid fucking moron,” did not lose protection of the Act); *Union Carbide Corp.*, 331 NLRB 356, 359 (2000), enfd. 25 Fed. Appx. 87 (4th Cir. 2001) (employee who called manager a “fucking liar” was found not so “out of line” as to remove him from the protection of the Act). But compare e.g., *Public Service Co. of New Mexico*, supra (steward lost the protection when he interrupted training meeting by making his own demands, refused to allow others to ask questions, initially refused to leave the meeting, and then, after leaving and returning, demanded the meeting end and employees leave), and *Waste Management of Arizona*, 345 NLRB 1339 (2005) (employee who loudly and repeatedly used profanity in front of coworkers and others, refused to move the discussion to a private location, threatened the supervisor, and refused to follow orders lost the Act’s protection). Additionally, the nature of the outburst must be examined in the context in which it occurred. *NLRB v. Thor Power Tool, Co.*, supra.

10 Although Ham’s outburst was loud and profane, it was spontaneous, brief, and unaccompanied by physical contact or threat of physical harm. The Board has held those types of outbursts do not lose the protection of the Act. See *Beverly Health and Rehabilitation Services, Inc.*, supra at 1323 (employee conduct “consisted of a brief, verbal outburst of profane language unaccompanied by insubordination, physical contact, or threat of physical harm); *Datwyler Rubber and Plastics, Inc.*, supra (employee outburst protected, as it was spontaneous, brief, and unaccompanied by physical contact or threat of physical harm).

25 Ham’s outburst was spontaneous. His statements reflect his shock and disbelief over Respondent’s decision to discipline Peer. He was shocked and in disbelief because at each of the meetings prior to Peer’s annual ride when Henson or Miller raised issues about Peer’s performance, Ham asked whether it could lead to discipline, and Henson and Miller repeatedly told him that it would not. Plus, in Ham’s experience, drivers do not receive discipline for their annual rides.

30 Ham’s reaction was brief. Upon learning of the discipline, Ham’s immediate reaction was to loudly state, “You’ve got to be fucking kidding me. This is fucking bullshit.” He then accused them of “fucking with a shop steward.”²⁹ When Henson told him to calm down and he could not talk that way to them, Ham responded that he could say whatever he needed to say as a union steward, as long as he was not threatening them. After that, Ham calmed down.³⁰

²⁹ Several witnesses testified about the use of profanity at the Coralville center, and the consensus was that it was fairly common. If a supervisor is present when it occurs, and someone raises an issue about the profanity, the supervisor likely will ask the profanity to stop. Respondent introduced examples of certain employees who were required to review and sign the Professional Conduct and Anti-Harassment Policy after they made threatening or offensive statements. However, there does not appear to be a consistent practice or policy regarding when Respondent will require an employee to review and sign the Policy. For example, during the February 6 meeting between Adam Miller, Ham, Peer, and Henson, Miller commented that Peer had his bulkhead door open too long, and Peer responded that was “bullshit.” Peer was not disciplined or reprimanded for using that term. Ham later used that same term, albeit more than once and with other profanity, during the February 16 disciplinary meeting. Respondent labeled it abusive and told Ham he needed to review and sign the Policy.

³⁰ Respondent argues that Ham repeatedly cursed and yelled at Henson and Miller during this meeting. While Ham yelled and used profanity, his comments were about the decision to discipline. He never personally insulted Henson or Miller. See *Wal-Mart Stores, Inc.*, 341 NLRB 796, 807–808 (2004)

5 There was no physical contact or threat of physical harm during this meeting. Henson testified Ham's hands were going every which way, his face was red, and the veins in Ham's neck were bulging out. But there is no claim Ham made any movement or threatening gesture toward anyone in the room.

Based on the foregoing, I conclude the nature of Ham's outburst, when examined in its context, favors continued protection.

10 The fourth *Atlantic Steel* factor is whether the misconduct was provoked by the employer's unfair labor practices. This does not require that the employer's conduct be explicitly alleged as an unfair labor practice, but rather includes conduct evincing intent to interfere with protected rights. *Postal Service*, 360 NLRB 677, 684 (2014) (citing to *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007), and *Overnite Transportation Co.*, 343 NLRB 1431, 1438 (2004)). As previously stated, Ham believed the decision to discipline Peer was unfair, unprecedented, and retaliatory because of Peer's status as a union steward. Peer later filed an unfair labor practice charge over the discipline, but that charge was dismissed. Regardless, under these circumstances, it was not unreasonable for Ham to view the discipline as an unlawful attempt to interfere with how he and Peer exercise their duties as stewards.

20 Accordingly, I conclude all four *Atlantic Steel* factors favor that Ham did not lose the protection of the Act, and Respondent, therefore, violated Section 8(a)(1) when Ervin threatened him with unspecified reprisals if he continued his union activities and/or filed charges with the Board.³¹

25 C. Written Warning

30 The amended complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act when Henson issued Ham a written warning on May 1 because of his protected concerted and union activity. The General Counsel contends Respondent issued the warning in response to Ham's challenging the break policy and complaining about not receiving his contractually requested 8-hour day.³²

35 Respondent denies it discriminated against Ham because of any protected concerted or union activities. Respondent also argues this case should be examined under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Respondent argues that under that standard, the General Counsel fails because there is no evidence of a causal link between Ham's alleged protected activity and the warning. In *Wright Line*, the Board stated the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. However, where, as here, an employer defends disciplining an employee for conduct that is part of the res gestae of the employee's protected activity, *Wright Line* is inapplicable

(employee retained the protection of Act notwithstanding his use of profanity where employee used the profanity to describe the employer's policy and its effects rather than to describe a member of management), enfd. 137 Fed.Appx. 360 (D.C. Cir. 2005).

³¹ Even if the fourth factor does not favor protection, Ham retained protection under the other factors.

³² The protected nature of Ham's complaints does not turn on whether he was correct that this amounted to a change in existing policy. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984).

because the causal connection between the protected activity and the discipline is not in dispute. *Phoenix Transit System*, 337 NLRB 510 (2002), enfd. mem 63 Fed.Appx. 524 (D.C. Cir. 2003). Respondent next contends that even if Ham was engaged in statutorily protected activity, he lost the protection of the Act by his conduct and statements during the exchange.

5 I conclude that Ham was engaged in protected concerted and union activity during his April 27 exchange with Henson. Ham's initial comments related to Respondent's new break policy that affected all drivers, which is both protected and concerted. Ham was present for this conversation with Henson in his capacity as a Union steward, and was speaking as such regarding the policy. As such, he was engaged in union activity. Ham's later comments were about the denial (by Henson) of his request under the contract not to work overtime that day. An employee is engaged in protected concerted activity when he/she exercises a contractual right. See *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2nd Cir. 1967).

15 As previously stated, when an employee is disciplined for conduct that is part of the res gestae of statutorily protected activity, the Board applies the *Atlantic Steel* factors to determine whether the conduct is sufficiently egregious or opprobrious to lose the Act's protection.³³ For the reasons stated below, I find Ham did not lose the Act's protection.

20 The first factor—the place of the discussion—favors protection. Henson selected the location of the discussion when he called Ham to his upstairs office to meet about the break policy. There were no other employees present or in the area. There is no evidence that any other employee overheard the discussion, or that the discussion had any effect on production.

25 The second factor—the subject matter of the discussion—also favors protection. As previously stated, the two discussed the break policy—a policy affecting all drivers and one that several of them had been discussing with Ham prior to this exchange. Ham and Henson also discussed about Ham not receiving his contractually requested 8-hour day, and Ham's belief that Henson was denying those requests because of his role as a steward. Both subject matters favor protection.

30 The third factor—the nature of the outburst—favors protection. Respondent contends Ham yelled, used profanity, and “acted menacingly” toward Henson during the exchange. Henson testified that Ham got loud after Henson confirmed the restroom break policy. But according to Ervin it was not uncommon for Ham to raise his voice and get red in the face, particularly when he is trying to get his point across on a labor-management issue. (Tr. 548–549). As for profanity, Ham said he was tired of Henson treating employees like shit. A single profane comment does not lose the protection of the Act. See *Alcoa, Inc.*, supra; *Tampa Tribune*, supra. The “menacingly” aspect is less clear. Henson testified that Ham looked angry,

³³ Respondent also argues that the framework set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) applies in this case. The Board has held that *Burnup & Sims* applies in cases involving mistakes of fact, not mistakes of law. Under *Burnup & Sims*, an employer violates the Act by disciplining an employee based on a good-faith belief that the employee engaged in misconduct during otherwise protected activity, if the General Counsel shows that the employee was not, in fact, guilty of that misconduct. “Otherwise, the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees.” 379 U.S. at 23. Plainly, this is not a “mistake of fact” case because management observed Ham's protected conduct. Therefore, *Burnup & Sims* does not apply. See also, *Triple Play Sports Bar & Grille*, 361 NLRB 308, 313 fn. 20 (2014).

and that his eyes and face were red. However, when he was asked to explain why this was, Henson testified that they “just had an issue with the breaks that he [Ham] disagreed with me on, so his face was still red.” As for gestures, Henson testified Ham made a chopping motion with his forearm while he was talking, but he confirmed that Ham did so when he was trying to make a point. Finally, in response to leading questions, Henson testified that after leaving his office, Ham turned around near the doorway and “leaned forward a little bit, chest was poked out, and his eyes looked like there was just pure madness and hate in there.” Then, after Ham then made a comment about being denied his 8-hour day, Ham allegedly gave Henson a “death stare” for 2 or 3 seconds before walking away. Henson did not specify any other conduct.

The Board uses an objective, rather than a subjective, standard to determine whether the conduct in question is threatening. *Plaza Auto Center, Inc.*, 360 NLRB 972, 975 (2014). Although Ham was loud and briefly profane, I again conclude his outburst was spontaneous, brief, and unaccompanied by physical contact or threat of physical harm. The comments were his immediate and brief reaction to learning that the break policy had been confirmed, and to having his request for an 8-hour shift denied once again. Although he appeared angry with Henson about both, he did not make any threatening statement, motion, or gesture. Instead, he left Henson’s office, turned to make his comment, looked at Henson for a few seconds, and then went home. Applying an objective standard, I conclude Ham’s reaction and expression—albeit one of anger and frustration—was not so opprobrious to lose the Act’s protection.

The fourth factor—whether the misconduct was provoked by the employer’s unfair labor practice—is again less clear but favors protection. Ham was angered by what he believed to be an incorrect interpretation of or change to the established practice regarding restroom stops and breaks. Ham also was angered about being denied his requested 8-hour day, causing him to ask Henson whether he was retaliating against him because he is a steward. Under these circumstances, I find the *perceived* unilateral change in break policy and discriminatory denial of a schedule change provoked Ham’s reaction.³⁴

Accordingly, in applying the *Atlantic Steel* factors, I conclude that Ham did not lose the protection of the Act, and that Respondent violated Section 8(a)(1) and (3) when Henson issued him a written warning for his protected concerted and union activities during the exchange.

CONCLUSIONS OF LAW

1. Respondent, United Parcel Service, Inc., has been an employer engaged in commerce out of its Coralville, Iowa facility, within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act on February 17, 2017, by threatening Mark Ham with unspecified reprisals if he continued to engage in union activity and/or filed charges with the National Labor Relations Board.

3. Respondent violated Section 8(a)(1) of the Act by issuing Mark Ham a written warning on May 1, 2017, because he engaged in protected concerted activities.

4. Respondent violated Section 8(a)(3) and 8(a)(1) of the Act by issuing Mark Ham a written warning on May 1, 2017, because he engaged in union activities.

³⁴ Even if the fourth factor does not favor protection, Ham retained protection under the other factors.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(6), and (7) of the Act.

5

REMEDY

10 Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes of the Act. Respondent shall rescind and remove any reference to the May 1, 2017 written warning issued to Mark David Ham relating to his conduct on April 27, 2017, remove any reference to the Professional Conduct and Anti-Harassment Policy Ham signed on February 17, 2017, and notify Ham in writing that this has been done and that none of these adverse actions will be used against him in any way.

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁵

ORDER

20 Respondent, United Parcel Service, Inc., its officers, agents, successors, and assigns at its Coralville, Iowa facility, shall:

1. Cease and desist from

25 (a) Threatening employees with unspecified reprisals if they continue to engage in union activities and/or threaten to file or file charges with the Board.

30 (b) Disciplining or otherwise discriminating against employees because they engage in protected concerted and/or union activities, including raising concerns about a new break policy.

(c) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

35 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order,³⁶ Respondent shall rescind and remove any reference to the May 1, 2017 written warning issued to Mark David Ham relating to his conduct on April 27, 2017, remove any reference to the Professional Conduct and Anti-Harassment Policy Ham signed on February 17, 2017, and notify Ham in writing that this has been done and that none of these adverse actions will be used against him in any way.

³⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5 (b) Within 14 days after service by the Region, post at its facility in Coralville, Iowa
copies of the attached notice marked Appendix. Copies of the notice, on forms provided by the
Regional Director for Region 18 after being signed by the Respondent's authorized
representative, shall be posted by the Respondent and maintained for 60 consecutive days in
conspicuous places throughout its Coralville, Iowa facility, including all places where notices to
employees are customarily posted. In addition to physical posting of paper notices, the notices
shall be distributed electronically, such as by email, posting on an intranet or an internet site,
and/or other electronic means, if the Respondent customarily communicates with its employees
by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices
10 are not altered, defaced, or covered by any other material. In the event that, during the
pendency of these proceedings, the Respondent has closed the facility involved in these
proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice
to all current employees and former employees employed by the Respondent at any time since
February 17, 2017.

15 (c) Within 21 days after service by the Region, file with the Regional Director a
sworn certification of a responsible official on a form provided by the Region attesting to the
steps that the Respondent has taken to comply.

20 DATED, WASHINGTON, D.C., JANUARY 5, 2018

25 

ANDREW S. GOLLIN
ADMINISTRATIVE LAW JUDGE

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT
FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL NOT threaten you with unspecified reprisals for engaging in union activity.

WE WILL NOT threaten you with unspecified reprisals for stating your intent to file or filing charges with the National Labor Relations Board.

WE WILL NOT discipline you because of your protected concerted and/or union activities, including raising concerns about a new break policy.

WE WILL NOT require you to sign the UPS Professional Conduct and Anti-Harassment Policy in response to you engaging in union activity.

WE WILL NOT require you to sign the UPS Professional Conduct and Anti-Harassment Policy in response to stating your intent to file or filing charges with the National Labor Relations Board.

WE WILL remove from our files any reference to the UPS Professional Conduct and Anti-Harassment Policy signed by Mark David Ham on February 17, 2017, and **WE WILL** notify him in writing that this has been done and the fact that he had signed the UPS Professional Conduct and Anti-Harassment Policy on that date will not be used against him in any way.

WE WILL rescind and remove from our files all references to the May 1, 2017 warning letter issued to Mark David Ham, and **WE WILL** notify him in writing that this has been done and that the warning letter will not be used against him in any way.

UNITED PARCEL SERVICE, INC.
(Employer)

DATED: _____ **BY** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.
Federal Office Building, 212 3rd Avenue S, Suite 200 Minneapolis, MN 55401-2221
(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/18-CA-193426 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE
OFFICER, (414) 297-3819.