

# Nos. 18-812, 18-893

---

---

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**MEYER TOOL, INC.**  
Petitioner/Cross-Respondent

v.

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

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**USHA DHEENAN**  
*Supervisory Attorney*

**REBECCA J. JOHNSTON**  
*Attorney*

**National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001  
(202) 273-2948  
(202) 273-1066**

**PETER B. ROBB**  
*General Counsel*

**JOHN W. KYLE**  
*Deputy General Counsel*

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

**National Labor Relations Board**

---

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of jurisdiction .....	1
Statement of the issue .....	2
Statement of the case.....	2
I. The Board’s findings of fact.....	3
A. Background; ongoing issues between management and the night shift .....	3
B. Management holds a meeting to announce a new go-to-guy position; Ackerson and McGuire react hostilely when Cannon-El raises collective concerns .....	4
C. Cannon-El, Poff, and Bauer agree to file complaints together .....	9
D. Cannon-El, Poff, and Bauer go to human resources together to file complaints; Adams calls for the police to remove Cannon-El .....	9
E. Meyer Tool investigates the May 25 and May 26 events and ultimately discharges Cannon-El .....	16
II. The Board’s conclusions and order.....	17
Standard of review .....	18
Summary of argument.....	19
Argument.....	22
Substantial evidence supports the Board’s finding that Meyer Tool violated Section 8(a)(1) of the Act when it summoned the police to remove, suspended, and discharged Cannon-El for engaging in protected, concerted activity.....	22

## TABLE OF CONTENTS

<b>Headings – Cont’d</b>	<b>Page(s)</b>
A. Meyer Tool took adverse action against Cannon-El for his protected, concerted activity; he retained the Act’s protection .....	22
1. Employees’ statutory right to engage in protected, concerted activity.....	22
2. Cannon-El engaged in protected, concerted activity .....	23
3. Meyer Tool summoned the police to remove, suspended, and discharged Cannon-El based on his conduct during protected, concerted activity .....	28
4. Cannon-El did not lose the protection of the Act .....	30
a. Location of the discussion .....	31
b. Subject matter of the discussion .....	32
c. Nature of the outburst .....	33
d. Meyer Tool’s provocation.....	36
B. Meyer Tool’s arguments are without merit.....	38
1. Meyer Tool’s argument that Cannon-El was not engaged in protected, concerted activity ignores the bulk of the record evidence .....	38
2. <i>Atlantic Steel</i> is the appropriate test.....	43
3. Meyer Tool’s argument that Cannon-El lost the Act’s protection relies on an exaggerated description of his conduct .....	46
Conclusion .....	50

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Abbey’s Transp. Servs., Inc. v. NLRB</i> , 837 F.2d 575 (2d Cir. 1988).....	18-19
<i>Am. Tel. &amp; Tel. Co. v. NLRB</i> , 521 F.2d 1159 (2d Cir. 1975).....	30
<i>Atlantic Steel Co.</i> , 245 NLRB 814 (1979) ....	20, 21, 23, 30, 31, 32, 33, 36, 38, 42, 43, 44, 45, 46, 48
<i>Caterpillar Logistics, Inc. v. NLRB</i> , 835 F.3d 536 (6th Cir. 2016) .....	35
<i>Cibao Meat Prods., Inc. v. NLRB</i> , 547 F.3d 336 (2d Cir. 2008).....	19
<i>Cibao Meat Prod.</i> , 338 NLRB 934 (2003), <i>enforced</i> , 84 F. App’x 155 (2d Cir. 2004) .....	25-26
<i>Circle K Corp.</i> , 305 NLRB 932 (1991), <i>enforced mem.</i> , 989 F.2d 498 (6th Cir. 1993) .....	25
<i>Consumers Power Co.</i> , 282 NLRB 130 (1986) .....	31, 41
<i>Daimlerchrysler Corp.</i> , 344 NLRB 1324 (2005) .....	48
<i>Datwyler Rubber &amp; Plastics, Inc.</i> , 350 NLRB 669 (2007) .....	33
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978).....	24

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Ewing v. NLRB</i> , 861 F.2d 353 (2d Cir. 1988).....	24, 41
<i>Felix Indus., Inc. v. NLRB</i> , 251 F.3d 1051 (D.C. Cir. 2001).....	42
<i>Felix Indus., Inc.</i> , 339 NLRB 195 (2003), <i>enforced mem.</i> , 2004 WL 1498151 (D.C. Cir. 2004) .....	33
<i>Fresh &amp; Easy Neighborhood Mkt., Inc.</i> , 361 NLRB 151 (2014) .....	23-24, 25, 40
<i>Goya Foods, Inc.</i> , 356 NLRB 476 (2011) .....	32, 33, 34, 42
<i>Inova Health Sys. v. NLRB</i> , 795 F.3d 68 (D.C. Cir. 2015).....	31
<i>Kiewit Power Constructors Co. v. NLRB</i> , 652 F.3d 22 (D.C. Cir. 2011).....	32, 35, 36
<i>King Soopers, Inc. v. NLRB</i> , 859 F.3d 23 (D.C. Cir. 2017).....	30
<i>LoSacco v. City of Middletown</i> , 71 F.3d 88 (2d Cir. 1995).....	43-44
<i>Mast Advert. &amp; Pub., Inc.</i> , 304 NLRB 819 (1991) .....	34
<i>Meyers Indus., Inc.</i> , 281 NLRB 882 (1986), <i>enforced sub nom.</i> , <i>Prill v. NLRB</i> , 835 F.2d 1481 (D.C. Cir. 1987).....	24
<i>Montefiore Hosp. &amp; Med. Ctr. v. NLRB</i> , 621 F.2d 510 (2d Cir. 1980).....	23

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>NLRB v. Allied Aviation Fueling of Dallas LP</i> , 490 F.3d 374 (5th Cir. 2007) .....	30
<i>NLRB v. Caval Tool Div.</i> , 262 F.3d 184 (2d Cir. 2001).....	22, 23, 24, 26
<i>NLRB v. City Disposal Sys. Inc.</i> , 465 U.S. 822 (1984).....	22, 23, 24
<i>NLRB v. Fansteel Metallurgical Corp.</i> , 306 U.S. 240 (1939).....	45
<i>NLRB v. Katz's Delicatessen of Houston St., Inc.</i> , 80 F.3d 755 (2d Cir. 1996).....	18, 38
<i>NLRB v. KSM Indus., Inc.</i> , 682 F.3d 537 (7th Cir. 2012) .....	39
<i>NLRB v. Mike Yurosek &amp; Son, Inc.</i> , 53 F.3d 261 (9th Cir. 1995) .....	24, 25, 41
<i>NLRB v. Oakes Mach. Corp.</i> , 897 F.2d 84 (2d Cir. 1990).....	23
<i>NLRB v. Pace Motor Lines, Inc.</i> , 703 F.2d 28 (2d Cir. 1983).....	26, 41
<i>NLRB v. Pier Sixty, LLC</i> , 855 F.3d 115 (2d Cir. 2017).....	18, 19
<i>NLRB v. Starbucks Corp.</i> , 679 F.3d 70 (2d Cir. 2012).....	44
<i>NLRB v. Talsol Corp.</i> , 155 F.3d 785 (6th Cir. 1998) .....	26
<i>Network Dynamics Cabling, Inc.</i> , 351 NLRB 1423, 1429 (2007) .....	37

**TABLE OF AUTHORITIES**

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Ontario Knife Co. v. NLRB</i> , 637 F.2d 840 (2d Cir. 1980).....	42, 43
<i>Overnite Transp. Co.</i> , 343 NLRB 1431 (2004) .....	37
<i>Peck, Inc.</i> , 226 NLRB 1174 (1976) .....	45
<i>Pipe Realty Co. &amp; Stone</i> , 313 NLRB 1289 (1994) .....	48
<i>Plaza Auto Ctr., Inc.</i> , 360 NLRB 972 (2014) .....	37
<i>Severance Tool Industries</i> , 301 NLRB 1166 (1990), <i>enforced</i> , 953 F.2d 1384 (6th Cir. 1992) .....	33
<i>United States Postal Serv.</i> , 360 NLRB 677 (2014) .....	33, 34, 37
<i>Universal Camera Corp v. NLRB</i> , 340 U.S. 474 (1951).....	18
<i>Venetian Casino Resort, L.L.C. v. NLRB</i> , 793 F.3d 85 (D.C. Cir. 2015) .....	45
<i>Verizon Wireless</i> , 349 NLRB 640 (2007) .....	48
<i>Weigand v. NLRB</i> , 783 F.3d 889 (D.C. Cir. 2015).....	39

**TABLE OF AUTHORITIES**

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Wright Line, a Division of Wright Line, Inc.</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 899 (1st Cir. 1981).....	43

<b>Statutes:</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157) .....	18, 22, 23, 30
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 3, 17, 20, 22, 29
Section 10(e) (29 U.S.C. § 160(e)) .....	2, 18
Section 10(f) (29 U.S.C. § 160(f)) .....	2
Section 10(a) (29 U.S.C. § 160(a)) .....	2

<b>Rules:</b>	<b>Page(s)</b>
Fed. R. App. P. 28(a)(8).....	44

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

Nos. 18-812 and 18-893

---

MEYER TOOL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

---

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

---

BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

---

**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Meyer Tool, Inc. (“Meyer Tool”) to review an order issued by the National Labor Relations Board (“the Board”) against it, and the Board’s cross-application to enforce that order. The Board’s Decision and Order issued on March 9, 2018 and is reported at 366 NLRB

No. 32. (JA 227-41.)<sup>1</sup> The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act (the “Act”), 29 U.S.C. §§ 151, 160(a), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Order is final with respect to all parties. The Court has jurisdiction over this appeal under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper because Meyer Tool transacts business in this Circuit. The petition and application were both timely because the Act imposes no time limits for such filings.

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

Whether substantial evidence supports the Board’s finding that Meyer Tool violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), when it summoned the police to remove, indefinitely suspended, and ultimately discharged employee William Cannon-El III for engaging in protected, concerted activity.

#### **STATEMENT OF THE CASE**

Acting on unfair-labor-practice charges filed by Cannon-El, the Board’s General Counsel issued a complaint alleging that Meyer Tool violated Section

---

<sup>1</sup> “JA” refers to the Joint Appendix; “Br.” refers to Meyer Tool’s opening brief; and “Tr.” refers to specific transcript pages, where more than one transcript page appears on a Joint Appendix cite. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

8(a)(1) of the Act by summoning the police to remove, suspending, and discharging Cannon-El for engaging in protected, concerted activity. (JA 8-12.)

After a hearing, an administrative law judge issued a decision and recommended order finding that Meyer Tool committed those violations. (JA 229-41.) On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted the recommended Order, with slight modification. (JA 227-29.)

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Background; Ongoing Issues Between Management and the Night Shift**

Meyer Tool manufactures components and parts for aerospace and industrial gas turbine engines at its facility in Cincinnati, Ohio. (JA 229; JA 8, 16, 31 (Tr. 29).) In May 2016, before his suspension and discharge, Cannon-El worked the night shift in Meyer Tool's New Product Introduction department. (JA 230; JA 31 (Tr. 29-31).) Rick Ackerson supervises that department, and Huck Finn had been appointed plant manager responsible for overseeing the night shift a few weeks to a few months earlier. (JA 230; JA 26-27 (Tr. 12-13), 31 (Tr. 31) 65-66 (Tr. 168-69), 91 (Tr. 271).) At the meeting announcing Finn's new role, Vice President of Operations Gordy McGuire instructed night-shift employees to report to Finn. (JA 230; JA 65-66 (Tr. 168-69), 91 (Tr. 271).)

Cannon-El's department had recently developed production-related issues, and day-shift and night-shift employees disputed over which shift was primarily

responsible for those issues. (JA 230; JA 95 (Tr. 286-87).) Night-shift employee John Poff informed Meyer Tool management that the day shift was falsely accusing night-shift employees, including specifically Cannon-El, of failing to perform their jobs properly. (JA 230; JA 95 (Tr. 286-87), see 97-98 (Tr. 295-99).) Poff, and other employees, presented management with reports showing that the accusations were untrue. (JA 230; JA 95 (Tr. 286-87), 109 (Tr. 341-42).)

**B. Management Holds a Meeting To Announce a New Go-to-Guy Position; Ackerson and McGuire React Hostilely When Cannon-El Raises Collective Concerns**

On May 25, Ackerson called a meeting with night-shift employees in the employee breakroom before their shift. (JA 230; JA 31 (Tr. 31-32), 64 (Tr. 162), 91 (Tr. 269-70).) Cannon-El, Poff, and Chris Bauer attended this meeting, along with several other night-shift employees. (JA 230; JA 31 (Tr. 32), 64 (Tr. 162-63), 91 (Tr. 270).) Ackerson opened the meeting by announcing that Meyer Tool had created a new “go-to-guy” position for the night shift, and that it had selected employee Mark Metcalf to fill that position. (JA 230; JA 31 (Tr. 32), 64 (Tr. 162-63), 91 (Tr. 270).)

When Ackerson asked if there were any questions, Cannon-El, Poff, and Bauer all spoke up. (JA 230.) Among other concerns, Poff asked Ackerson whether the night shift was now required to report to Metcalf instead of Finn. (JA 230; JA 32 (Tr. 33), 66 (Tr. 169), 91 (Tr. 271-72).) Ackerson responded,

“[t]hat’s what I have planned. That’s how it’s going to work. If you don’t like it, there’s the door.” (JA 230; JA 91 (Tr. 272), see 32 (Tr. 33), 66 (Tr. 169), 111 (Tr. 351).) Poff left the breakroom and went to the human resources department. (JA 230 & n.6; JA 32 (Tr. 35), 66 (Tr. 171), 92 (Tr. 273).)

Bauer and Cannon-El asked Ackerson questions about Metcalf’s qualifications and the selection process for the go-to guy. (JA 230; JA 32 (Tr. 34), 65 (Tr. 165-66), 91-92 (Tr. 272-73).) Bauer told Ackerson that he would not listen to Metcalf because he did not consider him qualified. (JA 230; JA 32 (Tr. 34-35), 64 (Tr. 164).) Cannon-El asked Ackerson why the night shift needed a “babysitter.” (JA 230; JA 32 (Tr. 36).) Ackerson stated that it was because Cannon-El was not doing his work and was never in his assigned area. (JA 230; JA 32 (Tr. 35-36).) When Cannon-El asked for proof of those allegations, Ackerson responded that he did not need to prove anything. (JA 230; JA 32 (Tr. 35).)

Ackerson then pulled out his cellphone and called Vice President McGuire in front of the meeting attendees. (JA 230; JA 32-33 (Tr. 35-37), 66 (Tr. 172).) He told McGuire that Cannon-El and Bauer both said they would refuse to listen to the new go-to guy. (JA 230; JA 33 (Tr. 37).) Cannon-El spoke up, “Rick, you’re lying on me, I never said that.” (JA 230; JA 33 (Tr. 37-38).) Bauer told Ackerson, who was still on the phone with McGuire, that it was him, and not Cannon-El, who

said that he would not listen to the go-to guy. (JA 230; JA 33 (Tr. 38).) Cannon-El asked if McGuire could come to the meeting so they could discuss the issue face-to-face, and McGuire agreed. (JA 230; JA 33 (Tr. 38).) While they waited for McGuire, Bauer left the meeting to return to work. (JA 230; JA 33 (Tr. 38), 66 (Tr. 171-72), 67 (Tr. 174).)

Meanwhile, Poff had spoken with Deanna Adams, a human resources generalist. (JA 230 n.6; JA 92 (Tr. 273), 124 (Tr. 397).) He expressed concern that Ackerson had told the night shift to report to Metcalf, but earlier McGuire had told them to report to Finn. Poff was worried that he would be disciplined for reporting to the wrong supervisor. (JA 230 n.6; JA 92 (Tr. 273-74), 124 (Tr. 397).) Adams telephoned McGuire, who told her that he was already on his way to the meeting. (JA 230 n.6; JA 92 (Tr. 274), 124 (Tr. 398).) Poff went back to the breakroom. (JA 230 n.6; JA 92 (Tr. 274), 124 (Tr. 398).)

When McGuire arrived, he immediately started yelling at Cannon-El: “Rick [Ackerson] is your supervisor. He tells you what to do. I don’t care who he appoint[s]. You listen to him.” (JA 230; JA 33 (Tr. 38-39).) McGuire stood over Cannon-El with his face inches from Cannon-El’s face. (JA 230; JA 34 (Tr. 41), see 92-93 (Tr. 275-77).) Cannon-El responded that Ackerson had given McGuire false information; he never said he would not listen to the go-to guy. (JA 230; JA 33 (Tr. 39).) He also asked McGuire to back up and calm down. (JA 230;

JA 34 (Tr. 41).) McGuire responded, “I don’t have to calm down. Don’t tell me what to do.” (JA 230; JA 34 (Tr. 41).) Cannon-El leaned back to create some space between them. (JA 230; JA 34 (Tr. 41), 93 (Tr. 277).) Poff returned to the meeting during the confrontation. (JA 230; JA 34 (Tr. 41), 92 (Tr. 275), 206-07.)

At some point, Ackerson also stated that he had data showing that the day shift was four times as productive as the night shift. (JA 230; JA 206.) Cannon-El asked for proof, but Ackerson said, “that’s none of your business.” (JA 230; JA 206.) Cannon-El reminded him that management had made similar allegations in the past, which were later proven false, and management did nothing to correct its error. (JA 230-31; JA 207.)

McGuire also told Cannon-El that management had evidence that he frequently left his work area during his shift. (JA 231; JA 34 (Tr. 42), 93 (Tr. 278).) Cannon-El again asked for proof. (JA 231; JA 34 (Tr. 42).) He also explained that sometimes he had to leave his work area to get fresh air, because one of the machines he used was in a room with no ventilation, and the air in that room was often thick with coolant. (JA 231; JA 34 (Tr. 42), see 65 (Tr. 166-67), 67 (Tr. 173), 93 (Tr. 278).) Poff had previously raised similar concerns to management about air quality. (JA 235; JA 94 (Tr. 281-82).) Cannon-El asked McGuire whether he had the “human right” to fresh air to which McGuire responded, “[n]o. The State of Ohio said the air is good enough for you to breathe,

so that's it." (JA 231; JA 34 (Tr. 42), see 93 (Tr. 279).) McGuire continued, "you are just like everybody else." (JA 231; JA 93 (Tr. 279-80), 207.)

At some point, Poff interrupted McGuire and Cannon-El and asked McGuire if he should report to Finn or Metcalf. (JA 231; JA 34 (Tr. 41), 92 (Tr. 275-76).) Contrary to Ackerson, McGuire responded that he should report to Finn. (JA 231; JA 34 (Tr. 41), 92 (Tr. 275-76).) Poff left the breakroom. (JA 231; JA 34 (Tr. 41), 93-94 (Tr. 280-81), 111 (Tr. 352).) After he left, he overheard McGuire continue to "jump on" Cannon-El for raising various concerns. (JA 231; JA 207.) Eventually, McGuire told the employees to get back to work. (JA 231; JA 34 (Tr. 43).)

As Cannon-El was leaving the meeting, McGuire asked him, "[d]o you think it was smart of you and a good worker of you to disrespect your supervisor the way you did?" (JA 231; JA 34 (Tr. 43).) Cannon-El asked Ackerson if he had done anything disrespectful, and Ackerson responded that Cannon-El had called him a liar. (JA 231; JA 34 (Tr. 43).) Cannon-El pointed out that Ackerson had lied about him and also asked McGuire, "[d]o you think it was professional of you to get in my face the way you did?" (JA 231; JA 34 (Tr. 43), 94 (Tr. 283).) McGuire denied getting in Cannon-El's face and turned to Ackerson, who responded, "[h]e did not get in your face." (JA 231; JA 34 (Tr. 43-44), 94 (Tr. 283), 207.) Cannon-El "laughed it off" and went back to work. (JA 231; JA 34 (Tr. 44), 94 (Tr. 283).)

**C. Cannon-El, Poff, and Bauer Agree To File Complaints Together**

Cannon-El, Poff, and Bauer spoke about the meeting later that evening.

(JA 231; JA 34 (Tr. 44), 67 (Tr. 176), 94-95 (Tr. 284-85).) They discussed the new go-to guy, the confusion about the reporting structure, and the way Ackerson and McGuire treated the employees during the meeting. (JA 231; JA 34-35 (Tr. 44-45), 67-68 (Tr. 176-77), 94-95 (Tr. 284-88).) They agreed to go to human resources together the next day before their shift to file complaints about what happened. (JA 231; JA 35 (Tr. 45), 68 (Tr. 177), 95 (Tr. 285-86, 288), see 201.) Poff said that the way McGuire spoke to Cannon-El at the meeting was not appropriate. (JA 231; JA 95 (Tr. 287-88).)

**D. Cannon-El, Poff, and Bauer Go to Human Resources Together To File Complaints; Adams Calls for the Police To Remove Cannon-El**

On May 26, Cannon-El, Poff, and Bauer all went to human resources before their shift, as agreed the night before. (JA 231; JA 35 (Tr. 46), 68 (Tr. 177), 95-96 (Tr. 288-89).) Meyer Tool expects its employees to go to human resources with any workplace questions or concerns. (JA 237; JA 35 (Tr. 46), 47 (Tr. 94), 63 (Tr. 157-58), 94 (Tr. 281), 123 (Tr. 395).) The human resources department is in a separate building, away from Meyer Tool's production areas. (JA 231; JA 39 (Tr. 61).)

Cannon-El arrived first. (JA 231.) He told Senior Human Resources Assistant Tina Loveless that he was involved in a situation the night before and wanted to file a complaint. (JA 231; JA 35 (Tr. 47-48), 154 (Tr. 517).) Loveless asked Cannon-El to put it in writing. (JA 231; JA 35 (Tr. 47-48), 154 (Tr. 518).) As she handed him a piece of paper, Poff and Bauer arrived. (JA 231; JA 35 (Tr. 47-48), 154 (Tr. 518).) She assumed they were all together, so she also gave them paper and asked them to document their complaints. (JA 231; JA 35 (Tr. 48), 68 (Tr. 178), 154 (Tr. 517-18).) The three went to the training room. (JA 231; JA 35 (Tr. 48), 96 (Tr. 290), 154 (Tr. 518-19).)

Bauer finished his complaint first and left the training room to file it. (JA 231 & n.9; JA 36 (Tr. 49), 68 (Tr. 178), 203-04.) The first human resources employee he could find was Adams, so he went into her office. (JA 231; JA 68 (Tr. 178).) He told Adams about the meeting the night before and raised concerns about the new go-to guy and the confusion about who now supervised the night shift. (JA 231; JA 68 (Tr. 178-79), 124-25 (Tr. 399-400).) He also gave Adams his written complaint. (JA 231; JA 68 (Tr. 179).) Although the conversation “helped resolve a ton of issues” for Bauer, he stayed in Adams’ office “[b]ecause we were all together. I believe we came together, we were going to leave together.” (JA 231 n.8; JA 79 (Tr. 224).)

Poff finished his complaint next and saw Bauer in Adams' office. (JA 232; JA 36 (Tr. 49), 96 (Tr. 291).) He entered and gave Adams his written complaint. (JA 232 & n.10; JA 69 (Tr. 181), 96 (Tr. 292), 206-07.) Poff then provided Adams with additional information and context about the go-to-guy issue, the meeting the night before, and the ongoing problems between the night shift and management. (JA 232, 236; JA 97-98 (Tr. 294-99).) He told Adams that every time night-shift employees tried to raise an issue with management, they were met with opposition. (JA 232, 236; JA 97 (Tr. 294-96).) He claimed that management was biased and treated the night shift like "second-class citizens." (JA 232, 236; JA 97-98 (Tr. 294-99).) According to Poff, day-shift employees falsely accused night-shift employees, specifically Cannon-El, of not doing their jobs; management would yell at night-shift employees based on those false accusations; and night-shift employees had data proving that the accusations were false and that Cannon-El was getting his work done. (JA 232, 236; JA 97-98 (Tr. 295-99).)

Cannon-El finished his complaint, saw Poff and Bauer with Adams, and entered Adams' office next. (JA 232 & n.11; JA 36 (Tr. 50), 97 (Tr. 294), 198-99.) He stood just inside the doorway. (JA 232; JA 37 (Tr. 56), 70 (Tr. 187).) Cannon-El asked Adams, "[i]f I'm filing a complaint against the Vice President, who holds him accountable?" (JA 232; JA 36 (Tr. 52), 125 (Tr. 403).) When Adams asked about the nature of the complaint, Cannon-El stated that McGuire had physically

assaulted him, demonstrating on Poff what had happened the night before when McGuire had gotten in Cannon-El's face. (JA 232; JA 36-37 (Tr. 52-53), 69 (Tr. 183), 126 (Tr. 404).) Cannon-El, Adams, and Poff debated about whether this was physical assault, and Cannon-El ultimately corrected himself, stating that he was verbally assaulted or threatened. (JA 232; JA 37 (Tr. 53), 69 (Tr. 183), 98 (Tr. 299-300), 126 (Tr. 404-05).) He told Adams that he thought McGuire's behavior was racially motivated because McGuire told him that he was "just like everybody else."<sup>2</sup> (JA 232; JA 36-37 (Tr. 52-53), JA 98-99 (Tr. 300-01), 126 (Tr. 405-06).) Adams responded that she did not think that was a racist comment. (JA 232; JA 36 (Tr. 52), 126 (Tr. 406).)

As Adams and Cannon-El debated back and forth, their voices got louder. (JA 232 & n.14; JA 70 (Tr. 185), 100 (Tr. 306).) Adams began repeatedly saying "whatever," and motioning with her hands to move the conversation along. (JA 232; JA 37 (Tr. 54), 69 (Tr. 183-84), 109 (Tr. 344).) Cannon-El responded by smirking and acknowledging that they were not getting anywhere. (JA 232; JA 37 (Tr. 54), 51 (Tr. 111).) He told Adams that he was going to add her to his complaint because she was "acting very unprofessional" and preventing him from filing it. (JA 232; JA 37 (Tr. 54).) Cannon-El stepped into Adams' office and

---

<sup>2</sup> At the time of the incident, Cannon-El identified as "black, African-American." (JA 232 n.13; JA 58 (Tr. 137-38).) Everyone else in his department is white. (JA 51 (Tr. 111), 58 (Tr. 138-39).)

used her filing cabinet as a writing surface to add Adams' name to the bottom of his complaint. (JA 232; JA 37 (Tr. 56), 198-99.) Adams told Cannon-El to leave her office. (JA 232; JA 37 (Tr. 55), 41 (Tr. 69), 99 (Tr. 301), 117 (Tr. 374).) He stepped back into the hallway, but he was still visible from inside Adams' office. (JA 232-33; JA 37 (Tr. 55), 38 (Tr. 57), 52 (Tr. 114), 70 (Tr. 187), 99 (Tr. 301), 117 (Tr. 374).)

From the hallway, Cannon-El asked Adams if he could leave his complaint with her. (JA 233; JA 37 (Tr. 55), 58 (Tr. 140), 70 (Tr. 187-88), 99 (Tr. 301) 117 (Tr. 376).) She said "no" and told him to clock out and go home. (JA 233; JA 39 (Tr. 63-64), 58 (Tr. 140), 99 (Tr. 301), 117 (Tr. 376).) When he asked why, she told him that he was being "very aggressive." (JA 233; JA 37 (Tr. 55).) Cannon-El denied acting aggressively and stated that he just wanted to file his complaint. (JA 233; JA 37 (Tr. 55).) Adams then told him that if he did not leave by the count of three, she was going to call the police. (JA 233; JA 37 (Tr. 55), 70 (Tr. 186), 99 (Tr. 301).) She began with "one," and Cannon-El finished with "two, three" and said he had done nothing wrong. (JA 233; JA 70 (Tr. 186), 99 (Tr. 301), 114 (Tr. 362).) At some point during this exchange, Adams telephoned the receptionist and asked her to call the police. (JA 233; JA 70 (Tr. 188), 99 (Tr. 301), 128 (Tr. 413-14).) Adams later walked past Cannon-El towards the lobby to again ask the receptionist to contact the police. (JA 233; JA 128 (Tr. 413-14).) Only a

couple of minutes had passed since Adams first asked Cannon-El to leave her office. (JA 233; JA 38 (Tr. 57), 70 (Tr. 188), 84-85 (Tr. 244-45), 88 (Tr. 260), 127 (Tr. 411), 145 (Tr. 480).)

After Adams left, Cannon-El was able to file his complaint with Loveless. (JA 233; JA 37-38 (Tr. 55, 57).) When gathering his belongings from the training room, he asked Loveless what Adams' last name was. (JA 233 n.16; JA 155 (Tr. 522).) When she told him, he responded, "[w]ell, she'll pay for her actions." (JA 233 n.16; JA 155 (Tr. 522).) Before turning in his complaint, he added Adams' last name to the bottom. (JA 233 n.16; JA 36 (Tr. 50), 198-99.)

Cannon-El remained in the human resources hallway and called his sister from his cellphone. (JA 233; JA 38 (Tr. 58), 101 (Tr. 311).) He told her that Meyer Tool had called the police when he tried to file a complaint and that he wanted her to come to the facility and act as a witness when the police arrived. (JA 233; JA 38 (Tr. 58), 53 (Tr. 119), 101 (Tr. 311).) As Cannon-El was talking to his sister, Adams passed him, returning to her office. (JA 233; JA 38 (Tr. 58).) She said, "[i]f [you] just would have let it go, none of this would have happened." (JA 233; JA 38 (Tr. 58), 40 (Tr. 65).) She also informed him that the police were on their way to the facility. (JA 233; JA 38 (Tr. 58).) Throughout Cannon-El's and Adams' exchange, other human resources employees continued working, with their doors open. (JA 237; JA 46 (Tr. 90-91), 101 (Tr. 310), 154 (Tr. 519), 156

(Tr. 526), 161 (Tr. 544), 165 (Tr. 561), 169 (Tr. 576-77, 579).) Ackerson was also in the human resources hallway during the exchange. (JA 233 n.15; JA 39-40 (Tr. 64-66), 45-46 (Tr. 88-89), 119 (Tr. 381), 144 (Tr. 477), 162-63 (Tr. 551-52), 166 (Tr. 565), JA 171 (Tr. 584).)

Cannon-El then left the human resources hallway and sat in the lobby waiting for his sister to arrive. (JA 233; JA 38 (Tr. 58), 39 (Tr. 64).) He did not wait outside because at that point Adams was outside smoking, and Cannon-El did not want to escalate the situation. (JA 233 & n.19; JA 40 (Tr. 66).) Cannon-El waited for the police to arrive because he did not want to be accused of fleeing the scene, and because he wanted to show the police that he was acting peacefully. (JA 233 n.19, 239; JA 40 (Tr. 66).) He also wanted documentation that Meyer Tool called the police to have him removed when he tried to file a complaint. (JA 233 n.19; JA 166 (Tr. 566-67).)

The police arrived approximately 15 minutes after they were called. (JA 233; JA 55 (Tr. 125-26), 213-14.) They spoke with Cannon-El and Adams separately. (JA 233; JA 40 (Tr. 67-68), 131 (Tr. 424-25).) Ultimately, they told Cannon-El that Meyer Tool wanted him to leave, so he left. (JA 233; JA 40 (Tr. 68).) No charges were filed. (JA 233; JA 40 (Tr. 68).) Although, at the time, Cannon-El had not been discharged, Meyer Tool promptly revoked his access to

the facility and, at some point, suspended him, pending an investigation. (JA 233-34; JA 40 (Tr. 67-68), 42 (Tr. 74-75), 55 (Tr. 127-28), 131 (Tr. 424).)

**E. Meyer Tool Investigates the May 25 and May 26 Events and Ultimately Discharges Cannon-El**

Meyer Tool formed a three-member committee to investigate what happened at the May 25 group meeting and, later, the events of May 26. (JA 234; JA 148 (Tr. 495), 149 (Tr. 498-99), 174 (Tr. 596-97, 599).) The committee collected and reviewed written statements from witnesses and conducted in-person interviews. (JA 234; JA 174-75 (Tr. 597-600), 198-99, 203-04, 206-07, 209-10, 215, 221-24.) Among other witnesses, Cannon-El, Poff, and Bauer shared their recollections of the May 25 meeting, Ackerson's and McGuire's conduct during that meeting, the employees' decision to file complaints together in human resources the next day, and their recollections of what happened in human resources on May 26. (JA 234; JA 42-43 (Tr. 76-77), 72-73 (Tr. 195-200), 103-06 (Tr. 319-29), 182-88 (Tr. 631-53).) They also addressed their confusion about the new go-to-guy position and ongoing issues in the night shift, which management refused to address. (JA 234; JA 42 (Tr. 76), 73 (Tr. 196), 104 (Tr. 321), 183-84 (Tr. 633-36), 185 (Tr. 642-43), 187 (Tr. 648-50).)

After conducting the investigation, the committee prepared written recommendations and submitted them, along with the witness statements and their interview notes, to Meyer Tool's owners. (JA 234; JA 180-81 (Tr. 623-24), 189

(Tr. 659), 221-24.) Among other things, the committee recommended individualized mandatory training for Ackerson, Adams, and McGuire “because their behaviors contributed to the escalation of both incidents.” (JA 234; JA 221.) The committee also recommended that Meyer Tool discharge Cannon-El for escalating the May 26 incident by “repeatedly refusing to leave the premises when requested” and for behavior that was “intentionally intimidating and threatening” and caused coworkers to feel unsafe. (JA 234; JA 221.) The committee report, however, did not specify what Cannon-El had done that it considered intentionally intimidating or threatening. (JA 234; JA 221.)

Meyer Tool’s owners adopted the committee’s recommendations. (JA 234; JA 73 (Tr. 200), 106 (Tr. 331-32), 150 (Tr. 500-01, 503), 202, 205, 208.) In Cannon-El’s discharge letter, Meyer Tool stated that the reason for his discharge was violation of “workplace violence and other policies.” (JA 234; JA 202.)

## **II. THE BOARD’S CONCLUSIONS AND ORDER**

On March 9, 2018, the Board (Chairman Kaplan and Member Pearce, Member Emanuel, concurring) adopted, over Meyer Tool’s exceptions, the administrative law judge’s finding that Meyer Tool violated Section 8(a)(1) of the Act when it summoned the police to remove, indefinitely suspended, and ultimately discharged Cannon-El for engaging in protected, concerted activity. (JA 227-29.) The Board’s Order requires Meyer Tool to cease and desist from the

unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157. (JA 227.) Affirmatively, the Order requires Meyer Tool, among other things, to offer Cannon-El full reinstatement to his former job, make Cannon-El whole for any loss of earnings and other benefits, and remove from its files any reference to the unlawful summoning of the police, suspension, and discharge. (JA 227-28.) The Order also requires Meyer Tool to post a remedial notice. (JA 227-29.)

### **STANDARD OF REVIEW**

The Court’s “review of Board orders is quite limited.” *NLRB v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996). The Board’s factual findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 121 (2d Cir. 2017). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera*, 340 U.S. at 477. *Accord Pier Sixty*, 855 F.3d at 121-22. Thus, the Board’s reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*; as the Court has explained, “[w]here competing inferences exist, we defer to the conclusions of the Board.” *Abbey’s Transp.*

*Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988). The Court will not disturb an administrative law judge’s credibility findings, as adopted by the Board, unless “the testimony is hopelessly incredible or the findings flatly contradict either the law of nature or undisputed documentary testimony.” *Pier Sixty*, 855 F.3d at 122 (citation omitted). The Court will uphold the Board’s legal conclusions if they have a “reasonable basis in law,” and will reverse only if they are “arbitrary and capricious.” *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008).

### **SUMMARY OF ARGUMENT**

On May 26, three Meyer Tool colleagues joined together in human resources to file complaints about what happened at a group meeting regarding workplace issues the night before. After his colleagues had raised concerns about the meeting and other ongoing issues, employee Cannon-El brought up collective concerns about how management treated him at that meeting and about management’s accountability. Human resources generalist Adams, after a brief back-and-forth, dismissed Cannon-El’s concerns by repeatedly saying “whatever.” Ultimately, she demanded that Cannon-El leave, first her office, and then the premises. When he persisted in trying to file his complaint, she threatened to call the police at the count of three. She began, “one . . .” and Cannon-El finished, “. . . two, three.” She had the receptionist call the police. Meyer Tool later suspended Cannon-El and, after an investigation, discharged him.

Substantial evidence supports the Board's finding that Meyer Tool violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), when it called the police to remove, suspended, and discharged Cannon-El because he engaged in protected, concerted activity. Cannon-El clearly engaged in statutorily protected activity during the events at issue: the concerns he raised in human resources were shared by his colleagues and related to their working conditions. Meyer Tool was aware of Cannon-El's protected, concerted activity at the time it took adverse action against him. And Meyer Tool admits that it summoned the police to remove, suspended, and discharged Cannon-El because of his conduct on May 26.

Although Cannon-El was briefly disrespectful, rude, and defiant that day, his conduct was not so egregious or opprobrious as to cost him the Act's protection under the Board's well-settled *Atlantic Steel Co.*, 245 NLRB 814 (1979), framework. Cannon-El acted impulsively when he finished Adams' count to three and briefly disregarded her order to leave, but he was in her office on the heels of a meeting in which managers had lied about him, gotten "in his face," berated him, and refused to substantiate allegations that he was not doing his job. Moreover, Cannon-El was in the human resources department, the place designated for hearing employee complaints. He did not use profanity, intimidation, or threats. And he was reacting to Adams' dismissing his concerns, calling him "aggressive," and escalating the situation by threatening to call the police.

Meyer Tool does not explicitly challenge the Board’s factual findings and inferences, and instead simply ignores them in favor of its own narrative. For example, in arguing that Cannon-El raised only “personal gripes,” not collective concerns, Meyer Tool misrepresents the record. It focuses on a few lines of Cannon-El’s testimony and ignores the bulk of the record evidence placing that testimony in context. Likewise, Meyer Tool exaggerates Cannon-El’s conduct on May 26, claiming that he was criminally trespassing and threatened employees. Meyer Tool relies on this embellished depiction to argue, unconvincingly, either that *Atlantic Steel* is inapplicable, or that, if it were to apply, Cannon-El lost the Act’s protection. Meyer Tool, however, fails to mention, let alone challenge the Board’s actual findings, namely, that it was reasonable for Cannon-El to stay at the facility once he knew the police were on their way and that he did not do anything objectively threatening. At most, Meyer Tool presents the Court with an alternative narrative, competing inferences, and readily distinguishable cases. It has not shown, as it must, that the Board’s findings are not supported by substantial evidence.

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT MEYER TOOL VIOLATED SECTION 8(a)(1) OF THE ACT WHEN IT SUMMONED THE POLICE TO REMOVE, SUSPENDED, AND DISCHARGED CANNON-EL FOR ENGAGING IN PROTECTED, CONCERTED ACTIVITY**

#### **A. Meyer Tool Took Adverse Action Against Cannon-El for His Protected, Concerted Activity; He Retained the Act’s Protection**

##### **1. Employees’ statutory right to engage in protected, concerted activity**

Section 7 of the Act guarantees employees the right “to engage in . . . concerted activities for . . . mutual aid or protection . . . .” 29 U.S.C. § 157. Determining whether activity is protected within the meaning of Section 7 is a task that “implicates [the Board’s] expertise in labor relations” and is for “the Board to perform in the first instance . . . .” *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984). The Court will defer to the Board’s finding that an employee has engaged in concerted activity, if reasonable and supported by substantial evidence. *Id.* at 829-30 & n.7. *See NLRB v. Caval Tool Div.*, 262 F.3d 184, 190-92 (2d Cir. 2001). An employee’s Section 7 rights are protected by Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” 29 U.S.C. § 158(a)(1). Thus, an employer violates Section 8(a)(1) of the Act by

taking adverse action against an employee for participating in activity protected by Section 7. *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 88 (2d Cir. 1990).

When an employee is engaged in protected activity, some leeway is necessary “since passions may run high and impulsive behavior is common.” *Caval Tool*, 262 F.3d at 192 (quoting *Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 517 (2d Cir. 1980)). Nevertheless, an employee engaged in protected, concerted activity “may act in such an abusive manner that he loses the protection” of the Act. *City Disposal*, 465 U.S. at 837. *Accord Caval Tool*, 262 F.3d at 191-92. The Board analyzes such employee conduct using the well-settled analytical framework set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), discussed in detail below.

Substantial evidence supports the Board’s findings that Cannon-El engaged in protected, concerted activity (discussed below in Section 2) and that, in doing so, he did not lose the Act’s protection (discussed below in Section 4). Meyer Tool’s challenges to those findings, addressed in Section B, lack merit.

## **2. Cannon-El engaged in protected, concerted activity**

Substantial evidence supports the Board’s finding that “Cannon-El was engaged in statutorily protected activity during the events at issue.” (JA 234.) To be protected under Section 7 of the Act, employee conduct must be both “concerted” and engaged in for “mutual aid or protection.” *Fresh & Easy*

*Neighborhood Mkt., Inc.*, 361 NLRB 151, 152 (2014). Whether an employee’s activity is “concerted” depends on some linkage to his coworkers. *City Disposal*, 465 U.S. at 831. *Accord Caval Tool*, 262 F.3d at 189. The Act, however, does not require that “employees combine with one another in any particular way.” *City Disposal*, 465 U.S. at 835. Rather, the term “concerted activities” includes “circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers Indus., Inc.*, 281 NLRB 882, 887 (1986), *enforced sub nom., Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). *See City Disposal*, 465 U.S. at 831 (affirming the Board’s power to protect certain individual activities); *Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988). An individual’s activity is also concerted when he raises a complaint that is a “logical outgrowth” of concerns raised within a group. *Ewing*, 861 F.2d at 361 (stating that “a lone act is concerted if it stems from prior ‘concerted activity’” (alteration omitted) (citing cases)). *Accord NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995).

The separate concept of “mutual aid or protection” focuses on the goal of concerted activity; chiefly, whether the employees involved are seeking to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-67 (1978). Both the

concertedness element and the “mutual aid or protection” element are analyzed using an objective standard. *Fresh & Easy*, 361 NLRB at 153. *Accord Mike Yurosek*, 53 F.3d at 266 (“An employee’s subjective characterization of his reason for engaging in conduct cannot be dispositive of the question whether his conduct is protected.”); *Circle K Corp.*, 305 NLRB 932, 933 (1991) (“Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one.”), *enforced mem.*, 989 F.2d 498 (6th Cir. 1993).

With those principles in mind, substantial evidence supports the Board’s finding that Cannon-El engaged in protected, concerted activity “in the classic sense” at the May 25 group meeting.<sup>3</sup> (JA 235.) When management announced the new go-to-guy position, he, along with Poff and Bauer, responded by raising questions and concerns about Metcalf’s qualifications and why management thought the night shift needed additional supervision. *See Cibao Meat Prod.*, 338 NLRB 934, 934 (2003) (“an employee . . . who protests, in the presence of other employees, a change in an employment term affecting all employees just announced by the employer at an employee meeting, is engaged in the ‘initiation of

---

<sup>3</sup> The Board appropriately drew an adverse inference against Meyer Tool for failing to present Ackerson and McGuire to testify about the context and contents of the May 25 meeting. (JA 231 n.7.) Meyer Tool does not challenge that adverse inference finding.

group action’’), *enforced*, 84 F. App’x 155 (2d Cir. 2004). *Accord Caval Tool*, 262 F.3d at 190 (citing, with approval, “group meeting” cases). When, in response, management accused the night shift, generally, and Cannon-El, specifically, of underperforming, Cannon-El pushed back and asked for proof. Cannon-El pointed out that night-shift employees had disproven similar allegations in the past, and management had done nothing to acknowledge its error. Cannon-El also raised health and safety concerns about the air quality in the facility—reiterating a complaint Poff had previously raised to management. *See NLRB v. Talsol Corp.*, 155 F.3d 785, 797 (6th Cir. 1998) (employee’s comments and questions about safety at plant meeting were protected and concerted); *NLRB v. Pace Motor Lines, Inc.*, 703 F.2d 28, 30 (2d Cir. 1983) (per curiam) (employee’s action was concerted as part of continuing group effort to ameliorate allegedly unsafe working conditions).

After the meeting, Cannon-El, Poff, and Bauer coordinated filing complaints—including about management’s treatment of Cannon-El. Poff told Cannon-El that “he didn’t have to put up with [management’s treatment of him] alone, let alone have it happen to anybody else.” (JA 95 (Tr. 287-88).) Bauer too was concerned about management’s treatment of employees, later questioning in his written complaint, “at what point does a boss step over the line verbally?” (JA 231 n.9, 237 n.28; JA 203-04.)

The next day, Cannon-El continued to engage in protected, concerted activity when he, Poff, and Bauer, as coordinated the night before, “went to human resources together to file complaints about what happened during the meeting, as well as how management treated the night-shift employees.” (JA 235-36.) Before the three colleagues came to Adams’ office to discuss and file those complaints, she was aware of at least some of their collective concerns. The night before, she and Poff had discussed the new go-to guy, and she knew that McGuire had come to the facility to address the issue at the group meeting.

On May 26, Bauer shared the same concerns with Adams about the go-to guy that Poff had raised the night before. He stayed in her office while his coworkers voiced their concerns because “we were all together . . . we came together, we were going to leave together.” (JA 231 n.8; JA 79 (Tr. 224).) When Poff joined Bauer in Adams’ office, he provided more “information and context” surrounding the issue and management’s treatment of the night shift, generally. (JA 236; JA 97-98 (Tr. 294-99).) According to Poff, the new go-to-guy position was a symptom of a broader, ongoing problem between the night shift and management. He told Adams that management was biased against the night shift and treated them like “second-class citizens.” (JA 236; JA 97-98 (Tr. 294-99).) Management was berating night-shift employees based on false accusations that they, specifically Cannon-El, were not doing their jobs. And at the group meeting,

management was “yelling at people for actions they didn’t do.” (JA 98 (Tr. 298).) When night-shift employees tried to push back and voice their complaints, management tossed those complaints “to the wayside.” (JA 97 (Tr. 295).)

At this point, Cannon-El joined the discussion with a question and concerns consistent with Poff’s narrative. He asked Adams who held the Vice President accountable and complained about McGuire’s hostile reaction, which he demonstrated on Poff, when he raised collective concerns the night before. Although Poff disagreed that McGuire had physically assaulted Cannon-El, he told Adams that he thought it was verbal assault. Cannon-El then claimed that McGuire’s “you are just like everybody else” comment evidenced racial bias—minutes after Poff had claimed that management was biased based on what shift employees worked. (JA 236; JA 98-99 (Tr. 300-01).) As the Board found, “both, within a matter of a few minutes, informed human resources of at least perceived biases on the part of management.” (JA 236.) The sequence of events described above was “more than sufficient to constitute protected, concerted activity.” (JA 236.)

**3. Meyer Tool summoned the police to remove, suspended, and discharged Cannon-El based on his conduct during protected, concerted activity**

Given the ample evidence that Cannon-El engaged in protected, concerted activity before and during his interaction with Adams, the Board also reasonably

found that Adams “was aware of Cannon-El’s protected, concerted activity based on what was said in her office on May 26.” (JA 236 & n.25.) In turn, the investigative committee, which ultimately recommended Cannon-El’s discharge, had a full picture of Cannon-El’s and his colleagues’ protected, concerted activity. By the end of its investigation, that committee knew of their “collective concerns related to the need for the go-to-guy position, the air quality issues, and management’s overall treatment of the night-shift employees, particularly Cannon-El.” (JA 236 n.25.) Meyer Tool’s owners, in turn, adopted the committee’s recommendations.

Meyer Tool admits (Br. 15, 19) that it summoned the police to remove, suspended, and discharged Cannon-El because of his conduct on May 26.<sup>4</sup> (JA 236.) That conduct was part of the *res gestae* of his protected, concerted activity, described above. Because Cannon-El’s conduct was not so egregious or opprobrious as to forfeit the Act’s protection, Meyer Tool violated Section 8(a)(1)

---

<sup>4</sup> Meyer Tool now claims that it discharged Cannon-El “for his disobedient refusal to leave Adams’s office and the premises, and for no other reason.” (Br. 19, see Br. 15.) At the time, however, its investigation committee’s report stated that he was also “intentionally intimidating and threatening” and caused employees “to feel unsafe” (JA 221) and his discharge letter claimed only that he violated Meyer Tool’s “workplace violence and other policies” (JA 202). Neither document specifies what he had done that was intimidating, threatening, or violent, and the discharge letter does not specify what “other policies” Cannon-El was supposed to have violated.

of the Act in taking the adverse actions against him for that protected, concerted activity.

#### **4. Cannon-El did not lose the protection of the Act**

In determining whether an employee's conduct is sufficiently egregious to forfeit Section 7 protection, the Board balances two policy concerns under the Act: allowing employees some latitude for impulsive conduct during protected activity and respecting employers' need to maintain order in the workplace. *See King Soopers, Inc. v. NLRB*, 859 F.3d 23, 36 (D.C. Cir. 2017) (citing cases). This Court has explained that "[t]he responsibility for applying this balancing test, depending as it does so heavily on the facts in a particular case, rests with the Board, whose decision, if supported by substantial evidence, will not be disturbed unless it is arbitrary or illogical." *Am. Tel. & Tel. Co. v. NLRB*, 521 F.2d 1159, 1161 (2d Cir. 1975). *Accord NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 379 (5th Cir. 2007).

To reach the appropriate balance of interests, the Board considers four factors to determine if the employee has lost the Act's protection: (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 practice. *Atlantic Steel*, 245 NLRB at 816. An animating principle behind this analysis is that "[t]he protections Section 7 affords

would be meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.” *Consumers Power Co.*, 282 NLRB 130, 132 (1986). Here, the Board concluded that “all four *Atlantic Steel* factors, individually and in the aggregate, favor Cannon-El’s protection under the Act.” (JA 239.)

**a. Location of the discussion**

Substantial evidence supports the Board’s finding that “the location of the discussion was reasonable under the circumstances and favors continued protection, even though it was overheard by other human resource employees.” (JA 237.) The May 26 conversation with Adams occurred in the human resources department, where Meyer Tool expects its employees to address their workplace issues or concerns. That department is in a separate building from Meyer Tool’s production areas, and therefore the events “had no effect on production.” (JA 237.) *See Inova Health Sys. v. NLRB*, 795 F.3d 68, 86 (D.C. Cir. 2015) (favored continued protection where conversation occurred in hallway by human resource offices away from public and patients). And because the type of issues complained about to human resources often arouse strong emotions, that department is a forum where employees “should be afforded greater latitude to

express their views.” (JA 237.) *See Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 26 (D.C. Cir. 2011).

In evaluating this factor, the Board considered evidence that other human resources employees heard Cannon-El and Adams’ exchange and later saw him in the hallway talking to his sister on his cellphone. The exchange, however, largely did not disrupt their work, and they did not even close their office doors. *See Goya Foods, Inc.*, 356 NLRB 476, 477-78 (2011) (though overheard by more than ten employees, conduct did not disrupt work and happened at place and time approved for union meetings). Moreover, any argument that the exchange somehow weakened Adams’ supervisory authority is undermined by her undisputed role in escalating the incident. (JA 237 n.27.)

**b. Subject matter of the discussion**

Likewise, substantial evidence supports the Board’s finding that the second *Atlantic Steel* factor—the subject matter of the discussion—favors continued protection. (JA 237 & n.28.) As discussed above, Cannon-El and his coworkers were in human resources together filing complaints about what happened during the group meeting the night before. Those complaints were concerted and plainly related to their terms and conditions of employment. Poff and Bauer shared Cannon-El’s concerns about how management responded to employees’ questions and concerns. And at the time of his impulsive behavior, Cannon-El was trying to

tell Adams, and overcome her dismissive response, about how management had treated him when he raised collective concerns at the group meeting and to determine what could be done about it. Although Cannon-El was briefly disrespectful while he was engaged in protected, concerted activity, the Board's finding that the subject matter of the discussion favors protection is consistent with settled law. *See Felix Indus., Inc.*, 339 NLRB 195, 196 (2003), *enforced mem.*, 2004 WL 1498151 (D.C. Cir. 2004); *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007) ("outburst" occurred during discussion of employee complaints about employment terms).

**c. Nature of the outburst**

The Board's finding (JA 237-39) that the third *Atlantic Steel* factor—the nature of the outburst—favors continued protection is also amply supported. The Board distinguishes between behavior that is disrespectful, rude, and defiant—which remains protected—and that which is truly insubordinate—which can lose protection. *Goya Foods*, 356 NLRB at 478 (citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1990), *enforced*, 953 F.2d 1384 (6th Cir. 1992) (per curiam)). The Board here found that Cannon-El did not cross that line, consistent with its precedent finding that employees who initially resisted a manager's instructions, while engaged in protected, concerted activity, did not lose the protection of the Act. *See, e.g., United States Postal Serv.*, 360 NLRB 677, 683-84 (2014)

(employee refused to immediately return to work until after supervisor called 911); *Goya Foods*, 356 NLRB at 478 (employee “initially refused . . . instruction to not get involved and . . . instruction to leave the meeting and then to leave the cafeteria, [but] in the end he complied”); *Mast Advert. & Pub., Inc.*, 304 NLRB 819, 819-20, 829 (1991) (employee interrupted meeting with insulting remarks and initially refused employer’s requests to stop interrupting and leave).

According to the credited evidence, the entire exchange between Cannon-El and Adams was over in a matter of minutes.<sup>5</sup> Although Cannon-El may have raised his voice during the exchange, so did Adams. And speaking loudly while engaged in protected activity generally does not forfeit the Act’s protection. *Postal Serv.*, 360 NLRB at 683; *Goya Foods*, 356 NLRB at 478.

Moreover, the Board found that “Cannon-El would not have engaged in this conduct—which ultimately resulted in the adverse actions at issue—but for Adams’ provocation, particularly her threats to involve the police.” (JA 238.) Cannon-El was calm when he first raised his complaints to Adams. (JA 238; see JA 100 (Tr. 306).) He became understandably frustrated, however, when Adams dismissed his claims with a string of “whatevers” while he was trying to explain them. Then, “in rather rapid succession,” Adams asked him to leave her office,

---

<sup>5</sup> As discussed below (p. 47), the Board reasonably did not consider the time Cannon-El stayed at the facility once he knew the police were on their way as evidence of insubordination. (JA 239.)

told him to clock out and leave the facility, and threatened to call the police at the count of three. (JA 238.) It was not until she had escalated the situation that Cannon-El, acting out of frustration and disbelief that she would involve the police, finished her count to three and briefly defied her request to leave, pausing only to ask if he could still file his complaint and for an explanation as to what he had done wrong. As Meyer Tool’s investigative committee found, Adams’ “behavior[] contributed to the escalation of [the] incident[.]” (JA 221.)

Thus, Cannon-El, although briefly disrespectful, did not engage in the type of conduct that typically causes an employee to lose the protection of the Act. For example, he did not use profanity or engage in intimidating or threatening behavior. (JA 238 & n.29 & n.30.) Although he later told Loveless that Adams would “pay for her actions,” the Board reasonably found that he was simply threatening to add her name to his complaint, which he subsequently did. (JA 233 n.16, 238 n.30.) Courts have agreed with the Board that far more serious comments did not lose the Act’s protection. *See Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 541, 548 (6th Cir. 2016) (comments “that motherf\*\*\*er is going down now” and “the gloves are f\*\*\*ing off now” were “metaphorical speech rather than threatening speech”); *Kiewit Power*, 652 F.3d at 25, 27-29 (comments that “it’s going to get ugly” and supervisor “better bring [his] boxing gloves”).

And although two human resources employees (Adams and Shireen Flick) claimed they felt threatened by Cannon-El's conduct that day, other employees who witnessed his behavior (including Loveless) did not feel the same way. (JA 232 n.14, 238 n.29; JA 70 (Tr. 185), 71-72 (Tr. 191-93), 100 (Tr. 306-08), 116-17 (Tr. 372-73), 161-62 (Tr. 545-46, 549).) Notably, Meyer Tool did not call Ackerson, who was in human resources during the exchange, to testify in support of its depiction of Cannon-El as threatening, intimidating, or violent, and the Board drew an adverse inference (unchallenged here) against it for failing to present him. (JA 233 n.15.) Meyer Tool's investigative committee's report and Cannon-El's discharge letter also failed to specify anything that he had done that it considered intentionally intimidating, threatening, or violent. The Board appropriately considered the above evidence and found that, objectively, Cannon-El's behavior was not intentionally intimidating or threatening, as Meyer Tool claimed. (JA 232 n.14, 238 & n.29 & n.30.) *See, e.g., Kiewit Power*, 652 F.3d at 29 n.2 (Board analyzes whether an employee's conduct is threatening under an objective standard) (citing cases).

**d. Meyer Tool's provocation**

Finally, substantial evidence supports the Board's finding that the fourth *Atlantic Steel* factor—whether the employer's unfair labor practices provoked the employee's conduct—weighs in favor of continued protection. (JA 239.) For this

factor to favor continued protection, the employer's conduct need not be explicitly alleged as an unfair labor practice, as long as it shows an intent to interfere with protected rights. *Postal Serv.*, 360 NLRB at 684 (citing *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007); *Overnite Transp. Co.*, 343 NLRB 1431, 1437-38 (2004)). Here, the Board reasonably relied on Meyer Tool supervisors' hostile response to Cannon-El's protected, concerted activity, which ultimately provoked his conduct. *See Plaza Auto Ctr., Inc.*, 360 NLRB 972, 979 (2014) ("[O]utbursts are more likely to be protected when the employer expresses hostility to the employee's very act of complaining than when the employer has indicated a willingness to engage on the merits."). Both Ackerson and McGuire harassed Cannon-El when he raised collective concerns at the group meeting. That harassment, among other workplace concerns, prompted Cannon-El, Poff, and Bauer to file complaints together in human resources the next day. Adams, in turn, was dismissive when Cannon-El tried to explain his concerns in her office and refused to take his written complaint. When he persisted in trying to be heard, she overreacted, demanded he leave, and threatened to call the police—all in the span of just a few minutes. *See Postal Serv.*, 360 NLRB at 684 (finding provocation where supervisor refused to talk to steward presenting grievances and instead ordered him back to work).

**B. Meyer Tool’s arguments are without merit**

Each of Meyer Tool’s challenges to the Board’s Order is easily rejected.

Meyer Tool does not explicitly challenge most of the Board’s findings. Instead, it simply ignores them in favor of its own version of the facts and the law. Meyer Tool’s narrative, however, cherry picks portions of the record and ignores the rest, without explanation. It makes no effort to argue, as it must, that “no rational trier of fact could reach the conclusion drawn by the Board.” *Katz’s Delicatessen*, 80 F.3d at 763. Likewise, Meyer Tool’s cited cases do not support its cause or remotely show that the Board erred in applying the well-settled *Atlantic Steel* framework to the facts of this case.

**1. Meyer Tool’s argument that Cannon-El was not engaged in protected, concerted activity ignores the bulk of the record evidence**

Considering the sequence of events on May 25 and 26, described above, the record does not support Meyer Tool’s primary defense (Br. 19-23) that Cannon-El was not engaged in protected, concerted activity in the first place. Meyer Tool conveniently ignores the substantial record evidence relied on by the Board and selectively cites pieces of Cannon-El’s testimony to disingenuously claim that Cannon-El raised “personal gripes and nothing else” (Br. 20) in Adams’ office.<sup>6</sup>

---

<sup>6</sup> Confusingly, Meyer Tool claims that the Board failed to consider whether Cannon-El engaged in protected, concerted activity in Adams’ office. (Br. 3, 19,

That testimony, alone and cited out of context, does not show the whole picture. As shown above, the bulk of the record evidence demonstrates that the concerns Cannon-El communicated to Adams—about how management treated him at the group meeting and who held management accountable for its conduct—were concerted and shared by his coworkers, and not his alone.<sup>7</sup> Indeed, Bauer and Poff shared concerns about the so-called personal gripes of how Cannon-El was treated at the May 25 group meeting. And notably, due to Adams’ dismissing his initial concerns (JA 238), Cannon-El “wasn’t provided the opportunity” to elaborate on them in her office (JA 52 (Tr. 113)). Although he planned to address the go-to-guy issue in human resources that day, he did not raise it verbally with Adams because he had included it in his written complaint (JA 48 (Tr. 100), 51- 52 (Tr. 112-15), 198-99), which he tried, in vain, to give her.

---

24-25.) The administrative law judge, however, discussed that issue at length (JA 234-36), and the Board affirmed his findings and conclusions (JA 227). *See, e.g., Weigand v. NLRB*, 783 F.3d 889, 895 (D.C. Cir. 2015) (“Where, as here, the Board adopts the ALJ’s findings and conclusions as its own, we apply the same deferential standard to those findings and conclusions.”) (citing *NLRB v. KSM Indus., Inc.*, 682 F.3d 537, 544 (7th Cir. 2012)).

<sup>7</sup> Alternatively, Meyer Tool disingenuously claims either that Poff and Bauer were in Adams’ office on another matter and simply overheard Cannon-El’s complaints, or that each employee was individually voicing an individual concern. (Br. 21.) Both of those claims, which are hardly fleshed out, are also refuted by the bulk of the record evidence.

Moreover, Cannon-El's question and complaints in Adams' office clearly were concerted, even if he were partially motivated by personal concerns, and regardless of how he subjectively characterized them at the hearing. *Fresh & Easy*, 361 NLRB at 153-54 & n.11. As the Board found (JA 236), the three colleagues' concerns and motivations did not need to perfectly align to find their actions concerted. *See id.* at 154 (citing cases). Meyer Tool, however, does not address that finding, nor does it claim that the Board erred in reaching it.

Meyer Tool also unconvincingly argues that only "the experience of Adams" is relevant to determining whether Cannon-El was punished for engaging in protected, concerted activity. (Br. 19.) But Meyer Tool's suggestion that Adams' summoning the police is all that matters ignores that the Board also found that different decisionmakers at Meyer Tool were responsible for unlawfully suspending and discharging Cannon-El. As discussed above, Adams clearly was aware of Cannon-El's protected, concerted activity at the time she called for the police. But even if she were somehow in the dark, substantial evidence supports the Board's finding that the investigative committee, which recommended Cannon-El's discharge, was not. (JA 236 n.25.) Meyer Tool does not challenge that finding, nor does it argue why, considering that finding, Cannon-El's suspension and discharge were nevertheless lawful. Again, it simply ignores the Board's well-supported findings.

Further, Meyer Tool vastly overstates (Br. 22-23) the Board's "logical outgrowth" concept and its application here. That concept, as acknowledged by this Court, finds "a lone act" to be concerted, "if it stems from prior 'concerted activity.'" *Ewing*, 861 F.2d at 361 (citing cases). Certainly, a "logical outgrowth" does not extend protection to "any later activity" of an individual, as Meyer Tool misrepresents the Board's finding (Br. 22 (emphasis added)). Rather, it applies to activity, like Cannon-El's, that is a "continuation" of earlier concerted complaints. *Consumers Power*, 282 NLRB at 131-32. See *Pace Motor Lines*, 703 F.2d at 30 (individual's refusal to drive allegedly unsafe vehicles "was part of a continuing group effort"); *Mike Yurosek*, 53 F.3d at 266 (employees' refusal to work extra hour was "outgrowth" of earlier concerted protests about schedule change). Here, Cannon-El's May 26 complaint logically grew from collective concerns he, and his coworkers, raised the night before (about the role of the go-to guy, false accusations against the night shift, air quality concerns, etc.), and management's hostile reaction when they raised those concerns at the group meeting.

Moreover, Meyer Tool overlooks that the Board did not rely primarily on its logical outgrowth theory to find concerted activity here. As discussed above, the Board found "more than sufficient" (JA 236) evidence that Cannon-El had engaged in classic protected, concerted activity when he joined with Poff and Bauer to file complaints about the May 25 meeting, and they clearly "share[d] an interest in the

matters Cannon-El raised with Adams” about management’s treatment of night-shift employees. (JA 236.) It was only in response to Meyer Tool’s claim, assumed *arguendo*, that Cannon-El was filing an individual complaint on May 26 “about how he personally was treated during the May 25 meeting,” that the Board made the alternative “logical outgrowth” finding. (JA 236.) And, contrary to Meyer Tool’s claim (Br. 22), the Board did not find that Cannon-El’s brief refusal to leave was a “logical outgrowth” of concerted activity or “grew out of a group concern.”<sup>8</sup>

Finally, Meyer Tool’s reliance on *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980), is misplaced. There, the employer discharged an employee, who had been engaged in protected, concerted activity about work assignments with a coworker, for spontaneously walking off the job, alone, in protest. *Id.* at 845.

Although the coworker shared the employee’s objections to the work assignment, there was no evidence that the coworker participated in, or approved of, the

---

<sup>8</sup> In arguing that Cannon-El’s brief refusal to leave was not concerted (Br. 21-23), Meyer Tool attempts to bifurcate that intemperate conduct from his protected, concerted activity. As discussed above, however, that conduct was intertwined with his protected, concerted activity and properly considered under the *Atlantic Steel* framework. “Where, as here, the conduct at issue arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline.” *Goya Foods, Inc.*, 356 NLRB 476, 477 n.8 (2011). *Cf. Felix Indus., Inc. v. NLRB*, 251 F.3d 1051, 1054 (D.C. Cir. 2001) (rejecting employer’s claims that employee’s obscenities had nothing to do with his protected activity and that second *Atlantic Steel* factor—subject matter of discussion—weighed against protection).

employee's walking off the job. *Id.* at 844, 846. Thus, the Court found that the employee's walk out was not concerted, and her discharge for walking out was lawful. *Id.* Here, Meyer Tool argues that Cannon-El's brief refusal to leave and the *Ontario Knife* employee's walking off the job are the same in that coworkers did not join in, rendering the act individual not concerted. (Br. 23.) But Cannon-El's initially disregarding Adams' order to leave was not some rogue way of protesting employment terms or going beyond the scope of the complaints he shared with his coworkers. It was a reaction to Adams' escalation and threat to call the police. And, unlike the coworker in *Ontario Knife*, Bauer and Poff had no opportunity to join Cannon-El in his refusal to leave because Adams did not order them to leave. Thus, here, there was no split between Cannon-El and his coworkers and no switch from concerted to individual action, as the Court found in *Ontario Knife*.

## **2. *Atlantic Steel* is the appropriate test**

Meyer Tool also unpersuasively claims that the Board erred in applying *Atlantic Steel*. (Br. 23-24.) Meyer Tool, however, presents no argument as to what legal framework the Board should have applied in its stead.<sup>9</sup> And its reliance on

---

<sup>9</sup> Meyer Tool has abandoned any argument that the Board's unlawful motive framework set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), is instead the appropriate test. (JA 237 n.26, 239-40 n.37; see JA 30 (Tr. 26).) *See LoSacco*

*NLRB v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012), is misplaced. That case is readily distinguishable on its facts.

In *Starbucks*, an off-duty employee, in the presence of customers, participated in a heated argument with an off-duty manager, shouting, “[y]ou can go f\*\*k yourself, if you want to f\*\*k me up, go ahead, I’m here.” 679 F.3d at 74. Even though the employee was engaged in protected, concerted activity at the time, the Court found *Atlantic Steel* to be inapplicable because the argument took place in a public venue where customers were present. *Id.* at 79-80. Here, in contrast, the exchange happened in the classic *Atlantic Steel* context, as described by the Court: “the workplace, *e.g.*, the factory floor or a backroom office.” *Id.* at 79. Unlike the employee in *Starbucks*, Cannon-El’s impulsive conduct took place, not in public, in front of any Meyer Tool customers, but in human resources—the department Meyer Tool specifically designated for hearing employee complaints.

Recognizing that *Starbucks* is factually inapposite, Meyer Tool appears to advocate for its extension. Without analysis, it summarily claims that Cannon-El’s conduct, which it embellishes as an “insubordinate, trespassory refusal to leave” (Br. 24), is at least as bad as an employee’s obscenity-riddled outburst in a public

---

*v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995) (issues not raised in opening brief on appeal are deemed abandoned); Fed. R. App. P. 28(a)(8).

venue in front of customers.<sup>10</sup> But the Board rejected the notion that Cannon-El was truly insubordinate, as described above (pp. 33-35, see also p. 47). (JA 238-39.) And none of Meyer Tool's cited cases (Br. 24, see also Br. 26) addresses *Atlantic Steel* issues, let alone similar factual scenarios. *Cf. NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 248-49 (1939) (approximately 95 employees engaged in 9-day sit-down strike by taking over two of employer's key buildings and halting production entirely); *Venetian Casino Resort, L.L.C. v. NLRB*, 793 F.3d 85, 88 (D.C. Cir. 2015) (over 1,000 demonstrators purportedly marched on employer's walkway); *Peck, Inc.*, 226 NLRB 1174, 1180 (1976) (eleven employees took over control of employer's property after their shift ended by occupying a portion of its building for about 50 minutes). Thus, Meyer Tool's citations do not remotely support its argument that *Atlantic Steel* should not apply to Cannon-El's conduct while attempting to file a complaint with a human resources employee.

---

<sup>10</sup> Meyer Tool disingenuously cites to Member Emanuel's concurrence as supporting its argument that Cannon-El's conduct "remove[s] this case from the *Atlantic Steel* analysis." (Br. 23.) But Member Emanuel agreed that *Atlantic Steel* was the appropriate legal framework and concurred in the outcome, finding that three of the four factors favored continued protection. He only disagreed with the majority's finding that the nature of the outburst favored continued protection. (JA 227 n.2, see 239 n.36.)

**3. Meyer Tool's argument that Cannon-El lost the Act's protection relies on an exaggerated description of his conduct**

Finally, Meyer Tool's argument that Cannon-El lost the protection of the Act under *Atlantic Steel* is equally unavailing. (Br. 24-26.) Meyer Tool does not explicitly challenge and address each of the *Atlantic Steel* factors. Instead, it again relies on an exaggerated description of Cannon-El's conduct on May 26, and leaves unchallenged the Board's actual findings. Contrary to Meyer Tool's depiction, the Board explicitly declined to find that Cannon-El "threatened Adams" (Br. 25) or was insubordinate in waiting at the facility after he learned that she had called for the police. (JA 238 & n.29 & n.30, 239.)

Meyer Tool's narrative relies almost exclusively on the testimony of human resources employee Flick and her subjective reaction to Cannon-El's conduct after Adams called for the police. Meyer Tool, however, completely disregards the Board's finding that under an *objective* standard, Cannon-El was not, as Meyer Tool claimed, "intentionally intimidating and threatening," considering testimony from several other employees who were present and who did not feel threatened or unsafe. (JA 232 n.14, 238 & n.29 & n.30; JA 221.) Indeed, according to the credited evidence, once Adams told him the police were on their way, Cannon-El had no more interactions with employees in the human resources department and instead called his sister to be his witness. Meyer Tool's additional claim that six

employees, including Adams, “stopped working to make sure everyone was safe” (Br. 25) is not supported by the record evidence.<sup>11</sup>

Furthermore, Meyer Tool’s version of events completely ignores the Board’s well-supported finding that once Cannon-El knew the police were on their way, it was “reasonable” and “prudent” for him to stay at the facility to show them that he was acting peacefully and to avoid being accused of fleeing the scene.<sup>12</sup> (JA 239.) His decision to wait in the lobby for the police, rather than outside, was also reasonable, given that he wanted to avoid further confrontation with Adams, who was out there smoking. In considering the reasonableness of Cannon-El’s conduct during this time, the Board found it significant that “but for Adams’ overreaction to the questions and concerns raised in her office, the police would not have been called” in the first place. (JA 239.)

---

<sup>11</sup> Meyer Tool’s citations to the record (JA 129 (Tr. 416), JA 130-31 (Tr. 423-24)) do not show that all six employees were on the clock, stopped their work, or were even in the human resources building at the time of the exchange and Adams’ decision to call for the police. (See JA 46 (Tr. 92), 130-31 (Tr. 422-24), 147 (Tr. 488, 490), 170 (Tr. 580), 178 (Tr. 613), 222.) Three of those employees did not testify. And, as mentioned above, the Board reasonably drew an adverse inference against Meyer Tool for its failure to call Ackerson, who was present during the exchange. (JA 233 n.15.) Meyer Tool does not challenge the adverse inference finding.

<sup>12</sup> Cannon-El also stayed because he wanted proof that Meyer Tool had called the police in response to his filing a complaint. That additional motivation does not detract from his two other reasons for staying. (JA 239 n.35.)

Meyer Tool also confusingly argues that Adams’ “supposed [unfair labor practice]” of summoning the police to remove Cannon-El could not have provoked his conduct that day. (Br. 26.) Again, Cannon-El’s conduct after he learned Adams had called for the police made sense under the circumstances. To the extent this argument is meant to challenge the Board’s findings on the fourth *Atlantic Steel* factor, the Board did not rely on Adams’ unlawful summoning of the police in finding provocation. Rather, it relied on her (and other Meyer Tool supervisors’) dismissive behavior and her *threatening* to call the police while Cannon-El was trying to voice his complaints. Meyer Tool makes no claim that the Board’s reliance on that conduct was improper.

Finally, Meyer Tool’s cited cases are readily distinguishable, considering the Board’s well-supported finding that Cannon-El retained the Act’s protection. (JA 239.) Unlike the employees in Meyer Tool’s cited cases, Cannon-El did not engage in profanity or intimidation, and he did not disrupt work. *Cf. Verizon Wireless*, 349 NLRB 640, 642-43 (2007) (employee lost protection of the Act when he made profane and unprovoked comments to coworker at employee cubicles, on working time); *Daimlerchrysler Corp.*, 344 NLRB 1324, 1328-30 (2005) (employee’s “sustained profanity” and intimidating behavior towards supervisor, in front of “quite a few” employees, lost protection of the Act); *Pipe Realty Co. & Stone*, 313 NLRB 1289, 1290 (1994) (employee lost protection when

he directed profanity at a supervisor, in his office, in the course of repeatedly resisting a work assignment, and was overheard by two employees). All Cannon-El did was finish Adams' count to three and briefly resist her order to leave. Thus, substantial evidence supports the Board's findings that Cannon-El's conduct was not so egregious as to lose the Act's protection, and that Meyer Tool's calling the police to remove, suspending, and discharging him was unlawful.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Meyer Tool's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

/s/ Usha Dheenan  
USHA DHEENAN  
*Supervisory Attorney*

/s/ Rebecca J. Johnston  
REBECCA J. JOHNSTON  
*Attorney*

National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001  
(202) 273-2948  
(202) 273-1066

PETER B. ROBB  
*General Counsel*

JOHN W. KYLE  
*Deputy General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

National Labor Relations Board  
October 2018

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

MEYER TOOL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

\*

\*

\* Nos. 18-812

\* 18-893

\*

\* Board Case No.

\* 09-CA-185410

\*

\*

\*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 11,784 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC  
this 30th day of October, 2018

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

MEYER TOOL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

\*

\*

\* Nos. 18-812

\* 18-893

\*

\* Board Case No.

\* 09-CA-185410

\*

\*

\*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 30, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

Ryan M. Martin  
Daniel G. Rosenthal  
Jackson Lewis P.C.  
PNC Center, 26th Floor  
201 East 5th Street  
Cincinnati, OH 45202

/s/Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC  
this 30th day of October, 2018