

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NEXTEER AUTOMOTIVE CORPORATION,

Respondent,

and

CASE 7-CA-215036

LOCAL 699, INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND AGRICULTURAL  
IMPLEMENT WORKERS OF AMERICA, UAW,

Charging Party.

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**CHARGING PARTY'S RESPONSE TO RESPONDENT'S EXCEPTIONS AND  
SUPPORTING BRIEF**

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## **I. INTRODUCTION**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), 29 C.F.R. § 102.46, Respondent Nexteer Automotive Corp. (“Nexteer” or “Respondent”) filed exceptions and a supporting brief to the December 10, 2018 Decision and Order (“Decision”) of Administrative Law Judge Paul Bogas (“ALJ”). The Charging Party International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its affiliated Local Union No. 699 (“Union” or “UAW”) now files its answering brief to the Respondent’s exceptions and brief. For the reasons discussed below, the UAW respectfully requests that the Board adopt the ALJ’s Decision, uphold his finding that Union District Committeeman Joshua Nuffer Bauer’s (“Bauer”) actions did not lose the protection of the Act under the standard set forth in *Atlantic Steel*, 245 NLRB 814 (1979) and, therefore, Respondent discharged Bauer for engaging in protected activity in violation of Sections 8(a)(1) and 8(a)(3) of the Act.

## **II. STATEMENT OF THE CASE**

Bauer is a vocal, passionate, and, at times, confrontational union representative with whom Respondent was simply tired of dealing. Respondent attempted to suspend Bauer for 30 days, for telling a supervisor “fuck no” and/or “fuck off” during a conversation about disciplinary interviews. Bauer filed unfair labor practice charges and, after a complaint issued, Nexteer agreed to settle those charges by rescinding the discipline. About four months later, Nexteer discharged Bauer under remarkably similar circumstances. During a meeting with supervisors to discuss workplace issues, the meeting became heated, Bauer stood up, said “fuck you” to one of the supervisors, and then left the room. Bauer then continued to report to work for a week, until he was terminated for violating the workplace violence policy and a work rule

prohibiting “assaulting, threatening, or intimidating” supervision. This termination violates NLRA Sections 8(a)(1) and (3).

The Union represents a unit of approximately 3,200 production and maintenance employees throughout Nexteer’s seven separate plants in Saginaw, Michigan. D. 2: 20-23, Tr. 20, 29. Bauer has been employed by Nexteer for over eight years and served as the elected District 13 Committeeperson for three and a half years, representing Plants 6 and 3 on the third shift. D. 2: 23-29, Tr. 17 (Bauer). The District Committeeperson is a full-time position, with the responsibility to “address issues between management and the employer on the floor that are contractual disputes or just concerns of the floor.” *Id.*

The issue originally arose as the result of Nexteer issuing a 30-day disciplinary suspension to Bauer on August 15, 2016. GC Ex. 3. Nexteer claimed that Bauer had violated Shop Rule 13 prohibiting “abusive language to supervision or other employees.” *Id.* As Bauer testified, the incident involved a conversation in which Bauer attempted to serve grievances to a Supervisor, Mark Lorence (“Lorence”), who refused to accommodate Bauer and said that he would conduct disciplinary interviews without Bauer there to represent the employees. Tr. 21-22 (Bauer). After a back-and-forth exchange where Bauer attempted to explain that the contract required union representation during the interviews, Lorence said that he would “do them with or without you,” to which Bauer responded that the answer would be “fuck no.” *Id.* D. 5:1-13.

Because Bauer was engaged in a discussion involving the workplace issues of grievance handling and the holding of disciplinary interviews, Bauer believed that he was disciplined for engaging in activity protected under the NLRA. As a result, he filed a grievance and an unfair labor practice charge. Tr. 21-22 (Bauer). After a complaint was issued, Nexteer agreed to settle

the matter by rescinding the discipline, reinstating Bauer with backpay, rescinding certain shop rules, and posting a notice. GC Ex. 4-5, D. 5:1-13.

After the settlement, Nexteer management exhibited a pattern of contempt and dismissiveness toward Bauer. Supervisors told Bauer that “they did not care about the settlement and they were going to do what they had to do.” Tr. 24 (Bauer). Members of management, including Benny Taylor (“Taylor”), told Bauer things like his “grievances were bullshit,” he was “just being an asshole,” and that he “better watch out” or else he will be “thrown out of the plant.” D. 5:17-26, Tr. 24, 25 (Bauer).

Out of concern that this treatment by management would not allow him to fulfill his duties as an elected union representative, Bauer approached Shop Committeeperson, JoAnn Reyna Frost (“Frost”) in October 2017. He explained to Frost that he was threatened with expulsion from the plant and that he felt his grievances were not being taken seriously. Tr. 25 (Bauer), 62 (Frost). Frost initially counseled Bauer to document these incidents in the hopes that the situation would improve, otherwise they would have to take it up with higher management. Within two weeks, Bauer again contacted Frost and informed her that the situation had not improved, after which she scheduled a meeting with HR Manager Dereon Pruitt (“Pruitt”) and HR professional Allison Bell (“Bell”) in November 2017. Tr. 63 (Frost). D. 5:26-30. The meeting resulted in Pruitt recommending that they schedule a follow up meeting between Bauer, Bell, and Taylor. D. 6:31-32.

The meeting took place on December 13, 2017 in Bell’s office. D. 6:32-33, Tr. 73 (Bell), R. Ex. 1 & 2. The office was small, approximately 9.5 feet by 12 feet, with two chairs and a desk that takes up a large portion of the room. D. 6:33-35, Tr. 75 (Bell), R. Ex. 1 & 2. Bell was late to the meeting, leaving Bauer and Taylor to wait outside until she arrived. Tr. 31 (Bauer). While

they waited, they engaged in friendly and casual small talk, discussing dog training and other “personal stuff.” *Id.* D. 6:43-44.

The meeting began with a normal exchange of pleasantries and small talk, but quickly moved onto the issues that the meeting was meant to address. Tr. 32 (Bauer). Bauer then began to “run down a summary” of what his issues were, which included management performing union work and other staffing issues, (Tr. 32 (Bauer), 78 (Bell)) as well as health and safety issues. D. 6:47-7:4, Tr. 34 (Bauer), 77 (Bell). One of the health and safety issues that arose was an incident where a production employee vomited while working on the line. Bauer felt strongly that Taylor had not handled the situation properly because the employee had to continue working and was not given relief to clean up properly. D. 7:11-17. Bauer was particularly passionate about this issue and both he and Taylor began “stepping over each other and not allowing each other to speak and getting quite loud.” Tr. 36 (Bauer). Bauer then testified that Taylor “raised his hands up and said, this is why we can’t get anything done on third shift; he’s just so hostile. And at that point [Bauer] got out of [his] chair and said, this meeting’s over. Really, Benny, go fuck yourself.” D. 7:1-21, Tr. 35-36 (Bauer). Bell then opened the door and asked Bauer to leave the office. D. 7:27. Again, the office was small, and Bauer was sitting about a foot away from Taylor. When Bauer got up, he was within two feet of Taylor and Bauer had to “scoot” through the narrow space between Taylor and the desk. Tr. 36 (Bauer). Bauer did not make any statements threatening physical or other harm to Taylor, Bell, or anyone else. D. 7:29-32. There is no claim that Bauer attempted to strike anyone, or raised his hands as if preparing to do so. *Id.* Bauer had not refused a direction from Taylor or Bell to leave the meeting or otherwise end the confrontation. *Id.*

Management took no immediate action against Bauer following the events of the meeting. Neither Bell nor Taylor felt compelled to call security or the police. Tr. 93 (Bell), 127-128 (Taylor). D. 9:8. They also decided not to suspend Bauer pending an investigation. Tr. 93 (Bell), 128 (Taylor). D. 9:9-14. Bell called HR Manager Pruitt who scheduled a meeting that day with Bell, Pruitt, HR Director of North America Tony Bierman, and in-house counsel Tamika Frimpong. Tr. 82 (Bell). Collectively, they again decided not to call security or police and not to suspend Bauer pending an investigation. Tr. 183 (Pruitt). Pruitt also testified that, based on his understanding of what took place, he did not think that Bauer was an immediate danger to himself or others. Tr. 186 (Pruitt). This was a deviation from the typical process at Nexteer where, if an employee has engaged in violent or threatening behavior, he or she is suspended pending an investigation. Tr. 39 (Bauer), 66-67 (Frost). Bauer continued to work and have access to the plants until Respondent terminated him six days later. D. 9:13-14.

The UAW filed the charge on February 16, 2018, and the amended charge on March 5, 2018. The General Counsel issued the complaint on April 9, 2018 and the hearing on this matter was held on August 6, 2018. At the hearing, the General Counsel alleged that, pursuant the framework set forth in *Atlantic Steel*, 245 NLRB 814 (1979), Nexteer's discharge of Bauer violated Section 8(a)(3) and (1) of the NLRA because the discharge was based on Bauer's protected activity during the December 13 meeting and that Bauer's actions in the course of the meeting did not cause him to forfeit the NLRA's protection. Nexteer did not dispute that it discharged Bauer for his conduct during the meeting but argued that Bauer's outburst caused him to lose NLRA protection.

The factors under the *Atlantic Steel* framework are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the

outburst was, in any way, provoked by an employer's unfair labor practice. 245 NLRB at 816. Weighing three of the factors in favor of protection and one factor narrowly against protection, the ALJ easily found that Bauer's conduct did not result in him forfeiting protection under the Act. D. 15:18-24.

The ALJ found that the first factor, the place of the discussion, weighed heavily in favor of protection. This was primarily due to the fact that the conduct the Respondent points to as grounds for discharge all took place in a private office setting. Only Bauer, Bell, and Taylor were present at the meeting and the door was closed. While there were other non-unit employees in the same building where the meeting took place, the Respondent provided no evidence whatsoever that Bauer was heard by any other employees. The ALJ noted the Board's repeated findings that discussions in a private office weigh against the forfeiture of NLRA protection, because they do not affect "an employer's interest in maintaining order and discipline in his establishment." D. 11:22-12:2.

The ALJ found that the second *Atlantic Steel* factor – the subject matter of the discussion – weighed heavily in favor of protection. He determined that "the meeting had been arranged for the purpose of addressing important issues related to the interests and welfare of bargaining unit employees, including: Bauer's allegation that supervisors were interfering with his ability to provide representation to bargaining unit employees, the employer's frequent use of non-unit individuals to perform bargaining unit work, and safety." By all accounts, safety issues were discussed at the meeting (Tr. 34-35 (Bauer), 77-78 (Bell), 107-109 (Taylor)), and the ALJ found that by Taylor's own account, he was dismissive of Bauer's safety concerns and "did not propose a way of addressing those concerns" even though management's dismissive treatment of Bauer was one of the primary purposes of the meeting. D. 12:13-36.

The ALJ found that the third factor weighed in favor of continued protection, due primarily to the fact that Bauer's conduct only involved profanity and did not involve any physical violence or even an implied threat of physical violence. He noted, again, that management did not act consistently with the claim that Bauer's behavior was threatening by deciding not to suspend Bauer pending investigation, which is its usual practice when employees are suspected of engaging in threatening behavior. It was also relevant that Nexteer did not contact its own security or law enforcement and Bauer had absolutely no history of violent behavior during his many years with the company. D. 12:38-49.

The ALJ found that the fourth and final factor of the *Atlantic Steel* analysis weighed lightly against protection. This factor looks at whether there was provocation on the part of the employer that resulted in the conduct being analyzed. While the ALJ did not have enough facts to decide that management's treatment of Bauer constituted an unfair labor practice that provoked Bauer's outburst, the ALJ did find that Bauer's outburst was at least partially provoked by Taylor's dismissiveness toward the issues for which Bauer was advocating. Therefore, the ALJ found that the final factor weighed only lightly in the Respondent's favor. D. 14:38-15:16.

Ultimately, the ALJ found that three of the factors weighed solidly in favor of protection and one factor only lightly weighed against. D. 15:19-24. As such, the factors weigh in favor of Bauer, and Respondent violated the Act by terminating him. *Id.* The Respondent filed exceptions and a brief to which the Union now responds.

### **III. THE EMPLOYER'S EXCEPTIONS**

The Respondent filed eleven exceptions to the ALJ's decision. The arguments contained in the Respondent's brief are legally and factually without merit. The exceptions are as follows:

1. To the credibility determinations issued in the Decision that are not supported by the record, as this is contrary to the substantial evidence in the record as a whole.
2. To the failure to consider Bauer's prior discipline where it establishes a pattern of conduct consistent with that alleged by Respondent in the instant case.
3. To the finding that Bauer did not yell profanities in the presence of other employees, where inconsistent with the testimony at hearing.
4. To the repeated rejection of Respondent's witnesses' testimony regarding facts not explicitly stated in contemporaneous writings.
5. To the rejection of Taylor's testimony that he felt threatened because "Taylor did not himself stand up or raise his hands in a protective gesture," where the record establishes Taylor moved backward away from Bauer out of concern for his safety.
6. To the finding that the first factor of *Atlantic Steel*, 245 NLRB 814 (1979), weighed in favor of protecting Bauer's conduct, where nonbargaining unit employees could overhear his profane outburst.
7. To the finding that the second factor of *Atlantic Steel* weighed "heavily in favor" of protection, where the ALJ noted that the subject matter of the meeting was to discuss a personal issue – "Respondent's dismissive treatment of [Bauer]."
8. To the finding that the third factor of *Atlantic Steel* weighed in favor of protection, where this is unsupported by the record as a whole and relevant precedent.
9. To the ALJ's reliance on *Plaza Auto Center*, 360 NLRB 972 (2014), *Pier Sixty*, 362 NLRB No. 59 (2015), *enfd.* 855 NLRB 115 (2nd Cir. 2017), and *Alton H. Piester*,

*LLC*, 353 NLRB 369 (2008), where the actions of the employees are clearly distinguishable from Bauer's actions in the instant case.

10. To the conclusion that Bauer's conduct did not lose the protections of the Act under *Atlantic Steel*, as this is unsupported by the record as a whole and relevant precedent.

11. To the conclusion that Respondent violated Sections 8(a)(1) and 8(a)(3) when it terminated Bauer, as this is unsupported by the record and relevant precedent.

Internal citations omitted.

#### **IV. THE UNION'S RESPONSE TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT**

Respondent's exceptions are without merit. The arguments below show that Respondent's exceptions and supporting brief should be rejected by the Board, and the decision of the ALJ should be affirmed.

##### **A. The ALJ Correctly Weighed the *Atlantic Steel* Factors in Favor of Bauer's Conduct Being Protected Under the NLRA (Exceptions 1-10).**

"Under well-established law, a four-factor balancing test applies where, as here, we must determine whether an employee acting in a representative capacity lost the protection of the Act on account of her outburst during an otherwise statutorily protected grievance discussion with the employer." *United States Postal Serv. & Am. Postal Workers Union, AFL-CIO, Portland Oregon Area Local 128*, 364 NLRB No. 62 (July 29, 2016) (citing *Postal Service*, 360 NLRB No. 74, slip op. at 1 fn. 2, 7-8 (2014), and *Atlantic Steel Co.*, 245 NLRB 814 (1979)). The four factors to be balanced are: (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 misconduct or unfair labor practice. *Atlantic Steel*, 245 NLRB at 816. The ALJ, applying these factors, found that the December 2017 meeting was protected conduct under the NLRA, and that Bauer's conduct during (and shortly after) that meeting did not lose protection of the Act.

Respondent makes a blanket exception to the ALJ's findings, arguing that "the Board will not second guess an employer's efforts to provide its employees with a safe workplace, especially where threatening behavior is involved." *Bridgestone Firestone S.C.*, 350 NLRB 526, 531 (2007), citing *Tenneco Packaging Inc.*, 337 NLRB 898 (2002), review denied 350 F. 3d 105 (D.C. Cir. 2003); *Clark Equipment Co.*, 250 NLRB 1333 (1980). However, for several reasons, this isolated quote misleads, and does not adequately explain the state of Board law.

First, these three cases were evaluated under a *Wright Line* (251 NLRB 1083 (1980)) analysis. The ALJ held that Bauer does not prevail under a *Wright Line* analysis (D. 15:28-16:31), but that Respondent agreed that *Atlantic Steel* is the correct framework for this case (D. 10:41-11:2), under which Bauer does prevail.

Second, *Bridgestone* and *Clark* involved situations where employees were terminated for hitting or threatening to hit another employee with a vehicle. *Bridgestone* at 530, *Clark* at 1337, 1338. *Tenneco* involved a situation where many employees complained of an employee's threatening behavior, he admitted to management that he kept guns in his home, and brandished a work knife in a threatening way. The employer called the police to have him removed from the facility and required a psychological evaluation before his return. *Tenneco* at 907. In the present case, it is not alleged that Bauer's conduct approaches anything near the facts of these other cases.

Third, Respondent cites these cases for the proposition that it “must remain free to quickly address genuine threats.” However, Respondent’s actions after the meeting indicate no such urgency, which is why the ALJ did not find Respondent’s accusations, in this regard, to be credible. It did not call law enforcement or security, it did not suspend Bauer pending an investigation as it would during a legitimate workplace violence incident, and it allowed Bauer to continue to have access to the facility for six days before it took any action against him. D. 12:42-49.

For these reasons, Respondent has not shown why the Board should accept its blanket exceptions to the ALJ Decision. Therefore, the Decision should be affirmed.

**i. The ALJ correctly found that the first *Atlantic Steel* factor weighed heavily in favor of protection due to the private office setting, and the complete lack of evidence that other employees heard the outburst or that employer discipline was undermined (Exceptions 1, 3, 4, 6).**

The ALJ found that the first *Atlantic Steel* factor weighed heavily in Bauer’s favor because the meeting took place in Bell’s office, with only Bell, Taylor, and Bauer present, the door was closed, and after the door was opened, it was unlikely that any other employee heard the conduct (in large part because Respondent offered no such evidence). D 11:21-26, 41-45. The ALJ found that, in such cases, the first factor weighs against forfeiture of protection. D. 11:26-28 (citing *Plaza Auto Center*, 360 NLRB 972, 978 (2014); *NLRB v. Starbucks Corp.*, 679 F.3d 70, 79 (2d Cir. 2012); *Success Village Apartments*, 347 NLRB 1065, 1069 (2006); and *Stanford Hotel*, 344 NLRB 558, 558 (2005).

Despite failing to offer any evidence that even a single employee heard Bauer’s brief outburst, Respondent focuses a great deal of its brief arguing that Bauer’s conduct lost the protection of the Act under the first *Atlantic Steel* factor, primarily based on the allegation that

other employees *might have* overheard it. There are factual and legal issues with this argument, which show that it should not be accepted.

On the factual side, Respondent incorrectly argues that it is “undisputed” that it is “likely” other employees could hear the outburst. Exceptions Brief at 11. This is certainly in dispute because the ALJ found the opposite to be true. D. 11: 44-45. Respondent also asserts that Bauer conceded there were other employees present outside of the office who could hear him. Exceptions Brief at 7. This is a misrepresentation of Bauer’s testimony. Bauer only stated that he believed there were some “engineers throughout the building” as he left. Tr. 49 (Bauer). There is no indication from this testimony that any of these employees were in close proximity to the office or that they overheard, or could have overheard, any of what was said.<sup>1</sup>

On the legal side, Respondent takes a quote from *Starbucks Corp.*, 354 NLRB 876 (2009) to suggest that it does not need to show any employees actually overheard Bauer as long as there was a “likelihood that other employees were exposed to the misconduct.” *Starbucks Corp.*, 354 NLRB at 878. In *Starbucks*, the Board’s determination that the conduct lost protection under the first *Atlantic Steel* factor was because the misconduct was shown to have occurred as part of a loud, public protest in front of customers and other employees, which started in the store and then continued onto the street. *Id.* The quote that Respondent uses is from a paragraph where the Board is declining to make a distinction between on-duty and off-duty employees. It is not

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<sup>1</sup> By Respondent’s own admission, “Nexteer did not go and survey employees after the outburst to determine whether they heard the profanity,” as not to “draw more attention to the outburst or somehow appear to condone the behavior exhibited by Bauer.” Exceptions Brief at 11-12. Despite this failure to gather any evidence to support its claims, Nexteer now asks the Board to just assume that other employees were present, overheard (or could have overheard) Bauer, and that discipline was undermined. Respondent does not cite any authority which stands for the proposition that an employer may be excused from presenting any evidence so long as it has an interest in “not drawing further attention” to the situation.

distinguishing between cases where there is a question as to whether the other employees actually heard the outburst, because it was undisputed that other employees could hear it. Also, the language comes from *Postal Service*, 350 NLRB 441, 459 (2007) where there was evidence that two employees actually heard the remark and there was a likelihood that other employees heard the remark and others would learn of the remark. Because of these distinctions, *Starbucks* is not as helpful as the Respondent hopes.

The Respondent does not and cannot point to a single case where the Board has decided to weigh the first Atlantic Steel factor against protection where there is only the mere possibility that the conduct was overheard without any showing that other employees actually overheard it. In fact, Board precedent suggests just the opposite. In *Overnite Transportation Co. & Teamsters Local 667, Affiliated with the Int'l Bhd. of Teamsters*, 343 NLRB 1431, 1437 (2004), the outburst in question took place in work areas, on work time, and at the instigation of the employee in question. *Overnite Transportation*, 343 NLRB at 1437. However, the NLRB favored protection because there was no evidence that other employees actually heard the exchange, that production was affected, or that supervision was undermined. *Id.*

Even when there is a finding that the conduct in question was overheard by other employees, it is not necessarily dispositive in the Board's determination, and the Board may nonetheless find the conduct protected. In *Meyer Tool, Inc. & William Cannon-El III*, 366 NLRB No. 32 (Mar. 9, 2018), there was also an exchange that took place in the HR department, away from production areas. Not only did the ALJ find, and the Board affirm, that a human resources department is a "forum in which employees should be afforded greater latitude to express their views," but the opinion also found that the employee's conduct was protected despite evidence that his conduct was overheard by at least one employee. *Id.* The opinion favored protection even

though the employee said that she felt unsafe because the overall evidence showed that all of the employees in the surrounding area continued to work with their doors open, indicating that there was no actual threat. *Id.* This is consistent with Board precedent where the location weighs in favor of protection if there is “little if any risk that other employees” heard it, even if others did inadvertently overhear it. See *Plaza Auto Center* at 978; See also *Stanford Hotel* at 558.

The undisputed evidence shows that the meeting took place in an HR office, away from the production line, and largely behind closed doors. There is absolutely no evidence that any employee, other than the meeting attendees, actually heard Bauer’s outburst. Under Board precedent, these factors weigh heavily in favor of protection. The Respondent has not pointed to a single case where the Board has found that an employee’s conduct lost protection under the first *Atlantic Steel* factor, based on the assertion that the conduct might have been overheard by another employee, without any evidence to show that it was, in fact, overheard. For these reasons, the ALJ was correct in his finding that the first factor weighs heavily in favor of protecting Bauer’s conduct.

**ii. The ALJ correctly found that the subject matter of the discussion involved important issues related to the interests and welfare of bargaining unit employees (Exception 7).**

The ALJ found that the second *Atlantic Steel* factor weighed heavily in favor of protection based on the important workplace issues that Bauer addressed at the meeting, including: “Bauer’s allegation that supervisors were interfering with his ability to provide representation to bargaining unit employees, the employer’s frequent use of non-unit individuals to perform bargaining unit work, and safety.” D. 12:13-18. In response, Nexteer asserts that the meeting was solely to address how Bauer was “personally was being treated,” and points to the ALJ’s acknowledgment that the meeting “was called to discuss Bauer’s frustration over

Respondent's dismissive treatment of him." Exceptions Brief at 14-15. Respondent mischaracterizes the meeting.

The "dismissive treatment" that Bauer complained of was about his ability to process grievances, not because of any personal hurt feelings. Respondent goes on to imply that, even though the topics discussed in the meeting did actually move into protected content, the *reason* for calling the meeting should be determinative. Exceptions Brief at 15. This is unsupported by Board precedent and Respondent does not attempt to provide any. Respondent further implies that, since Bauer was not subject to discipline, or because, in its opinion, the meeting should not have incited such emotion in Bauer, that the subject matter of the meeting is not protected. *Id.* This contention is also without merit, and Respondent provides no authority for such an assertion.

For these reasons, Respondent's exceptions are without merit and the ALJ finding that the second *Atlantic Steel* factor weighs heavily in favor of protecting Bauer's conduct should be affirmed.

**iii. The ALJ correctly found that Bauer's conduct was not so egregious as to lose protection under the third *Atlantic Steel* factor (Exceptions 1, 2, 5, 8, 9).**

The ALJ found that the third *Atlantic Steel* factor weighed in favor of protection because, although he used "crude language," "he did not engage in any physical violence, or even touch, anyone at the December 13 meeting. He did not make a threat, either express or implied. Moreover, he did not improperly prolong the confrontation, or refuse a direction to end it." D. 12:38-42. This is consistent with precedent: "The Board has repeatedly held that strong, profane, and foul language, or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity." *United States Postal Serv. & Am. Postal Workers Union, AFL-CIO, Portland Oregon Area Local*

128, 364 NLRB No. 62 (citing *Hawaii Tribune-Herald*, 356 NLRB 661, 680 (2011), enfd. 677 F.3d 1241 (D.C. Cir. 2012; accord *Noble Metal Processing, Inc.*, 346 NLRB 795, 799 (2006)). Indeed, “a certain amount of salty language and defiance” is to be expected and “must be tolerated” in disputes over employees' terms and conditions of employment. *Id.* (citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. mem. 953 F.2d 1384 (6th Cir. 1992)). This is especially true when there are no real threats of violence. Knowing this, Respondent, again, attempts to re-describe the events of the meeting to paint Bauer as threatening and violent. However, as the ALJ found, Respondent simply did not act consistently with an employer that had genuine concerns about workplace violence, or even in accordance with its own policies regarding how those accused of threatening or violent behavior should be treated. D. 12:42-49.

After the meeting, Bell, an experienced HR professional “didn’t know what to do.” Tr. 82 (Bell). She and Taylor did not call security or the police. Tr. 93 (Bell), 127-128 (Taylor). They did not suspend Bauer pending an investigation. Tr. 93 (Bell), 128 (Taylor). Instead, Bell called HR Manager Pruitt. They scheduled a follow up meeting for the same day with Bell, Pruitt, HR Director of North America Tony Bierman, and in-house counsel Tamika Frimpong. Tr. 82 (Bell). Together, they decided not to call security or the police and not to suspend Bauer pending an investigation, Tr. 183 (Pruitt), as the typically would when an employee is suspected of workplace violence or threatening behavior. Tr. 39 (Bauer), 66-67 (Frost). In fact, Pruitt testified that, based on his understanding of the situation, he did not think that Bauer was an immediate danger to himself or others. Tr. 186 (Pruitt). Accordingly, the HR professional, the HR Manager, the HR director, and the company lawyer decided to allow Bauer to continue to continue to work in the facility (for several days) so that they could “continue investigating.” Tr. 83 (Bell).

This is a glaring inconsistency in Respondent’s story, which the ALJ correctly observed. Respondent’s brief does nothing to address this inconsistency and instead opts for quibbling with the ALJ’s factual findings.<sup>2</sup> Respondent attempts to distinguish several cases upon which the ALJ relies to find that the third factor weighs in favor of Bauer. However, underlying each of those attempted distinctions is the false premise that Bauer acted in a violent or threatening manner. The ALJ clearly rejected this premise.

Further, Respondent argues that the ALJ erred by not considering Bauer’s previous disciplinary record in his analysis of the third *Atlantic Steel* factor. This is simply not true. The ALJ considers Bauer’s employment history and construes it against Respondent’s version of the facts. After noting that Respondent did not act as if it perceived Bauer’s actions as a genuine threat, the ALJ added, “This is not surprising given that Bauer, during his 8 years with the company, had sometimes been verbally volatile, but had never been known to be violent.” D. 12:45-47. As the ALJ recognized, “The Respondent has no information indicating that Bauer had ever been physically violent.” D. 5:12-13.

For these reasons, the ALJ was correct in finding that Bauer’s conduct was not so egregious as to lose protection under the third *Atlantic Steel* factor. In fact, based on the evidence, the testimony, and past Board decisions, the ALJ could have easily found that this factor weighed heavily in favor of protection.

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<sup>2</sup> It is well established that Board policy is to attach “great weight” to a Trial Examiner's credibility findings insofar as they are based on demeanor, and to not overrule a Trial Examiner's resolutions as to credibility except where the “clear preponderance of all the relevant evidence” shows that the Trial Examiner's resolution was incorrect. *Standard Dry Wall Prod., Inc.*, 91 NLRB 544, 545 (1950). Respondent’s objections amount to little more than disagreements with the ALJ’s conclusions.

**iv. The ALJ correctly found that Bauer’s conduct did not lose protection under the Act and, therefore, Respondent violated the Act by terminating him (Exceptions 10, 11).**

As the ALJ noted, while the fourth *Atlantic Steel* factor looks at whether misconduct was provoked by the employer’s unfair labor practices, the analysis is not limited to circumstances where the alleged provocation is actually an unfair labor practice. D. 14:39-40. The fourth factor can also weigh in favor of protection where the employer demonstrated an intent to interfere with protected rights or escalated the confrontation. D. 14:40-15:3 (citing *Meyer Tool, Inc.*, 366 NLRB no. 32, slip op. at 13; *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007); *Overnite Transportation Co.*, 343 NLRB 1431, 1438 (2004)).

Provocation can exist, even absent an unfair labor practice, as long as the employer’s conduct demonstrates an intent to interfere with protected rights. *Network Dynamics Cabling, Inc.* at 1429. Taylor was aware that the purpose of the meeting was to address Bauer’s concerns that his attempts to exercise protected rights were being dismissed. Even with this knowledge, Taylor decided to continue this pattern of dismissiveness. As Bauer was attempting to address safety concerns on behalf of unit members, Taylor disregarded his efforts completely by saying “this is why we can’t get anything done on third shift; he’s just so hostile.” Tr. 35-36 (Bauer). D. 12:30-31. This statement, coupled with Bauer’s previous treatment by management and the unproductiveness of the meeting meant to address those issues, was the final straw for Bauer. By trivializing Bauer’s concerns in the December 2017 meeting after weeks of hostile and dismissive treatment, the Respondent provoked Bauer into making a brief outburst out of frustration. The ALJ did recognize that Bauer was at least partially provoked, but found lightly in

favor of the Respondent because the Respondent's conduct was not proven to be an unfair labor practice at the hearing. D. 15:15-16.

Aside from giving a very close decision in favor of the Respondent for the fourth *Atlantic Steel* factor, the ALJ weighed the first two factors strongly in favor of protection, and the third in favor of protection. D. 15:18-24. The ALJ recognized that the three factors favoring retention of protection outweigh the one factor marginally favoring forfeiture. *Id.* When viewed as a whole, the *Atlantic Steel* factors weigh strongly in favor of protection and the ALJ's decision should be upheld.

## V. CONCLUSION

Having shown that the Respondent's exceptions to be meritless, the Union respectfully requests that the Board reject the exceptions and affirm the Administrative Law Judge's decision.

Respectfully Submitted,

LOCAL 699, INTERNATIONAL UNION,  
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Dated: February 19, 2019

## CERTIFICATE OF SERVICE

I, Stuart Shoup, hereby certify that I caused a true and correct copy of the foregoing Response to Respondent's Exceptions and Supporting Brief to be e-filed with the NLRB, and served via email on the following parties on the date below:

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Dated this 19th day of February, 2019

    /s/ Stuart Shoup      
Stuart Shoup