

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

NEXTEER AUTOMOTIVE CORP.	)	
	)	
and	)	
	)	Case No. 07-CA-215036
LOCAL 699, INTERNATIONAL UNION,	)	
UNITED AUTOMOBILE, AEROSPACE	)	
AND AGRICULTURAL IMPLEMENT	)	
WORKERS OF AMERICA (UAW), AFL-CIO	)	

**RESPONDENT’S REPLY BRIEF TO THE GENERAL COUNSEL AND  
CHARGING PARTY’S ANSWERING BRIEFS TO RESPONDENT’S EXCEPTIONS**

Respondent Nexteer Automotive Corp. (“Respondent” or “Nexteer”), by its undersigned counsel and pursuant to Rule 102.46(e) of the Board’s Rules and Regulations, respectfully submits this Brief in Reply to the Counsel for the General Counsel’s Answering Brief in Response to Respondent’s Exceptions to the Decision of Administrative Law Judge (“ALJ”) Paul Bogas and Charging Party’s Response to Respondent’s Exceptions and Supporting Brief (collectively “the Answering Briefs”).

The Answering Briefs contain multiple erroneous statements of facts and application of the law, several of which Respondent highlights below. Specifically, the Answering Briefs incorrectly: 1) claim that this was a case of mere profanity for which leniency should be granted; 2) attempt to rely on the fact that Joshua Nuffer Bauer (“Bauer”) was not immediately suspended to downplay the severity of the misconduct; 3) assert Bauer’s status as a habitual offender, as evidenced by his lengthy discipline record, does not weigh toward credibility determinations; 4) rely on *Pier Sixty*, 362 NLRB No. 59 (2015), *enfd.* 855 NLRB 115 (2nd Cir. 2017), a social media case, in support of their position; and 5) claim Area Manager Benny Taylor’s (“Taylor”) behavior was a contributing factor in this case.

The Board should reject these assertions where they are without support in the record, other than the ALJ's erroneous decision. Instead, the Board should properly find merit in Respondent's Exceptions and should dismiss the Complaint.

### ARGUMENT

#### **I. Bauer Engaged in Hostile, Violent Behavior, Not Merely Profanity and the Answering Briefs' Reliance on Profanity Cases is Misplaced**

In characterizing Bauer's behavior in this case, the Answering Briefs both attempt to paint this as a case involving some limited profanity and nothing else; however, in so doing, they ignore the testimony presented at hearing. The General Counsel summarized the incident as "Bauer stood up, stated 'really, Benny, go fuck yourself,' passed between Taylor and the desk, and walked out the door which had just been opened by Bell." (GC Ans.<sup>1</sup> 8-9). Similarly, Charging Party characterized the incident as "'Bauer got out of his chair and said, this meeting's over. Really, Benny, go fuck yourself.' Bell then opened the door and asked Bauer to leave the office." (CP Ans. 7). The Answering Briefs ignore the testimony presented at hearing – namely that Bauer stood over Bell while repeatedly yelling, "Fuck you." As the testimony demonstrated, Bauer stood up from his chair so he was standing over Taylor, pointing and saying, "Fuck you, fuck you, Benny, fuck you, Benny Taylor." (Tr. 80, 94, 130-131). Taylor had to lean back to get out of Bauer's away to avoid physical contact from Bauer. (Tr. 80, 97, 100, 110). This continued to the point where Bauer was standing over Taylor in a menacing manner, a mere twelve to sixteen inches

---

<sup>1</sup> References to the General Counsel's Answering Brief will be "GC Ans. \_\_\_" followed by the page number and Charging Party's Answering Brief will be "CP Ans. \_\_\_" followed by the page number. ALJ's Decision are identified by the letter "D" followed by page and line number, e.g., "D. \_\_\_:\_\_\_." References to the hearing transcript will be "Tr." followed by the appropriate page number. General Counsel exhibits, Union exhibits, and Respondent exhibits will be similarly referenced "GC Ex.," "U. Ex.," or "R. Ex." followed by the exhibit number. The Complaint is referenced as "Compl." followed by the appropriate paragraph number.

away from Taylor. (Tr. 82). Taylor was concerned Bauer might “do something” based on his demeanor and even put his hands up in defense. (Tr. 110, 115).

In support of their position, General Counsel and Charging Party contend that Bauer was only profane and wholly ignore the physical conduct of Bauer, where he stood over Taylor while yelling profanities. Charging Party contends that “‘a certain amount of salty language and defiance’ is to be expected and ‘must be tolerated.’” (CP Ans. 19, *citing Severance Tool Industries*, 301 NLRB 1166, 1170 (1991)). This wholly ignores the testimony of both Taylor and Human Resources Partner Allison Bell (“Bell”) who testified that Bauer acted aggressively and with hostility, standing over Taylor, inches away.

Similarly, the General Counsel points to an incident where a human resources generalist used profanity during a grievance meeting as evidence that “swearing by employees and management occurs at the facility on a daily basis and employees are rarely discipline for such vulgarities.” (GC Ans. 4). While profanity may be used at the plant during employee and supervisory interactions, Bauer did not only engage in profanity. Instead, Bauer coupled his profane outburst with aggressive and threatening behavior. The General Counsel and Charging Party’s attempt to paint this as a case where Bauer engaged in simple profanity while calmly discussing an issue with his supervisor. The evidence establishes that was not the case. Bauer stood over Taylor, pointing his finger, while yelling profanities. This is hardly comparable to the use of profanity while sitting across a table from someone during a generally civilized conversation.

The Board must consider all of the evidence presented in reviewing Bauer’s conduct – not just the evidence presented by Bauer who has a self-serving interest in downplaying his actions. The Answering Briefs’ attempts to paint a more positive picture must be rejected.

## **II. The Fact that Bauer was Not Immediately Suspended Did Not Downplay Severity of Conduct Where Respondent was Required to Exercise Due Diligence**

Charging Party's Answering Brief contends there is an inconsistency in Respondent's actions because Respondent "decided to allow Bauer to continue to work in the facility (for several days) so they could 'continue investigating.'" (CP Ans. 19). General Counsel's Answering Brief similarly implies that because "[m]anagement did not call for security or police nor did it suspend Bauer pending investigation," Respondent did not take Bauer's actions seriously. (GC Ans. 9). In so doing, both the Charging Party and General Counsel fail to appreciate the implications of Respondent's actions in this case. This was not the discipline of a run-of-the-mill employee. Bauer was a Union steward with a history of misconduct and a prior Board case. Respondent had to be circumspect and exercise due diligence in making the decision to terminate Bauer. It was not a decision that could be taken lightly. As Bell testified, she did not immediately suspend Bauer because she wanted to ensure that she handled the situation appropriately given Bauer's Union position. (Tr. 82). Moreover, the fact that Respondent did not fear continued violence from Bauer (not believing he would initiate violence days later), did not undermine his hostility during his discussion with Bell and Taylor or otherwise excuse his misconduct.

The Board should not discount the seriousness of Bauer's actions merely because Nexteer was cautious in its actions and wanted to ensure that it acted in accordance with the National Labor Relations Act ("the Act") prior to disciplining a Union steward.

## **III. The Assertion Bauer's Disciplinary History Must be Ignored is Erroneous and Must be Rejected**

General Counsel's Answering Brief encourages the Board to accept Bauer's version of the events in question because the Board should not overrule an ALJ's credibility resolutions; however, in so doing, the General Counsel (and the ALJ) ignored Bauer's discipline history and

his propensity for aggressive and improper behavior. It is not difficult to believe that Bauer engaged in behavior as alleged by Bell and Taylor when his entire record is considered. It is undisputed that, since Bauer began working at Nexteer in 2011, he has had a history of insubordinate and profane outbursts toward supervisors. In fact, prior to the instant occurrence, Bauer had three different incidents where he hurled profanities or made inappropriate statements to supervisors. In resolving the disputes between the testimony of Bell and Taylor with Bauer, Bauer's past conduct demonstrates that he has a propensity for improper behavior. Bell and Taylor's testimony regarding the incident is consistent with Bauer's character, as demonstrated by his repeated poor behavior.

The General Counsel attempts to paint the incident at issue in the same light as his prior discipline, incidents for which Bauer received a lesser level of discipline. Despite these efforts, the evidence is clear that in the incident leading to his termination in December 2017, Bauer was more hostile and violent than his prior interactions. Bauer's discipline history demonstrates Bauer repeatedly used profanity toward supervisors, ignored Nexteer's procedures and standards, and engaged in inappropriate and unacceptable behavior. In the instant case, he escalated his usual profanity laden outburst with threatening actions. Despite the General Counsel's urging to the contrary, the Board should not ignore Bauer's discipline history when reviewing Bauer's actions. Bauer's conduct, as described by Bell and Taylor, is completely in line with his character as demonstrated by his history. Whether Bauer's disciplinary history can be used for purposes of progressive discipline under the terms of the collective bargaining agreement is an issue for an arbitrator to consider. (GC Ans. 16). That does not preclude the Board from considering Bauer's character when determining whether Bauer engaged in the threatening behavior as alleged.

#### **IV. The General Counsel's Continued Reliance on *Pier Sixty* is Misplaced**

Despite the apparent differences between the facts of Bauer's misconduct and that examined in *Pier Sixty, LLC*, 362 NLRB No. 59 (2015) as set forth in Respondent's Exceptions, the General Counsel double downs on this case in support of its position. As set forth in more detail in Respondent's Exceptions, *Pier Sixty* is clearly distinguishable where the employee in that case used profane language on social media. While the language was directed toward a supervisor, the profanity alone, stated on social media while away from work, is far less threatening than that engaged in by Bauer. The General Counsel contends the behavior in *Pier Sixty* was, in fact, more egregious than Bauer's because it was "much more volatile and visible to co-workers." Apparently, the General Counsel relies on the use of capital letters in *Pier Sixty* to demonstrate volatility but nonetheless asks the Board to ignore Bauer's volatility – his loud profane outburst, standing over Taylor, and pointing. (Tr. 79-80, 109). Bauer's outburst occurred within Taylor's personal space. This is hardly less offensive than a "yelled" social media post. The General Counsel's Answering Brief continues to ignore that Bauer engaged in misconduct more than just the mere use of profanity. The Board should consider all facets of Bauer's misconduct to determine his behavior was so opprobrious as to lose the Act's protection. The Board should ignore the General Counsel's urging to apply a social media standard to this case. Bauer engaged in a face-to-face altercation with his supervisor, using language almost as offensive as that used in *Pier Sixty*, and was openly hostile. Under the authorities cited in Respondent's Exceptions, this misconduct was sufficiently serious to take Bauer outside the protections of the Act.

#### **V. The Answering Briefs Erroneously Assert Taylor Contributed to Bauer's Misconduct**

Charging Party's Answering Brief claims the ALJ properly determined Taylor provoked Bauer's outburst based on his actions, weighing toward protection for Bauer's actions. Charging

Party fails to state any additional basis for the claim Taylor provoked Bauer other than Taylor's statement, "this is why we can't get anything done on third shift; he's just so hostile." (CP Ans. 21). This hardly rises to the level of provocation as required under the Act. For instance, in *Roemer Industries, Inc.*, 362 NLRB 828 (2015), the Board found provocation (where there was no threat, no violence, and no aggression but only name calling of a "backstabber" and "someone not to be trusted" to another employee) by the managers' direction that union representatives could not speak to union members. When the managers' conduct in *Roemer Industries* is compared to the employee's outburst, it is apparent the managers' actions were more egregious than the employee's were. That is not the same in the instant case.

Bauer's actions far outweighed any claimed "provocation" by Taylor. Taylor did not commit an unfair labor practice. Instead, he pointed out that Bauer's frequent outbursts (as evidenced by his prior disciplinary record) interfered with productivity in meetings. The fourth factor of *Atlantic Steel*, 245 NLRB 814, 816 (1979) asks whether the employee's actions were "provoked by the employer's unfair labor practices." Taylor's statement in no way constitutes an unfair labor practice. Even if a lower standard were acceptable, Taylor's statement comes nowhere close to "provocation" for purposes of Bauer's outburst. Charging Party's Answering Brief cites *Network Dynamics Cabling, Inc.*, 351 NLRB 1423 (2007) in support of its claim that "[p]rovocation can exist, even absent an unfair labor practice, as long as the employer's conduct **demonstrates an intent to interfere with protected rights.**" (CP Ans. 21). Taylor's comment, even if flippant, was merely an expression of his frustration with Bauer's frequent outbursts that stifled discussion. He did not state that he would not work with Bauer any longer or that Bauer was not free to continue acting as Union committeeman. It can hardly be said that Taylor provoked Bauer by a single statement. Charging Party contends Taylor's statement – coupled with his

treatment on prior occasions – “was the final straw for Bauer.” (Id.). In so doing, Charging Party implicitly acknowledges Bauer snapped. Despite Taylor’s comment, Bauer was not entitled to get hostile and aggressive. The standard established by the Board in *Atlantic Steel* does not extend protection to any conduct in response to a statement with which an employee takes offense. Instead, the conduct must be so egregious as to rise to the level of an unfair labor practice or an intention to interfere with protected rights. Taylor’s comment was neither.

The attempt to place the blame for Bauer’s actions on Taylor must be rejected. Taylor’s comment did not excuse Bauer’s actions or otherwise lead to protection. Charging Party’s claims to the contrary must be rejected.

### **CONCLUSION**

Given the facts and legal authorities applicable to this matter, the portions of the ALJ’s Decision excepted to by Respondents should be reversed.

Respectfully submitted,

By: /s/ Kim F. Ebert  
OGLETREE, DEAKINS, NASH,  
SMOAK AND STEWART, P.C.

Kim F. Ebert, Esquire  
Sarah M. Rain, Esquire  
111 Monument Circle, Suite 4600  
Indianapolis, IN 46204  
317.916.1300 (phone)  
317.916.9076 (fax)

Counsel for Respondent

Dated: March 5, 2019

