

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C. BRANCH OFFICE**

LION ELASTOMERS LLC

Respondent

and

**Cases 16-CA-190681
16-CA-203509
16-CA-225153**

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, LOCAL 228**

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

**Bryan Dooley
Counsel for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102**

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I. STATEMENT OF THE CASE

This case centers on Respondent's decision to discharge employee Joseph K. Colone, Sr., a longtime elected Union official, because of grievance activity he engaged in on behalf of bargaining unit employees. Respondent has offered no alternative rationale for its decision to discharge Colone.

This brief will begin by presenting a statement of the relevant facts. The brief will then establish that Respondent engaged in unlawful conduct including threatening Colone with discharge because of his Union activity, disciplining Colone because of his protected concerted activity during a July 2017 meeting, and ultimately firing Colone because of his protected grievance activity.

II. STATEMENT OF FACTS

A. Respondent's Operations

Respondent operates a rubber manufacturing plant in Port Neches, Texas. (Tr. 33, LL. 13-20). Prior to Respondent, the plant was operated by a series of predecessor employers. (Tr. 70, LL. 3-7). The Port Neches plant employs about 207 people, including about 90 members of the bargaining unit represented by the Union. (Tr. 33, LL. 21-25; 71, LL. 17-19). The number of bargaining unit employees has decreased by roughly half over the past two decades, leading to increased overtime due to lack of manpower. (Tr. 71, LL. 8-19).

B. Joseph Colone's Employment History

Joseph K. Colone, Sr., often referred to as "KC," was employed at the Port Neches plant from January 1977 until he was discharged on June 8, 2018. (Tr. 68-69, LL. 19-2; GC. Exh. 7). At the time of his discharge, Colone worked as a Pigment/Soap Senior Tech Operator. (Tr. 69, LL. 3-5). Besides two warnings for production related incidents on August 14, 2017, and October 20, 2017, Colone had a good work record¹. Ultimately, Colone was discharged for his conduct in his role as a Union representative and not for any performance related problems.

Over the last sixteen years of his employment, Colone has been elected to serve multiple terms as Group Chairman and Committeeman for the Union. (Tr. 72-74, LL. 4-4). As Group Chairman, Colone consulted on behalf of the bargaining unit with the Union's executive board and with representatives of employees of other employers also represented by the Union. (Tr. 72-73, LL. 18-19). As one of five committeemen, Colone participated in contract negotiations and was responsible for policing the contract and addressing grievances. (Tr. 73-75, LL. 20-21). Elections

¹ On November 7, 2017, a soap line on which Colone was working became plugged, but Colone was not disciplined for that incident (Tr. 62, LL. 15-22).

for these positions were held every two years. (Tr. 72, LL. 16-17; 74, LL. 7-8). In the most recent election prior to Colone's discharge, he was the only incumbent committeeman to win reelection. (Tr. 75-76, LL. 24-13). Colone filed a substantially larger number of grievances than other committeemen. (Tr. 76, LL. 14-17). Staffing levels and related safety concerns were a frequent subject of these grievances. (Tr. 77, LL. 5-19).

C. The October 24, 2016 Threat

On October 24, 2016, Colone was called into a meeting by James Mosley and Tony Wisenbaker. (Tr. 77-78, LL. 20-10). Colone's understanding was that the meeting was related to an ongoing wage and hour dispute regarding donning and doffing, and that company representatives from Louisiana would be present. (Tr. 78-79, 14-19). Colone asked the other committeemen if they were aware of the meeting, and none were. (Tr. 78, LL. 14-16). He asked Committeeman Mark Vickers and Union Scribe Robert Griggs, who were working at the time, to attend with him. (Tr. 78, LL. 14-25). The three men reported to the administrative conference room, where Wisenbaker and Mosley were present. (Tr. 79, LL. 2-21).

When the meeting began, it immediately turned to grievances Colone had filed related to staffing levels and Respondent's use of subcontractors, rather than newly hired forklift drivers, to work scheduled overtime. (Tr. 80, LL. 5-19). The staffing issues related to Respondent's plans to automate and reduce staffing in the pigment area, which Colone adamantly opposed because he believed it would result in additional work for the remaining employees in the area and potential safety issues. (R. Exhs. 5, 42; Tr. 409-424, LL. 23-17). Mosley and Wisenbaker wanted Colone to drop his grievances, but Colone refused. (Tr. 80-82, LL. 22-13). This led to an increasingly heated exchange between Mosley and Colone, with Mosley accusing Colone of hurting the Union

and Colone accusing Mosley of hurting the Union, the plant, and the surrounding community. (Tr. 82-83, LL. 15-6).

The exchange culminated with Mosley pointing at Colone and saying, “you ain’t gonna make it.”² (Tr. 83, LL. 7-10). Colone interpreted this as a threat to his employment.

Colone responded that he had been “making it” for 39 years and that Mosley should watch how he spoke to him. (Tr. 83, LL. 11-23). Colone then signed the forms indicating the grievances had not been resolved, and returned to work. (Tr. 83-84, LL. 13-10).

Colone filed a grievance regarding Mosley’s statement and reported it to HR. (Tr. 84, LL. 11-15). Griggs confirmed to Lord that Mosley had made the statement alleged by Colone.³ (Tr. 332, LL. 10-19; 364, LL. 7-17). At the time, Griggs explained to both Colone and to Lord that he did not know what Mosley meant by the statement, but that he did not see it as a threat because he did not believe Colone had any reason to be concerned about losing his job. Griggs reasoned that Colone “had a lot going for him—his work performance and his status as a union official—that would protect him from being terminated.” (Tr. 363, LL. 3-7; 375, LL. 3-10). Griggs also acknowledged during the hearing that he did not want to be involved in this dispute and did not want to see

² Griggs and Wisenbaker were present during this exchange; Vickers had left the meeting prior to the exchange. (Tr. 356, LL. 22-25).

³ Lord’s notes indicate she spoke to Griggs about the meeting on at least three occasions; on November 3, 2016, January 17, 2017, and January 18, 2017. (R. Exh. 32). It is not clear whether all of the notes presented as Respondent’s Exhibit 32 were based on conversations with Griggs. There are two sets of notes dated January 17, 2017, for example, and Griggs testified that only portions of the notes appeared to reflect things he had said to Lord. (R. Exh. 32; Tr. 370-71, LL. 9-11). Some portions of the notes refer to Griggs in the third person. (R. Exh. 32 at 001585-001587). Other portions of the notes appear to reflect Lord’s personal conclusions rather than anything that was said, such as the portion including the phrase “it’s [sic] sounds like KC was the aggressor,” which Griggs testified is not something he said. (R. Exh. 32 at 001595; Tr. 373, LL. 11-17). Lord’s notes indicate that the first time she asked about the specific statement “you’re not going to make it” was on January 18, 2017. (R. Exh. 32 at 001595). This was after the charge in Case 16-CA-190681 had been filed, and after Lord met with Colone for the first time to discuss the situation in early January 2017. (GC Exh. 1(a); Tr. 84-85, LL. 17-21).

anyone, including Mosley, disciplined as a result of the meeting. (Tr. 364, LL. 18-21; 374, LL. 19-24). Griggs testified that his initial impression of Mosley's statement has changed, as Respondent did ultimately fire Colone. (Tr. 375, LL. 19-25).

Mosley testified that although the meeting was heated and both he and Colone were speaking loudly, Colone never stood over him or acted in an aggressive or intimidating manor, and there was no name calling on either side. (Tr. 430, LL. 3-14). At one point, Mosley stood up to leave the meeting because he did not feel he was getting anywhere with Colone, but Wisenbaker stopped him and told him to stay. (Tr. 431, LL. 14-19). Mosley testified that at this point, he "started talking about the weather, what day it was, trying to ramble loud just to drown [Colone] out." (Tr. 431, LL. 20-22). Mosley testified that he did not threaten Colone's job, and that anything he said about "making it" was in reference to Colone not making the situation any better or not making it any better for the Union. (Tr. 433, LL. 5-17). Wisenbaker testified that he did not recall Mosley making any reference to Colone "making it." (Tr. 477, LL.1-2).

D. The April 3, 2017 warning letter

On March 22, 2017, Colone filed a grievance regarding staffing on the reactors. (GC Exh. 3; Tr. 86-87, LL. 9-2). Specifically, Colone learned from a co-worker that Respondent had not staffed the reactor units with a start-up operator. *Id.* Based on this, Colone believed that the employees operating the reactors would be required to perform the start-up functions. Colone believed that the burden of performing these new duties, coupled with the normal work involved in operating the units, could compromise their ability to operate safely. (GC Exh. 3, Tr. 86-87, LL. 20-8). On the grievance, Colone identified two employees who worked in the area as those whom he believed would be required to perform the additional work. (GC Exh. 3, Tr. 87, LL. 4-18). Shortly after filing the grievance, Colone learned that the employees he had identified had

not been required to multi-task, and that a superintendent had instead performed the start-up work. (GC Exh. 4, Tr. 87, LL. 14-18). Based on this information, on March 23, 2017, Colone voided the grievance he had filed, wrote an apology note to management regarding his being misinformed, and filed a new grievance on behalf of unit employees which more generally alleged that the area was unsafe because it was understaffed. (GC Exhs. 3-5; Tr. 87-88, LL. 21-15).

On April 3, 2017, Lord issued Colone a letter with the subject line “Re: Grievance Processing.” (GC Exh. 2). The letter stated that because Colone had discovered his error “before disciplinary action could be taken,” the letter would not be considered a formal reprimand. *Id.* The letter warned Colone to be cautious going forward about “what [he] say[s] in these grievances.” It continued, “[i]n a worst case scenario, your actions could be viewed as a direct fabrication or falsification, which would be grounds for termination.” *Id.* The letter then turned to Colone’s conduct in the processing of the replacement grievance filed on March 23, 2017. *Id.* Specifically, the letter noted that Colone asked Mosley three times, “in [his] usual argumentative tone,” whether the parties had an agreement on staffing levels; suggested Mosley might have amnesia; and stated that “people in the position of leadership have no integrity.” *Id.*

The letter stated that similar conduct in the future could be considered a violation of company policy and grounds for discipline. *Id.* The letter specifically cited the following plant rules:

#2- ...disrespect of your supervisor(s)⁴

#8 – Behavior, threats...or conduct that creates an intimidating, hostile, or offensive working environment⁵

⁴ The full text of this rule reads: “Insubordination, abuse, or disrespect of your supervisor(s) or failure to follow the legitimate instructions of your supervisor(s) or site security.” (R. Exh. 2).

⁵ The full text of this rule reads: “Behavior, threats or other indecent, inappropriate or obscene conduct that creates an intimidating, hostile, or offensive working environment.” (R. Exh. 2).

#10 – Falsifying, providing false information...or other Company report. This includes misrepresentation through omission⁶

#14 – Actions of an employee that bring into disrepute the image or reputation of LION ELASTOMERS or its employees.

Id.

E. The July 12, 2017 Safety Meeting

On July 12, 2017, Safety Manager Brad Dead led a regular monthly safety meeting attended by employees working C Shift, including Colone and co-workers Jonathan Bailey and Sherman McCray. (Tr. 15, LL. 12-23; 89, LL. 12-24). After a discussion of the previous month's safety incidents, the meeting turned to open discussion. (Tr. 17-18, LL. 16-6). During open discussion, employee Chris Cleary brought up the fact that he had been forced to work past the maximum amount of overtime allowed by company policy.⁷ (Tr. 18, LL. 16-24). Dean initially indicated that he did not believe Cleary. (Tr. 19, LL. 11-12). This prompted Bailey to mention that he, too, had been required to work past 73 hours, and Dean again responded that he did not believe it. (Tr. 19, LL. 12-18). This prompted several other employees to speak up and state that it had happened to them as well. (Tr. 19, LL. 20-24).

Dean responded by stating that the company was discussing moving to a maximum of 84 hours. (Tr. 20, LL. 1-2). This prompted additional complaints from the group of employees. (Tr. 20, LL. 4-8).

⁶ The full text of this rule reads: "Falsifying, providing false information, or causing others to falsify a Company record, work document, information on an application for employment, job resume, medical history form, attendance & overtime report, time sheet/card or electronic time keeping/payroll system, process documentation or log, laboratory documentation or other Company report. This includes misrepresentation through omission." (R. Exh. 2)

⁷ At the time of the meeting, company policy allowed for employees to be compelled to work 25 hours of overtime in addition to a regular 48-hour work-week, for a total of up to 73 hours. (Tr. 18-19, LL. 25-5).

At this point, Colone began questioning Dean. First, Colone questioned whether Dean was aware of the heat conditions in the workspace. Second, Colone questioned whether the company would be liable if an exhausted employee was injured traveling to or from work. (Tr. 20-21, LL. 10-8). Unsatisfied with Dean's evasive responses, Colone repeated his liability question three times. (Tr. 21, LL. 3-8; 24, LL. 5-17). Colone remained seated and was calm throughout this exchange. (Tr. 21, LL. 9-16). Dean's account of the meeting was generally consistent with that of other witnesses who testified. (Tr. 386-92; LL. 24-15).

On July 20, 2017, Respondent issued Colone a verbal warning for his conduct during the meeting. (GC Exh. 6). Referring to the April 3, 2017 warning letter discussed above, the July 20, 2017 verbal warning, stated that Respondent had previously cautioned Colone about his "actions pertaining to use of inflammatory and insulting language which inhibits our attempts to create a cooperative working relationship and atmosphere." *Id.* The verbal warning stated that Colone, at the July 12, 2017 meeting, had "exhibited that same unacceptable conduct with a line of questioning that was provoking, misleading, and inappropriate." *Id.* The verbal warning also stated that Colone had been warned in the April 3, 2017 letter about providing fabricated and false information, and that statements he had given to management conflicted with statements from "other employees who attended the meeting."⁸ *Id.*

F. November 13, 2017 Harassment Grievance

On November 13, 2017, Colone filed a grievance alleging a slanderous comment had been made over radio. (GC Exh. 9). Specifically, Colone filed this grievance after he heard a voice he

⁸ Respondent has not at any point elaborated on the nature or substance of these asserted conflicts. Respondent's counsel at several points asked questions related to an exchange between Colone and McCray during the meeting and an exchange between Colone and Dean after the meeting, neither of which is referenced in Colone's disciplinary notice. Dean was disciplined in relation to his conversation with Colone after the meeting ended. (Tr. 394, LL. 3-11).

believed to belong to James Mosley suggest over the radio that employees were sabotaging equipment after a malfunction was identified. (Tr. 102-03, LL. 8-25).⁹ Respondent accuses Colone (discussed below) of engaging in misconduct by the filing of this grievance on the grounds that Mosley denies making the comment. Mosley denied making the comment, but did not deny that someone had made the sabotage accusation over the radio as alleged in the grievance. (Tr. 443, LL. 16-24).

G. February 15, 2018 Grievance on Behalf of Wilbert Butler

On February 15, 2018, Colone filed a grievance on behalf of employee Wilbert Butler. (GC Exh. 10). The grievance concerned a heated confrontation between Butler and Warehouse Supervisor Randy Watson. (Tr. 105, LL. 16-21). Colone filed the grievance based on his conversations with Butler and another employee, Larry Burton. (Tr. 108, LL. 12-15). In the grievance, Colone stated that Watson had created a hostile working environment by accusing Burton and Butler of loading the wrong truck, and by escalating the argument after Butler disagreed and tried to walk away. (GC Exh. 10). As the requested remedy, Colone wrote: “Everyone is working hard and a lots [sic] of hours in shipping. We all make mistakes Watson and the workers. Both men or [sic] at fault, be men and apologize to each other, and move on. Be more professional.” Id. As discussed below, Respondent would later accuse Colone of fabricating the Union’s claims, but the record demonstrates only that the parties disagreed about what occurred that day.

⁹ Colone had previously filed a grievance in September 2017 regarding being accused of sabotage after an engineer made a remark that issues always seemed to arise while Colone was working. (R. Exh. 49). After speaking to the individuals involved, Mosley concluded the comment had been made, but that it had not been intended to suggest Colone was intentionally causing the issues. Id.

H. March 23, 2018 Grievances on Behalf of Christopher Granlee

On March 23, 2018, Colone filed three grievances in relation to the discharge of employee Christopher Granlee, centering on the issue of whether Granlee should be considered a permanent or probationary employee after an extended injury-related absence. (GC Exhs. 7, 11-13; R. Exh 28; Tr. 309, LL. 13-18). Colone attached a statement to the grievances based on his conversations with Granlee. (Tr. 113, LL. 15-17). Respondent later accused Colone of fabricating the Union's version of the facts in this grievance, however, the record demonstrates only that the parties disagreed about certain facts.

I. The June 8, 2018 Last Chance Agreement and Discharge

On June 8, 2018, Lord issued Colone a last chance agreement for "job performance."¹⁰ (GC. Exh. 7). The last chance agreement references the April 2017 warning letter to Colone as well as the July 2017 verbal warning related to the safety meeting. *Id.* It continues, "since that time, you have continued to make false accusations using inflammatory and insulting language both verbally and through submission of grievances." *Id.* It then cites four specific instances of alleged misconduct or falsification of information in violation of company policy. *Id.*

First, the agreement discusses a production incident involving a plugged soap line that occurred seven months prior, on November 7, 2017. *Id.* Colone had not been disciplined when the incident occurred. (Tr. 62, LL. 15-22). Lord acknowledged at the hearing that this incident alone would not warrant discipline. (Tr. 62-63, LL. 23-5).

¹⁰ The last chance agreement is the final step in Respondent's progressive discipline system, rather than a settlement tool negotiated to avoid a discharge, as seen in some other contexts. (Tr. 319-20, LL. 22-15). In addition to the July 20, 2017 verbal warning related to the safety meeting, Colone received two production-related written reminders on August 14, 2017, and October 20, 2017, which are not at issue in this case. (R. Exhs. 18, 23).

Second, the last chance agreement references the harassment grievance filed by Colone on November 13, 2017. (GC Exhs. 7, 9). (Tr. 102-03, LL. 8-25). The last chance agreement stated that no other witnesses had come forward to confirm that Mosley had made the statement alleged by Colone. (GC Exh. 7).

Third, the last chance agreement addresses the grievance filed by Colone on February 15, 2018, on behalf of Butler. (GC Exhs. 7, 10). The last chance agreement asserts that Colone provided false information to management because his description of the confrontation did not align with witness accounts later obtained by management; specifically, that Burton did not confirm that Wilbert had used profanity during the exchange. (GC Exh. 7; R. Exh. 38; Tr. 303, LL. 15-22).

Finally, the last chance agreement addressed the attachments Colone provided to the grievances filed on behalf of . (GC Exhs. 7, 11-13). The last chance agreement asserts that Colone's statement was contradicted by supervisors in three respects. (GC Exh. 7). First, HR Representative Cheryl Benoit denied having a conversation with Granlee related to an extended absence and retraining. (GC Exh. 7; Tr. 310-1, LL. 17-6). Second, Safety Manager Brad Dean denied that he personally issued Granlee a hard hat. (GC Exh. 7; Tr. 311-12; LL. 10-2). Third, Safety Department supervisor Si Ancelet denied making statements attributed to him regarding Granlee's status. (GC Exh. 12; Tr. 312, LL. 9-18).

The last chance agreement would have imposed a 12-month probationary period, during which he would be subject to immediate discharge during this period for violating "any of the provisions set forth in this agreement, no matter how minor the infraction may be." (GC Exh. 7). It further noted that such termination would be "considered for all purposes to be final," and that "this Agreement eliminates the just cause provision as it applies to Mr. Colone during the

probationary period.” Id. Colone refused to sign the last chance agreement and was terminated. (Tr. 69, LL. 1-2).

III. CREDIBILITY

To determine whether Respondent engaged in unfair labor practices as alleged in the Complaint, the Administrative Law Judge must make credibility determinations. The Board gives weight to the ALJ’s credibility determination as she “sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records.” *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). The ALJ may assess all aspects of the witness’s demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication.” *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078-1079 (9th Cir. 1977). Besides these evaluations, “credibility resolutions are also based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole.” *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (citing *Panelrama Centers*, 296 NLRB 711, fn. 1 (1989); *Gold Standard Enterprises*, 234 NLRB 618, fn. 4 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979); *V & W Castings*, 231 NLRB 912, 913 (1977), enfd. 587 F.2d 1005 (9th Cir. 1978)). Many of the central facts in this case are undisputed. Colone’s testimony was credible and consistent with other testifying witnesses as well as the documentary record. Bailey and Griggs were also credible, and their testimony should be afforded additional weight due to their status as current employees offering testimony adverse to Respondent. *Flexsteel Industries*, 316 NLRB 745 (1995).

IV. LEGAL ANALYSIS AND ARGUMENT

The facts above demonstrate that Respondent violated the Act as alleged in the complaint. As described below, the following section of the brief shall discuss that: (A) Respondent unlawfully threatened Colone during the October 24, 2016 grievance meeting; (B) Respondent unlawfully disciplined Colone for his questions during the July 12, 2017 safety meeting, which constituted protected concerted activity and did not lose the protection of the Act; and (C) Respondent unlawfully discharged Colone because of his union and other protected concerted activity.

A. Mosley’s statement to Colone during the October 24, 2016 grievance meeting was an unlawful threat

When Colone refused to drop his grievances, Mosely became frustrated. The two argued and Mosely told Colone, “you’re not going to make it.” Colone reasonably interpreted that statement as threatening him with job loss. See, e.g., *Overnite Transp. Co., Inc.*, 332 NLRB 1331, 1335 (2000) (employee’s future was “real iffy”); *Amptech, Inc.* 342 NLRB 1131, 1135 (2004) (company would keep its “options open”); and *Union National Bank*, 276 NLRB 84, 88 (1985) (“watch yourself”). The threat was coercive of Section 7 rights because it was made toward Colone as Colone was acting in his role as a union steward.

The circumstances of Mosley’s threat during the October 24, 2016 grievance meeting are substantially similar to those in *Covanta Bristol, Inc.*, 356 NLRB 246 (2010). In that case, a union steward and a supervisor engaged in a heated argument during a grievance meeting, during which both sides were shouting. The steward insulted management and used profanity, including telling the supervisor he needed to “get his head out of his ass” and “stop wiping the asses of his supervisors.” *Id.* at 251. The exchange culminated with the supervisor standing up, slapping a table, and shouting “You want to see intimidation? I’ll show you intimidation.” *Ibid.*

In *Covanta Bristol, Inc*, the judge rejected the employer's argument that the supervisor's statement was lawful because the steward had lost the protection of the Act. Applying *Atlantic Steel*, 245 NLRB 814, 816 (1979), the judge found that the steward's conduct remained protected. *Id.* at 254. The Judge further noted that even if the steward had lost the protection of the Act, another employee who was present at the meeting and witnessed the statement certainly had not. *Ibid.*

The Board majority agreed with the judge that the supervisor's statement constituted an unlawful threat, but found the *Atlantic Steel* analysis to be unnecessary. *Id.* at 247 fn. 1. The Board found that even if the statement had been provoked by the steward's insulting remarks, which were made in the course of his performance of his duties as a steward, the threat was not limited to addressing the steward's offensive remarks. *Ibid.* Thus, both the steward and the other employee present at the meeting would reasonably have understood the statement as a threat of retaliation for engaging in protected union activity. *Ibid.*

Here, there is no evidence that Colone used profanity or engaged in any other insulting conduct toward Mosley or Wisenbaker. The two simply engaged in a heated conversation related to pending grievances, and Colone steadfastly refused to drop them. Mosley's statement that Colone was not going to make it, made in the presence of another employee, Griggs, would reasonably have been construed as a threat to retaliate against him because of his protected union activity.

B. Respondent unlawfully disciplined Colone for his conduct during the July 12, 2017 safety meeting

i. Colone’s questioning of Dean during the July 12, 2017 safety meeting was protected concerted activity.

The governing standards for determining whether an activity is concerted are set forth in the Board's decisions in *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); and *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In *Meyers I*, the Board held that “[i]n general, to find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” 286 NLRB at 497. In subsequent decisions, the Board has applied these standards to situations involving individual employees speaking in the presence of co-workers to address work-related questions or complaints. See, e.g., *Whittaker Corp.*, 289 NLRB 933 (1988); *Caval Tool Division, Chromalloy Gas Turbine Corp.*, 331 NLRB 858 (2000), enfd. 262 F.3d 184 (2d Cir. 2001); *Alstate Maint., LLC*, 367 NLRB No. 68 (N.L.R.B. Jan. 11, 2019) (overruling *WorldMark by Wyndham*, 356 NLRB 765 (2011)).

In the instant case, there is no real question as to whether Colone’s questions during the meeting were concerted. Colone was speaking on behalf of other employees as an elected representative of the Union. The complaints at issue, related to heat conditions and excessive work hours, were clearly group complaints that employees discussed frequently. Colone only engaged in the conversation after multiple employees had already spoken out about being forced to work beyond the maximum number of overtime hours allowed under company policy, and after Dean

had responded by floating that the Employer was considering moving to an 84-hour maximum work week.

Nor is there any question that the complaints Colone was making were of a protected nature. These complaints related to hours (mandatory overtime) and terms of employment (heat and safety) and as such were protected. Compare *Alstate Maint., LLC*, 367 NLRB No. 68, slip op. at 9 (Jan. 11, 2019) (complaint about tips neither concerted nor protected).

ii. Colone did not lose the protection of the Act

In *Atlantic Steel Co.*, 245 NLRB 814 (1979), the Board outlined the factors to be considered in determining whether an employee engaged in otherwise protected conduct has engaged in sufficiently opprobrious conduct to lose the protection of the Act. These factors 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. *Id.* at 816.

In the instant case, there is no evidence that Colone used profanity, insulted Dean or any other supervisor, or engaged in any other conduct so offensive as to lose the protection of the Act. In the July 20, 2017 disciplinary action issued to Colone, the Employer asserts that he proceeded with a “line of questioning that was provoking, misleading, and inappropriate,” and that his repetitive questions “created an intimidating work environment for the Safety Manager and an offensive, uncomfortable environment for your coworkers attending the meeting.”

In *Air Contact Transp. Inc.*, 340 NLRB 688 (2003), *enfd.* 403 F.3d 206 (4th Cir. 2005), an employee was issued a reprimand after questioning a supervisor about pay and benefits after a work luncheon. The employer in *Air Contact* asserted that, although the employee's questioning was concerted, it was the manor and tone of the employee's questioning that were objectionable.

Id. at 689. Specifically, the employer argued that the employee became loud and boisterous during the questioning, cut the supervisor off when the supervisor attempted to answer his questions, and turned to the employees behind him and characterized the supervisor's response as "a bunch of baloney." Id. at 693. The employer issued the employee a memo stating that the employee's "challenging, loud, animated and insubordinate tone embarrassed [the supervisor], [the] operations manager, and . . . [the employee's] own manager when he heard about it." Id. at 688. The employer subsequently fired the employee when he refused to sign the memo. Id. at 689. The Board agreed with the ALJ that the employee's conduct was not so opprobrious as to lose the protection of the Act, and found the employer had unlawfully fired the employee for refusing to sign the unlawful memo. Id. at 688.

Similarly, here, while Colone's questions may have made Dean uncomfortable, there is no evidence of any conduct that was so opprobrious as to deny him the protection of the Act.

The first three factors of the *Atlantic Steel* test favor protection, while the fourth is not applicable. Colone's questions were made during a group meeting, a setting which favors protection. See *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007). The subject matter of the discussion involved vital terms and conditions of work, another factor which favors protection. *Datwyler id.* and *Mexican Radio Corp.*, 366 NLRB No. 65 (Apr. 20, 2018) ("subject matter invoked a continuing dialogue of concerted activity regarding the terms and conditions of employment and is protected under the Act.") Regarding the nature of the outburst, the Board has held that leeway exists for employee remarks or actions, made in the course of protected activity that are much more extreme than any action by Colone in this case. See, e.g., *Kiewit Power*, 355 NLRB 708, 710 (holding that employees telling their supervisor that things could "get ugly" and that he should "bring his boxing gloves" did not cause them to lose the protection of the Act);

Leasco, Inc., 289 NLRB 549, 549 n.1 (1988) (employee’s statement, “if you're taking my truck, I'm kicking your ass right now,” did not cause him to lose the protection of the Act). Colone did not threaten, slander or insult a supervisor, he simply repeated a legitimate question.

Because Colone’s questioning during the meeting was protected activity, and because he did not lose the protection of the Act, the July 20, 2017 discipline related to the meeting was unlawful.

C. Respondent unlawfully discharged Colone because of his protected union activity

It is well established that under Section 7 of the Act employees have the protected right to file and process grievances, and that the discipline or discharge of employees for doing so is a violation of Section 8(a)(1). *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), *enforced* 388 F.2d 495 (2d Cir. 1967), *approved in NLRB v. City Disposal Systems*, 465 U.S. 822, 831-32 (1984); *Thor Power Tool Co.*, 148 NLRB 1379, 1380-81 (1964), *enforced*, 351 F.2d 584 (7th Cir. 1965) (calling superintendent “horse’s ass” following grievance discussion was not independent basis for discharge but “part and parcel” of employee’s participation in protected grievance activity). The *Interboro* protection applies to individual employees even where an employee’s assertions are incorrect, if the employee has a reasonable and honest belief that the contract has been violated. 465 U.S. at 840. The merits of the grievance at issue, whether according to the evaluation of the employer or the Board, are not relevant. *Mushroom Transportation Co. Inc.*, 142 NLRB 1150, 1158 (1963), 142 NLRB 1150 at 1158 (1963), *reversed on other grounds*, 330 F.2d 683 (3d Cir. 1964).

It is also well established that union representatives are protected by the Act when presenting a grievance to an employer. *Union Fork and Hoe Co.*, 241 NLRB 907, 908 (1979) (Board finding repugnant to the Act an arbitral award which upheld the termination of a union

steward for alleged insubordinate conduct while he was engaged in presenting and processing the grievance of a fellow employee). The Board recognizes that “union stewards filing and processing grievances on behalf of other employees enjoy the protection of the Act, even if, while doing so, they ‘exceed the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure.’” *Roadmaster Corp.*, 288 NLRB 1195, 1197 (1988), *enforced*, 874 F.2d 448 (7th Cir. 1989). *See also Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1028, 1034 (1976).

When an employee is discharged for conduct that is part of the *res gestae* of protected activities, the question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service. *Desert Cab, Inc.*, 367 NLRB No. 87 (Feb. 8, 2019). Steward activity that would ordinarily be protected under the Act will lose its protection if it includes defamatory statements, bad-faith conduct, or deliberate or malicious falsehoods. *See, e.g., Ogihara America Corp.*, 347 NLRB 110, 111-12 (2006) (finding employee lost protection of Act when he inserted a different co-worker’s name on the return address label of an anonymous letter critical of supervisor because he feared employer repercussions); *HCA/Portsmouth Regional Hospital*, 316 NLRB 919, 930 (1995) (finding no protection where employee tried to raise support for a supervisor’s removal by recklessly spreading false rumors about a supervisor).

In *Roadmaster Corp.*, *supra*, the Board agreed with the ALJ that the employer violated Section 8(a)(3) and (1) of the Act by discharging an employee for allegedly violating a company policy prohibiting the falsification of documents by signing the names of other individuals on grievance forms. 288 NLRB at 1195. The Board found that, although this stated reason was pretextual, the employer would have violated Section 8(a)(3) and (1) even if it were not. *Id.* at

1197. The Board noted that “grievance forms . . . written on union letterhead cannot reasonably be considered company documents” within the meaning of the employer’s rule, and that the steward’s signing other individuals’ names to grievances was distinguishable from the falsification of medical excuses, employment applications, or personnel records. *Id.* at 1196. The grievance forms “merely initiated a procedure through which personnel decisions would later be determined.” *Id.* at 1196. The Board further noted that the steward derived no personal benefit from his conduct and did not demonstrate any intent to deceive the employer, and that no actual deception occurred as a result of the grievances being filed. *Ibid.* See also *OPW Fueling Components*, 343 NLRB 1034, 1034, 1036 (2004), enforced, 443 F.3d 490 (6th Cir. 2006); see also *Clara Barton Terrace Convalescent Center*, 225 NLRB at 1029 (“Arbitration awards like the one handed down in the instant case are bound to discourage a grievant's recourse to the grievance and arbitration procedure for fear that an inartfully or overzealously worded grievance might subject him to reprisal from his employer”); cf. *United Parcel Service of Ohio*, 305 NLRB 433, 434 (1991) (arbitrator award upholding termination of steward for “making false statements on his Grievance Report” not repugnant to the Act because steward “deliberately” made “false orchestrated statements” which evidenced bad faith).

Respondent has presented no evidence that Colone at any point intentionally or knowingly presented false information in a grievance. There is similarly no evidence that Colone at any point acted in bad faith. Colone testified credibly that his grievances were filed based on the information available to him at the time they were filed.

Respondent issued the April 3, 2017 warning letter to Colone after he had filed and withdrawn a grievance after learning his initial understanding had been mistaken. The evidence indicates that, after issuing this letter, Respondent began investigating Colone’s grievances less to

come to a position on the merits and more to identify any discrepancy with Colone's initial account. Rather than simply denying grievances it believed were unmeritorious, Respondent cataloged relatively minor discrepancies between Colone's initial account and the accounts of other witnesses (often supervisors) in three grievances over the course of seven months. Respondent asserts these discrepancies as the basis for Colone's last chance agreement.¹¹

Because the last chance agreement was issued to Colone expressly because of his protected union activity, a *Wright Line* analysis is not necessary. *Phoenix Transit System*, 337 NLRB 510 (2002), enfd. 2003 WL 21186045 (D.C. Cir. 2003) (unreported opinion); *Saia Motor Freight Line, Inc.*, 333 NLRB 784 (N.L.R.B. 2001) (citing *Felix Industries*, 331 NLRB No. 12 (2000)). Although the last chance agreement includes one performance-related incident, Lord explicitly testified that this incident, which occurred seven months prior to issuance of the last chance agreement, would not have warranted discipline on its own.

Finally, assuming Respondent argues that Colone's refusal to sign the last chance agreement, rather than his union activity, was the immediate cause of his discharge, this argument must also fail. See, e.g., *Air Contact Transport, Inc.*, 340 N.L.R.B. 688 (2003) (rejecting employer's reliance on employee's refusal to sign unlawful reprimand as independent basis for discharge) (citing *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001)).

V. CONCLUSION

For all of the reasons advanced above, the General Counsel respectfully requests a finding that Respondent violated the Act as alleged in the Complaint. The General Counsel also

¹¹ An analysis under *Burnup & Sims*, 379 U.S. 21 (1964), is not appropriate in this situation. See *PAE Technologies*, 367 NLRB No. 105, fn. 11 (2019). If applied however, it would yield the same result because, as discussed above, Respondent has not presented evidence to support a good faith belief that Colone engaged in any serious misconduct during the course of his protected union activity.

respectfully seeks the traditional reinstatement, a make whole remedy and order (including backpay, with interest), a cease and desist Order, and a Notice Posting. The General Counsel further seeks all other relief as may be deemed appropriate to remedy the unfair labor practices alleged.

DATED at Fort Worth, Texas this 2nd day of April, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Bryan Dooley', written in a cursive style.

Bryan Dooley
Counsel for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the General Counsel's Brief to the Administrative Law Judge has been served this 2nd day of April 2019, via electronic mail upon each of the following:

Jaklyn Wrigley, Attorney
Fisher & Phillips, LLP
2505 14th St., Suite 300
Gulfport, MS 39501-1953
jwrigley@fisherphillips.com

Steven R. Cupp, Attorney
Fisher & Phillips, LLP
2505 14th St., Suite 300
Gulfport, MS 39501-1953
scupp@fisherphillips.com

Sasha Shapiro, Assistant General Counsel
United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union
60 Blvd. of the Allies Five Gateway Ctr., Rm. 807
Pittsburgh, PA 15222-1214
sshapiro@usw.org



Bryan Dooley
Counsel for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102