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Cadillac of Naperville, Inc and Automobile Mechanics Local 701, International Association of Machinists & Aerospace Workers, AFL-CIO. Case 13-CA-207245

June 12, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND EMANUEL

On June 19, 2018, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel also filed limited exceptions with supporting argument.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions only to the extent consistent with this Decision and Order.³

At issue here are alleged violations in connection with an economic strike by the Respondent's auto mechanics. As explained below, in addition to the earlier mentioned judge's findings that the Board is adopting, we also adopt the judge's conclusion that the Respondent violated

¹ During the hearing, the judge made two evidentiary rulings: (1) admitting the recording, made surreptitiously in violation of Illinois state law, of the Respondent's October 6, 2017 meeting; and (2) denying the Respondent's request to possess witness statements after cross-examination, to which the Respondent objected and now excepts. The Respondent requests that we (1) overturn Board precedent and ignore the recording, and (2) remand the case for further cross-examination and allow the Respondent to maintain the witness statements after cross-examination.

Sec. 102.35 of the Board's Rules and Regulations provides, in pertinent part, that a judge should "[r]egulate the course of the hearing" and "[t]ake any other necessary action" authorized by the Board's Rules. Thus, the Board accords judges significant discretion in controlling the hearing and directing the creation of the record. See *Parts Depot, Inc.*, 348 NLRB 152, 152 fn. 6 (2006), enf'd. 260 Fed.Appx. 607 (4th Cir. 2008). Further, it is well established that the Board will affirm a judge's evidentiary ruling unless that ruling constitutes an abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008).

We deny both requests as the judge's rulings were not an abuse of discretion. The rulings were consistent with Board precedent and neither unreasonable nor an interference with the Respondent's case. See *Orange County Publications*, 334 NLRB 350, 354 (2001) ("The Board has found such tape recordings of employer meetings with employees to be admissible as evidence, even when the surreptitious recording violates State law.") (citations omitted), enf'd. 27 Fed.Appx. 64 (2d Cir. 2001); *Wal-Mart Stores, Inc.*, 339 NLRB 64, 64 (2003) ("[T]he plain meaning

of Sec. 102.118(b) of the Board's Rules and Regulations limits the purpose of disclosure [of witness statements] to cross-examination.").

Section 8(a)(3) and (1) by terminating employee and Union Steward John Bisbikis for his union activity, but we revise the judge's rationale. Additionally, we agree with the judge, for the reasons stated in his decision and those set forth below, that the Respondent violated Section 8(a)(1) by making threatening or coercive statements in a conversation with Bisbikis before the strike and at two employee meetings after the strike, but we reverse the judge's findings that certain other statements were unlawful.

I. BACKGROUND FACTS

The Respondent is an auto dealership in Naperville, Illinois, and has been a member of the New Car Dealer Committee (NCDC), a multiemployer bargaining entity, since 2002. The Respondent recognizes the Automobile Mechanics Local 701, International Association of Machinists & Aerospace Workers, AFL-CIO (the Union) as the exclusive bargaining agent of its 12 mechanics.

On May 6, 2017,⁴ the Union and the NCDC began negotiations for a successor contract as the existing collective-bargaining agreement was set to expire on July 31. The Union's negotiating team included Business Agents Sam Cicinelli and Kenneth Thomas, and employee and Union Steward John Bisbikis. On August 1, after the parties failed to reach a new agreement, unit employees went on strike. The Respondent laid off several nonunit employees during the strike.

On August 9, the Respondent sent letters to six strikers, including Bisbikis, advising them that they were being permanently replaced and would be placed on a

of Sec. 102.118(b) of the Board's Rules and Regulations limits the purpose of disclosure [of witness statements] to cross-examination.").

² We adopt the judge's findings that the Respondent violated Sec. 8(a)(1) when it threatened employee Patrick Towe with discharge on September 20, 2017, and expressed doubt about employee Brian Higgins' employment longevity on October 27, 2017. We also adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) when it unilaterally prohibited union representatives' access to unit employees on the Respondent's premises, enacted new attendance policies, and removed free gloves and free drinking water.

There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to reinstate five strikers for 2 months after their unconditional offer to return to work or to the judge's dismissal of the allegation that the Respondent moved a unit employee to less agreeable nonunit work following the strike.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We have amended the judge's remedy consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings and substitute a new notice to conform to the Order as modified.

⁴ All dates are in 2017 unless otherwise noted.

preferential hiring list provided they made an unconditional offer to return to work. In response, the strikers positioned themselves across the street from the dealership's main entrance, blew horns, used a loudspeaker, sought to engage customers, yelled at nonstriking employees, and interfered with a customer attempting to take a vehicle for a test drive.

On September 15, the NCDC and the Union entered into a strike settlement agreement. On September 17, employees ratified the settlement agreement and the 2017–2021 successor collective-bargaining agreement. Following discussions on September 18, discussed *infra*, seven of the striking employees received recall letters from the Respondent later that day. The seven recalled employees returned to work on September 20.

II. THE 8(A)(3) DISCHARGE

On September 18, Cicinelli, Thomas, and Bisbikis met with the Respondent's Owner and President, Frank Laskaris, in his office. The purpose of the meeting was to discuss the return-to-work process for the strikers.⁵ During the meeting, Laskaris and Bisbikis engaged in a back-and-forth that culminated in Laskaris telling Bisbikis to “get the fuck out before I throw you out.” As he was leaving the office, Bisbikis called Laskaris a “stupid jack off” in Greek. Laskaris responded that he was firing Bisbikis for insubordination. Later that day, Laskaris sent Bisbikis a “notice of termination for insubordinate conduct and inappropriate language.” The notice referenced Bisbikis' conversation in Laskaris' office and noted that it was a “direct violation of [the Respondent's] Standards of Conduct” and a “terminable action.”

In finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Bisbikis, the judge applied the test set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), which is appropriate when the alleged violation turns on the employer's motive in taking an adverse action against an employee. However, where, as here, an employer defends a discharge based on employee misconduct that is part of the *res gestae* of the employee's union or protected concerted activity, and that occurred during a workplace confrontation, the employer's motive is not at issue, and the test set forth in *Atlantic Steel*, 245 NLRB 814 (1979), applies.⁶ See *Postal Service*, 360 NLRB 677, 682 (2014). Under that test, the question is whether the conduct at issue was so egregious as to lose the Act's protection. See *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 fn. 2 (2018), *enfd.* by summary order 2019

⁵ Laskaris and Bisbikis also discussed the permanently replaced employees and grievances filed by unit employees.

WL 949082 (2d Cir. 2019). In making this determination, the Board considers four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice. See *Atlantic Steel*, *supra* at 816.

We find that all four *Atlantic Steel* factors weigh in favor of protection. As the judge noted, the incident occurred in Laskaris' office and was not witnessed by any other employees. Bisbikis, in his capacity as shop steward, was discussing the return-to-work process, the permanent replacement of striking employees (including Bisbikis), and other grievances filed by employees. The outburst was brief—a single name-calling incident—and not a sustained course of action. See *Kiewit Power Constructors, Co.*, 355 NLRB 708, 710 (2010) (finding that a single, brief verbal outburst weighed in favor of protection), *enfd.* 652 F.3d 22 (D.C. Cir. 2011). Additionally, the outburst was not accompanied by any threats or menacing behavior. See, e.g., *Staffing Network Holdings, LLC*, 362 NLRB 67, 67 fn. 1, 75 (2015) (adopting the judge's finding that the nature of the outburst weighed in favor of protection where, among other things, the employee was not hostile and neither raised her voice nor made threats), *enfd.* 815 F.3d 296 (7th Cir. 2016). Moreover, Laskaris himself used vulgar language in the workplace, including during that very meeting. See generally *Corrections Corp. of America*, 347 NLRB 632, 636 (2006) (finding that an employee did not lose the Act's protection by cursing where profanity was commonly used by employees and supervisors and was used in the room where the employee's conduct occurred). Lastly, we find that Laskaris provoked Bisbikis when he denied Bisbikis' account of an earlier conversation the two of them had engaged in about terms and conditions of employment, used profanity while dismissing Bisbikis from the meeting, and threatened to remove Bisbikis by force. See *Network Dynamics Cabling*, 351 NLRB 1423, 1429 (2007) (finding that an employee's outburst during protected conduct was provoked by certain comments made by a supervisor where, although the comments were not alleged as unfair labor practices, the comments clearly sought to interfere with the employee's protected right to assist organizational activity).

In light of the above, we agree with the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) when it discharged Bisbikis.

⁶ While the judge eventually applied *Atlantic Steel*, he did so *after* applying *Wright Line*. The only appropriate test in this situation is that set forth in *Atlantic Steel*.

III. THE 8(A)(1) THREATS

June 29

On June 29, Bisbiki initiated a conversation with Laskaris about employee concerns. Laskaris responded that “things would not be the same” if employees went on strike. The judge found that Laskaris’ statement was unlawful as it did not “communicate any objective facts or predictions as to the effects of a potential strike,” and that “the statement cannot be viewed as anything but a threat that a strike would produce only negative consequences for the [u]nit.” We agree with the judge’s finding. Laskaris’ statement that “things would not be the same” is similar to other statements the Board has found unlawful. See, e.g., *Colonial Parking*, 363 NLRB No. 90, slip op. at 7 (2016) (finding that, despite the close and good relationship the employer had with employees in the past, a supervisor’s warning that employees’ terms and conditions of employment would change for the worse because of their protected activity constituted an unspecified threat of future reprisals); *Valmet, Inc.*, 367 NLRB No. 84, slip op. at 2 fn. 7 (2019) (finding an employer’s direction to an employee to “[r]emember that I hired you” unlawful). Moreover, although not necessary to finding the violation, this statement was not an isolated occurrence. It was followed on subsequent occasions by multiple additional violations of the Act, all committed by Laskaris. This context further supports finding that Laskaris’ remark that “things would not be the same” if employees went on strike would be perceived by employees as threatening—a foreshadowing of worse to come.⁷

September 25

On September 25, only a few days after the strikers returned to work, Laskaris conducted a staff meeting, attended solely by the recalled mechanics, in which he expressed his frustration over the Union’s leafletting outside the dealership. During the meeting, Laskaris stated that the leafletting was taking money out of their pockets and

⁷ See, e.g., *Aldworth Co.*, 338 NLRB 137, 141–142 (2002) (statement that union supporters had “one foot out the door” could reasonably be interpreted by other employees as a warning threat because the remarks were in fact followed by retaliatory discipline against those union supporters), enf. 363 F.3d 437 (D.C. Cir. 2004); *Aircraft Plating Co.*, 213 NLRB 664, 664–665 (1974) (subsequent unlawful changes in work rules by the manager served as verification of the manager’s threats that employees would lose benefits because of their union sympathies, and an employee was unlawfully discharged for her union activity).

Member Emanuel disagrees with his colleagues and would find the statement lawful. The judge conceded that the statement was “vague,” but nevertheless found it unlawful, relying primarily on the timing of the statement (about 1 month before the strike). In Member Emanuel’s view, the statement is too vague to constitute a threat of reprisals, and neither the timing alone nor the Respondent’s subsequent conduct is sufficient to render it coercive. See *Valmet*, supra, slip op. at 2 fn. 7 (Member

that if the Respondent ran out of work, it would lay off all the recalled employees. The judge found that Laskaris’ statement, which “cast union activity as inimical to [u]nit members’ employment security,” was a threat and not a lawful, fact-based prediction of economic consequences beyond the employer’s control.

We agree. Laskaris singled out the recalled strikers, rather than employees in general, as those who would suffer the impact of any economic consequences. By targeting employees who engaged in protected activity, Laskaris went beyond the mere prediction of economic consequences beyond his control. Accordingly, we find the statement unlawful.⁸

October 6

On October 6, Laskaris met with mechanics to discuss his approach to labor relations going forward. During his 40-minute speech, Laskaris made several statements that the judge found unlawful. First, Laskaris informed employees that there would be stricter enforcement of company rules—stating that, if he chose to enforce the rules as written, things would be much harder for them. Second, he stated that he did not “give a shit about grievances. Grieve all you want. It doesn’t matter. They can’t do shit,” and that he did not care about grievances. Third, he stated, “if I were you, I would have changed my [union] membership a week before the strike.” Fourth, he referenced nonunit employees who were laid off during the strike and asked the recalled strikers to consider how the laid-off employees felt. Lastly, he stated that he “can be the nicest guy in the world” and would “give you a kidney,” but “you fuck with me and my people, I’m going to eat your kidney out of your body and spit it at you.”

We agree with the judge that the Respondent violated Section 8(a)(1) when it threatened employees with stricter enforcement of rules and suggested that filing grievances was futile.⁹ We further agree with the judge that the “eat your kidney” statement was unlawful, although, contrary

Emanuel, dissenting). In contrast, the statement in *Colonial Parking*, supra, made it clear that the employer would treat employees less favorably in the future.

⁸ Member Emanuel disagrees with his colleagues and would find that this statement was a lawful prediction as to the precise effects Laskaris believed leafletting would have on the Respondent. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). In drawing this conclusion, Member Emanuel emphasizes that only the recalled striking employees attended the meeting. Therefore, the Respondent’s reference to them in predicting the adverse effects of union leafletting was because they were the only employees in attendance.

⁹ Member Emanuel disagrees with his colleagues that Laskaris’ statements about grievances were unlawful. He finds the statements too vague to constitute a threat of futility. Rather, Laskaris appeared to be simply expressing frustration with the filing of grievances that, in Laskaris’s view, lacked merit.

to the judge, we do not find that it constituted a threat of physical violence. Instead, we find that, given the circumstances (a 40-minute rant filled with multiple unlawful statements), the statement, as the judge alternatively found, would reasonably tend to coerce employees in the exercise of their Section 7 rights. See *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, slip op. at 1 fn. 6 (2016) (reversing the judge and finding that an employer's statement that it would "shoot the union," even if not interpreted as a specific threat of violence, would reasonably tend to coerce employees in the exercise of their Sec. 7 rights).

We reverse the judge's finding that the Respondent violated Section 8(a)(1) when, at the October 6 meeting, Laskaris told employees, "if I were you, I would have changed my [union] membership a week before the strike." We find that Laskaris' suggestion that employees should have "changed" their union membership was an opinion, as evidenced by the "if I were you" phrasing, permitted by Section 8(c).¹⁰ Additionally, the General Counsel failed to present any evidence demonstrating that Laskaris went further than stating his opinion by, for example, assisting employees in withdrawing their union support.¹¹ We also reverse the judge's finding that the Respondent violated Section 8(a)(1) when Laskaris told the recalled employees that nonunit employees had lost their jobs over unit employees' decision to strike. We find that, in asking the recalled employees to consider laid-off nonunit employees, Laskaris' statement was merely a truthful recitation of what occurred during the strike.

IV. AMENDED REMEDY

In light of the General Counsel's request during the hearing for make-whole relief for the five late-recalled strikers, we shall modify the Order to require the Respondent to make unit employees and former unit employees whole for any loss of earnings or other benefits they suffered as a result of Respondent's unlawful failure and refusal to reinstate them from and after September 18, 2017, the date the strikers made their unconditional offer to return to work, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

¹⁰ Sec. 8(c) gives employers the right to express their views about unionization or a particular union as long as those communications do not threaten reprisals or promise benefits. *NLRB v. Gissel*, supra.

¹¹ Member McFerran disagrees with her colleagues and would adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by encouraging unit members to resign from or become only financial-core members of the Union. In her view, Laskaris went beyond simply stating his opinion about the Union; he improperly warned unit employees to withdraw or minimize their memberships. Thus, in the context of the

ORDER

The Respondent, Cadillac of Naperville, Inc., Naperville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that their terms and conditions of employment would not be the same if they went on strike.

(b) Telling permanently replaced employees that the Respondent does not want them to return to work and that if they return to work it would not be long before they were gone.

(c) Telling recalled striking employees that they would not be employed by the Respondent very long and should find another job because they engaged in strike or other union activities.

(d) Telling recalled striking employees that, if the Respondent ran out of work, it would lay them off first because they engaged in strike or other union activities.

(e) Telling employees that it would more strictly enforce company rules because of employees' union activities or support.

(f) Telling employees that it would be futile to file grievances.

(g) Telling employees that it would eat the kidneys of employees because of their union activities or support.

(h) Enacting attendance policies and removing free work gloves and drinking water because employees engaged in strike or other union activity, without first notifying the Union and giving it an opportunity to bargain over such changes.

(i) Prohibiting union representatives' access to unit employees without first notifying the Union and giving it an opportunity to bargain over such changes.

(j) Unilaterally changing the terms and conditions of employment of unit employees by implementing an attendance policy and charging employees for the cost of work gloves and drinking water.

(k) Discharging employees because they supported the Union.

(l) Failing or refusing to immediately reinstate economic strikers upon their unconditional offer to return to

multiple unlawful threats and statements running throughout Laskaris' speech on October 6, employees would reasonably have understood Laskaris to be going beyond expressing an opinion and instead sending a message that employees would regret a choice not to follow his suggestion. See *NLRB v. E.I. DuPont de Nemours*, 750 F.2d 524, 528 (6th Cir. 1984) ("the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees").

work without a legitimate and substantial business justification.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer John Bisbikis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

(b) Make Bisbikis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge’s decision.

(c) Compensate Bisbikis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to Bisbikis’ unlawful discharge, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Notify all employees that written attendance policies issued on and after September 18, 2017, and policies issued on or after September 25, 2017, charging employees for the cost of work gloves and drinking water have been rescinded.

(f) Before implementing any changes to policies regarding attendance, work gloves, drinking water or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All of Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

(g) Make each striker whole for any loss of earnings and other benefits suffered as a result of the Respondent’s unlawful failure to reinstate them upon their unconditional offer to return to work, in the manner set forth in the amended remedy section of this decision.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Naperville, Illinois, copies of the attached notice marked “Appendix.”¹² Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 29, 2017.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 12, 2019

John F. Ring, Chairman

Lauren McFerran Member

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

- FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that your terms and conditions of employment will change if you go on strike.

WE WILL NOT tell you, if you go on strike and subsequently return to work, that we do not want you to return to work and that, if you do return to work, it would not be long before you were gone.

WE WILL NOT tell you that you will not be employed by us very long and should find another job if you engage in strike or other union activities.

WE WILL NOT tell you that, if we run out of work, we will lay you off first because you engage in strike or other union activities.

WE WILL NOT tell you that we will more strictly enforce company rules because of your union activities or support.

WE WILL NOT tell you that it would be futile for you to file grievances.

WE WILL NOT tell you that we will eat your kidneys because of your union activities or support.

WE WILL NOT prohibit union representatives' access to you without first notifying the Union and giving it an opportunity to bargain over such a change.

WE WILL NOT enact attendance policies and charge you for work gloves and drinking water because you engage in strike or other union activity without first notifying the Union and giving it an opportunity to bargain over such changes.

WE WILL NOT discharge you if you support a union or engage in union activities.

WE WILL NOT fail and refuse to immediately reinstate economic strikers upon their unconditional offer to return to work without a legitimate and substantial business justification.

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

WE WILL, within 14 days from the date of the Board's Order, offer employee John Bisbikis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

WE WILL make Bisbikis whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Bisbikis for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Bisbikis, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind written attendance policies issued on and after September 18, 2017, and policies issued on or after September 25, 2017, charging employees for the cost of work gloves and drinking water.

WE WILL, before implementing any changes to policies regarding attendance, work gloves, drinking water or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

- All of Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

WE WILL make whole with interest such employees as would have been reinstated sooner but for our unlawful refusal to reinstate them as soon as possible after September 18, 2017, for wages and benefits lost on account of our failure to reinstate them to their positions as soon as possible after September 18, 2017.

CADILLAC OF NAPERVILLE, INC.

The Board's decision can be found at www.nlr.gov/case/13-CA-207245 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Christina B. Hill, for the General Counsel.
Michael P. Macharg, Esq. (Freeborn & Peters, LLP), of Chicago, Illinois, for the Respondent.
Brandon M. Anderson, Esq. (Jacobs, Burns, Orlove & Hernandez), of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Chicago, Illinois on March 20–21, 2018. The complaint alleges that Cadillac of Naperville, Inc. (the Company or Respondent) engaged in numerous violations of the National Labor Relations Act (the Act)¹ relating to a 7-1/2 week strike by its service mechanics during the summer of 2017.² Specifically, the Company is alleged to have violated Section 8(a)(1) of the Act by: threatening employees before and after the strike with discharge and other reprisal; informing employees that it would be futile for them to bring complaints to the Union; and encouraging or soliciting employees to resign their membership or become core members in the Union. The Company also allegedly violated Section 8(a)(3) and (1) of the Act by discharging employee and union steward John Bisbikis in retaliation for his union and protected concerted activities. Finally, the Company allegedly violated Section 8(a)(5) and (1) of the Act by implementing new policies relating to employee attendance, grievance procedures, free water and work gloves without affording notice to the Union and an opportunity to bargain over the change.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and Charging Party,³ I make the following

¹ 29 U.S.C. §§ 151-169.

² All dates refer to 2017 unless otherwise indicated.

³ The Company excepted to my ruling that witness affidavits needed to be returned to the General Counsel after cross-examination pursuant to *Jenks v. United States*, 353 U.S. 657, 662 (1957). Relying on the Board's decision in *Wal-Mart Stores, Inc.*, 339 NLRB 64, fn. 3 (2003), the Company argued that it was entitled to retain witness affidavits until the close of the hearing. As I ruled at the time, that the Board's holding

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, is engaged in the sale and service of new and pre-owned automobiles at its facility in Naperville, Illinois, where it annually derives gross revenues in excess of \$50,000, and purchases and receives goods and materials valued in excess of \$5000 directly from points outside the State of Illinois. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company, an auto dealership, has been individually owned and operated by Frank Laskaris since 1996. He serves as president. John Francek is vice president of operations. The Company's operations consist of the sales, service, parts and administrative departments. Mark Klodzinski, as service manager, supervises the service and parts department employees.⁴ The discriminatee, John Bisbikis, was employed 15 years by the Company as a journeyman mechanic. He was never disciplined prior to his termination. Bisbikis served as a union steward for over 10 years. Prior to June, Bisbikis had a good relationship with Laskaris, who often referred to him as a leader of the mechanics.

B. The Expired Contract

The New Car Dealer Committee (the NCDC) is a multi-employer bargaining committee composed of 129 car dealers who assigned their rights to it to negotiate and administer master agreements with the Union representing 1,949 employees. The Company has been an employer-member of the NCDC since it was formed in 2002. At all times since August 1, 2013, the Company has recognized the Union as the exclusive collective-bargaining representative of its approximately 12 mechanics. The mechanics comprise a bargaining unit (the unit) appropriate for the purposes of collective bargaining as described in the 2013-2017 contract between the NCDC, on behalf of the Company and other car dealers (the Expired Contract):

The Employer recognizes the Union as the exclusive bargaining agent for all of its Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

Article 2 of the Expired Contract delineated the unit employees' duties and responsibilities as follows: journeyman technicians perform electrical, mechanical and other technical repair work; body shop technicians perform painting and

in that decision, as well as Sec. 102.118 of the Board's Rules and Regulations, is not inconsistent with my practice of permitting renewed access to witness affidavits upon request in connection with the cross-examination of other witnesses. (Tr. 104–108.)

⁴ The Company admits that Laskaris, Francek and Klodzinski are supervisors within the meaning of Section 2(11) and agents within the meaning of Sec. 2(13) of the Act.

reconditioning work; semi-skilled body shop technicians perform sanding, masking, buffing, polishing, shop clean-up, disassemble damaged vehicles and deliver parts to body shop technicians; semi-skilled technicians prepare new vehicles for delivery, minor inspections, repairs and maintenance services and used vehicle reconditioning; apprentices perform the work of, and are supervised by, journeyman technicians and journeyman technicians and journeyman body shop technicians; and lube rack and part-time express team technicians perform miscellaneous tasks such as minor maintenance work, snow plowing and removal, transporting vehicles, cleaning and organizing shop equipment and delivering parts.

Notwithstanding the aforementioned classifications, article 4 of the Expired Contract provided the Company flexibility in certain situations:

Temporary Work. If business is slack, the Employer may assign an employee work other than that which the employee is regularly classified where such work would not be hazardous to the employee due to lack of experience and training. The employee shall receive their applicable rate. This assignment shall not infringe on the jurisdiction of another Union. Money earned under these circumstances shall be considered a part of the employee's regular flat earnings.

Article 5 provides unit employees with an hourly rate of pay times 40 hours worked each week, plus pay for additional work performed within their specific classifications.⁵ In addition, mechanics were often able to earn significantly more than the flat rate based on the "book time" for particular tasks. However, book time compensation was not applicable to work performed outside of a unit employee's specific duties. For example, lube rack and part-time express team technicians were responsible for cleaning vehicles. If a journeyman mechanic or apprentice performed such work, however, the time would be counted towards his base rate of pay, but would not be compensable as additional pay.

Unit employees are required to acquire the tools necessary to perform their work. They were also responsible to provide tool boxes to secure their tools. That arrangement is impliedly confirmed at article 14, which requires the Company to insure employees' personal tools, requires employees to provide the Company with an inventory of their personal tools, authorizes the Company to inspect employee tool boxes, and requires employees to remove their tools within 2 weeks of termination.⁶

C. The Strike

On May 6, the Union and the NCDC began negotiations for a successor contract, which was due to expire on July 31. The members of the Union's negotiation team included Union representatives Sam Cicinelli and Kenneth Thomas, and Bisbikis.

On June 29, with negotiations dragging on, Bisbikis approached Laskaris in the latter's office to discuss several shop-

related issues, including the Company's newly imposed requirement that employees pay part of the cost of their uniform shirts. Laskaris rejected Bisbikis' appeal regarding the shirts and redirected the discussion towards the sputtering labor negotiations, warning that if the mechanics decided to strike, "things wouldn't be the same."⁷

The parties were unable to negotiate a new contract by the July 31 deadline and, on August 1, the Company's unit employees walked out and set up camp across the street from the dealership. On August 4, the Company sent the striking employees letters setting forth several changes to their terms and conditions of employment:

To all Service Technicians,

It is very unfortunate that you have chosen to strike. In serving the best interest of the stability of Cadillac of Naperville, its employees and their families, as well as our loyal and trusting customers, you are hereby put on notice of the following:

We will no longer be paying for your health insurance. You will be responsible for the premiums in their entirety.

We have placed ads for replacement technicians. You will be notified once you have been replaced. At that time should you make an unconditional offer to return to work, you will be placed on a preferential hiring list should an opening occur.

Cadillac of Naperville will no longer be responsible for your belongings when you are not working. All tools, tool boxes, and personal belongings must be removed from our property by Saturday, August 5, 2017 by 5:30 p.m.

Please make immediate arrangements to have your tools and personal belongings removed from our property by contacting your immediate supervisor at (630) 355-2700 to arrange an appointment. They will assist you in returning any special tools or Cadillac of Naperville property, as well as assist in an expedient and peaceful transfer of your belongings.

Sincerely,
Cadillac of Naperville, Inc.⁸

As instructed, unit employees removed their equipment and tool boxes during business hours by August 5 and transported them on trailers to a commercial storage facility. Empty toolboxes weighed at least 550 pounds; when full, they weighed several thousand pounds.

On August 9, the Company sent the following form letters to 6 of the 13 striking employees – Bisbikis, Louis Mendralla, Michael Wilson, Kenneth Scott, Brian Higgins and Mathew Gibbs notifying them that they were being replaced:

This letter is to advise you that you have been permanently replaced as of today August 9, 2017. You will be placed on a preferential hiring list provided you make an unconditional application for a return to work. In the event you have a tool box

⁵ Notwithstanding the pay rate formula stated in the contract, unit employees are guaranteed pay for 35 hours if present at the dealership for at least 40 hours. (Tr. 162–163.)

⁶ The cited provisions remained essentially the same in the Successor Contract. (Jt. Exh. 1–2.)

⁷ I credit Bisbikis' detailed version of this conversation in contrast with Laskaris' steadfast denial ("I wasn't thinking about a strike") after conceding that, "a few weeks before it happened," he "thought there was a small chance" for a strike. (Tr. 116–117, 139, 205–208.)

⁸ Jt. Exh. 4.

or any personal belongings that you have left behind, please call your supervisor to make arrangements to pick them up.⁹

The Company was one of only three dealerships that replaced employees during the strike. Francek hired three replacement workers based on employment advertisements¹⁰ or personal familiarity: Hector Plaza (Aug. 7), Edward Silva, Jr. (Sep. 1) and Scott Anderson (Sep. 2). Another employee, Michael Vitacco, was hired on the day that the strike ended (September 15). They were all retained as mechanics after September 15. In addition, three nonunit employees were transferred from other departments to fill-in for the striking mechanics: service advisors Jay Montalvo and Jake Johnson (both on August 7), and salesman George Laskaris (Aug. 21). Montalvo and Johnson returned to their jobs as service advisors after the strike, while George Laskaris remained as a mechanic.¹¹

Initially, the striking employees picketed across the side street from the dealership on Ogden Avenue. After the termination letters went out on August 9, the strikers became more vocal and repositioned themselves across the street from the main entrance. They blew horns, utilized a loud speaker to excoriate the Company, sought to engage customers, and yelled at nonstriking employees. On one occasion, striking mechanic Patrick Towe interfered with an elderly customer attempting to take a test drive. On several occasions, the Company called the police to intercede.¹² However, the Company never filed police reports or unfair labor practice charges.

D. Strike Settlement Agreement

About 35 dealerships entered into interim agreements after several weeks into the strike. On Friday, September 15, the NCDC, on behalf of the remaining member companies, entered into a strike settlement agreement (the settlement agreement), contingent upon ratification by the union membership. The Union's membership ratified the settlement agreement, as well as the 2017–2021 collective-bargaining agreement (the Successor Contract), on Sunday, September 17.

The settlement agreement addressed the return-to-work procedures for all unit employees at the 129 dealer-members as follows:

2. *Return to Work:* The return-to-work process will be determined by each individual dealer. Employees will be reinstated per the terms of the Successor Contract, but may be placed on layoff depending on the business needs of the Employer. Replacement employees, if retained, shall be credited with seniority as set forth in the Successor Contract and will be placed on layoff status until higher seniority employees within the same

⁹ The letter sent to Gibbs was not included with the other five letters in Jt. Exh. 5. However, the subsequent recall letter indicates that he received the same notification.

¹⁰ There was no evidence of the advertisements or the terms of employment of the replacement workers, specifically, whether they were hired on a temporary, permanent or other basis.

¹¹ I credited the reliability of GC Exh. 6, a company business record, over that of GC Exh. 5, which appeared to be a chart compiled for litigation.

¹² I credited the undisputed testimony of Laskaris and Francek that the police was called at unspecified times. However, the incidents were

classification are recalled.

4. *Mutual Non-Retaliation:* Both parties, on behalf of their respective members, hereby covenant and agree to use their best efforts and take any action deemed necessary to ensure an orderly and peaceful return to work by striking employees, to ensure no retaliation of any kind towards any employee or NCDC member dealer, and to maintain order in the workplace once striking employees have returned to work. NCDC and the Union agree, on behalf of themselves and each of their respective members, that there will be no retaliation against any employee based upon conduct that is protected by law, and that there will be no retaliation against any NCDC member dealer or the Union based on actions taken or statements made during negotiations or the ensuing labor dispute.¹³

The Successor Contract set forth the seniority, layoff, and recall provisions at article 3, which states, in pertinent parts:

Section 2. Layoff and Recall. Part-time Express Team Technicians will be laid off before any other bargaining unit employee. In a decrease or increase in the number of Journeyman Technicians, apprentices, semi-skilled technicians, or lube rack technicians, when two employees are capable of doing the job, the one with the least product line seniority shall be laid offered first and recalled in reverse order, provided the employer has submitted a current product line seniority list to the Union via certified mail. The Employer shall be permitted to recall or hire up to three (3) Lube Rack Technicians notwithstanding the layoff status of any Journeymen. A Lube Rack Technician hired or recalled while a Journeyman is on layoff status may not be promoted while that Journeyman retains recall rights. The Employer shall notify the employee of a layoff no later than the end of the employee's last scheduled workday of the calendar week, not the Employer's pay week.

Section 6. Reporting After Recall. The Employer shall give notice of recall to the employee. An employee who fails, without reasonable excuse, to report for work within three (3) working days of notice of recall shall be considered as having resigned from employment.¹⁴

E. Employees Attempt to Return to Work on September 18

(1) Laskaris rebuffs employees' efforts to return during business hours

On September 18, the day following the Union membership's ratification of the Successor Contract, the unit employees congregated in their customary location across the street from the dealership at about 7 a.m. Cicinelli and Thomas, anticipating a

brought under control once police arrived and no police reports were filed. (Tr. 210–213, 224, 229–230, 282, 310–312.)

¹³ Jt. Exh. 2–3.

¹⁴ The Company relies on this provision as the basis for Laskaris' belief that he had three days to recall the strikers. The testimony of Laskaris and Francek, however, with both professing ignorance as to the content of the settlement agreement or alluding to conflicting advice from attorneys, did little to clarify the Company's responsibilities under this provision. (Tr. 218–219, 268–270, 306–308.)

contentious return-to-work process due to the replacement letters received by the five-unit members and concern over the logistical difficulties in returning the returning mechanics' tools and tool boxes, were also present. In fact, Cicinelli arrived with pre-prepared grievance forms, which he had the returning employees sign.

A few minutes later, Cicinelli, Thomas, and Bisbikis walked across the street to the dealership in order to negotiate a date and process for the employees' return to work. They entered Laskaris' office. Francek was also present. Almost immediately, Laskaris said that he did not want Bisbikis present. Cicinelli responded that Bisbikis was a necessary participant because he was the steward and needed to be in the loop. Laskaris said that he did not care, insisting that Bisbikis was the ringleader and at fault for the strike, and he did not want him as an employee. Bisbikis asked Cicinelli what he should do. The latter suggested Bisbikis leave so he and Thomas could resolve issues preventing the employees from returning that day. Bisbikis complied and returned to join the other unit members across the street.

During the meeting that ensued, Cicinelli insisted that Laskaris was obligated to reinstate the replaced employees pursuant to the settlement agreement. Laskaris replied that he needed time to figure out whether to recall the permanently replaced employees because he had not seen the contract and was getting inconclusive legal advice. He added that he did not want any of the strikers back and asked, "can't you find them all jobs?" Cicinelli said that he probably could find them other employment, but the employees wanted reinstatement. At one point, Cicinelli referred to the replacement workers as "scabs," causing Laskaris to admonish Cicinelli because they were "good family men" and note that the Union was obliged to represent them as well. Cicinelli said he did not care but concurred with the notion that the Union would be responsible to represent them if they were retained and became union members. As Cicinelli left to update the employees, Laskaris proposed that in return for the employees not returning he would give them \$1000 or \$2000 each to find a job elsewhere. Cicinelli said it was his responsibility to run any offer by the employees but considered it a futile effort.¹⁵

Cicinelli and Thomas left Laskaris' office and communicated his offer to the returning employees. After the employees rejected the offer, Cicinelli and Thomas returned to Laskaris' office along with Bisbikis. Once again, Laskaris asked why Bisbikis was there. Cicinelli responded that Bisbikis was there to speak on behalf of the unit employees. Bisbikis then began to explain that the striking employees were personally offended after receiving permanent replacement letters. He asked Laskaris why he issued the letters, and if they issued because he and the

other mechanics did not get along with Francek, which the latter denied. Bisbikis added that he had been there for 15 years and excoriated Laskaris for his treatment of Bisbikis and the other strikers. Laskaris said he did not want to hear it and asked why Bisbikis would want to return. Bisbikis replied that he had been there for 15 years and considered it his home. Francek interjected by questioning the strikers' loyalty because they harassed customers and other employees during the strike. Bisbikis denied that allegation. Francek then engaged Bisbikis in a side conversation questioning the latter's recent extended absence and Bisbikis replying that he was still disabled when he returned to work.¹⁶ Laskaris reiterated that he did not want any of the strikers to return, especially the "seven" who received permanent replacement letters. Cicinelli said that the Union was aware of only five such letters and asked Francek to provide copies of the other two letters. As the conversation continued, there was disagreement over how many people were issued replacement letters, and to resolve that disagreement, Francek left the room to retrieve copies of the letters.

With Francek gone, Bisbikis brought up his June 29 conversation with Laskaris about several employee concerns. Laskaris denied ever having such a discussion and Bisbikis accused him of lying. Laskaris cursed at Bisbikis, telling him to "get the fuck out before I get you the fuck out." Bisbikis replied by calling Laskaris a "stupid jack off" in Greek as he left the office. Laskaris asked Bisbikis "what did you just say." Bisbikis looked at Laskaris and asked what he was talking about? I didn't say a word." Cicinelli smirked, looked at Thomas and said "I didn't hear him say anything. Did you?" Laskaris replied, "[n]ow even if I have to take you back, now I'm firing you for insubordination."¹⁷

Cicinelli responded that the Union would have to file another grievance regarding Bisbikis' termination and then asked Bisbikis to leave the room. He then asked Laskaris to clarify his position regarding the recall status of the remaining strikers. Laskaris reconsidered and agreed to allow the remaining employees who did not receive replacement letters to bring back their tools. Cicinelli suggested that some had trailers and could begin returning their tools in the afternoon. Laskaris rejected that arrangement on the ground that it would be too disruptive, insisting that it was not the Company's responsibility to transport the employees' tools to the dealership before they reported for work. The meeting ended with Laskaris giving Cicinelli and Thomas a list of guys who were not permanently replaced and the plan for the return-to-work schedule. He also agreed to open the shop two hours early on Tuesday at 5:30 a.m. and needed them to be in their stalls by 7:30 a.m. ready to go. Cicinelli insisted it would

¹⁵ Testimony regarding the first meeting was fairly consistent. Laskaris' testimony regarding his alleged confusion over how to implement the settlement agreement and whether he was required to displace the replacement workers was not credible. He had no interest in ever reading the settlement agreement and shifted explanations between contradictory legal advice and testimony evincing a clear intent to deny reinstatement under any circumstances. (Tr. 38-41, 125-127, 220-226, 270.)

¹⁶ Bisbikis was on short-term disability for a herniated disc in his back from December to May.

¹⁷ I credit the testimony of Laskaris, a fluent Greek speaker, that Bisbikis called him a "stupid jack off" in Greek. Bisbikis did not deny the

statement at the time and the cavalier manner in which Cicinelli and Thomas, neither of whom speak nor understand Greek, denied hearing Bisbikis say anything manifested an evasiveness that undermined their credibility regarding this incident. At the time, however, Bisbikis was standing by the door and not, as Laskaris suggested, moving toward him in a threatening manner. (Tr. 42-48, 125-133, 142, 144, 167-173, 184-187, 221-234, 258, 273.) In addition, Laskaris made no mention of threatening behavior on Bisbikis' part in the termination letter that followed.

be a problem getting the tools out of storage before 9 a.m. and Laskaris replied, "It's noon. My understanding is 701 has a truck. 701 has a union hall for this purpose. Why don't you get their tools, put them on the truck, take them down to the hall. Not my issue. Now I need you to get away from the front door and go." After Cicinelli and Thomas left, Francek followed up with telephone calls to each of the returning mechanics. He spoke with some and left messages for others. Some said they would be ready to start work at 7:30 a.m. One employee said he could not continue the call without union representation.

(2) The Union attempts to recruit the replacement workers

Shortly thereafter, Laskaris walked into the shop and found Thomas speaking to the five replacement mechanics. Laskaris intervened and said, "Ken, this is not the time. Guys get back to work. Ken, I'll set up a private conference room for you before or after work any time you want and you can sit and talk to them all you want, but you're not going to stop them from working." Thomas left and rejoined the group across the street.¹⁸

(3) The Company formally terminates Bisbikis

Later that morning, Laskaris sent Bisbikis a "notice of termination for insubordinate conduct and inappropriate language:"

Your insubordinate behavior occurred during a conversation in my office on Monday, September 18, 2017 at or around 9:05 a.m. during a business meeting where you spoke to me in [G]reek and called me a [stupid jack off] . . . When confronted and told you can't speak to me that way, there was no apology nor denial of your actions, instead you very sarcastically to Sam Cicinelli "I guess that means I should leave now."

This offensive and insubordinate behavior is a direct violation of Cadillac of Naperville's Standards of Conduct. In order to assure orderly operations and provide the best possible work environment, we expect employees to follow rules of conduct that will protect the interests and safety of all personnel.

This violation of conduct is a terminable action. We ask that you immediately refrain from entering our property. Should you have any personal items, please reach out to your supervisor to make any and all arrangements regarding your personal item pick up.¹⁹

(4) The Company recalls seven employees

Later that afternoon, Veronica Coy, the Company's controller, emailed "all currently employed technicians returning from work stoppage" regarding the return-to-work arrangement and copied Cicinelli and Thomas:

Return to Work Procedures: Under the terms of the new contract, each individual dealer may determine how many employees to recall and when. Please make note that after review of our work requirements we have determined that the following

¹⁸ I base this finding on Laskaris' credible and undisputed testimony. (Tr. 251–252.)

¹⁹ Laskaris testified, as the letter states, that Bisbikis' conduct violated the Company's Standards of Conduct." He also testified that those standards were reflected in a "book" which was not produced. (Tr. 259–260,

employed employees will need to return to work AND in their assigned work stall ready for work on September 19, 2017 at 7:30 a.m.

THE FOLLOWING EMPLOYEES HAVE BEEN RECALLED:

ZIOCCHI, MICHAEL D
GONZALEZ, RONALD J
MICHOLSON, CHARLES E
SCHULTE, RYAN D
TOWE, PATRICK
AGUIREE-PORTILLO, ANTONIO
SCOTT, JERICHO

We have made arrangements to have the dealership open 5:30 a.m. until 7:30 a.m. on September 19, 2017 in order to bring TOOL boxes and Tool carts in. Please note that ONLY TOOL boxes and Tool carts will be allowed to be returned to the stalls as we have a redesigned shop and usage will be at full capacity.

Please also note the Cadillac of Naperville Attendance Policy

ATTENDANCE AND PUNCTUALITY

As an employee you are expected to be regular in attendance and to be punctual. Any tardiness or absence causes problems for your fellow employees and your supervisor. When you are absent, your work load must be performed by others, just as you must assume the work load of others who are absent. In order to limit problems caused by absence or tardiness of employees, we have adopted the following policy that applies to absences not previously approved by the Company.

If you are unable to report for work on any particular day, you must call and speak to (not text message or email) your supervisor at least one hour before the time you are scheduled to begin working for that day. Absent extenuating circumstances, you must call in on any day you are scheduled to work and will not report to work.

Excessive absenteeism or tardiness may result in disciplinary action up to and including termination of employment. If you believe the absence is legally protected, please see the company's Disability Accommodation Policy for more information. Each situation of absenteeism or tardiness will be evaluated on a case-by-case basis. Even one unexcused absence or tardiness may be considered excessive, depending on the circumstance.²⁰

F. Recalled Employees Attempt to Report to Work on September 19

At 7 a.m. on September 19, the employees met at their usual location across the street from the dealership. A short while later, Cicinelli and Thomas marched across the lot with the recalled mechanics to the service area as vehicles were coming through the service entrance. They were met there by Laskaris

276–277; Jt. Exh. 6.) In the absence of documentary evidence to support that assertion, there is insufficient evidence to conclude that Bisbikis violated any written standards.

²⁰ Jt. Exh. 7.

and Francek. Laskaris asked what they were doing. Cicinelli said that he wanted to discuss the logistics for the employees' return since the storage facility did not open until 9:30 a.m. Laskaris replied that it was not his problem and if the employees were not in their stalls with their tools ready to go at 7:30 a.m., he would issue them warning letters because they were technically late.²¹

Laskaris proceeded to escort the group into the new car delivery area. As they passed customers in parked vehicles waiting to enter, Cicinelli said to a customer that "these are the real technicians. Your scabs are in there." Francek interjected, reassured the customer that the real mechanics were working and the dealership would take care of him, adding that the individuals walking in "can't do shit."²²

Once in the room, Laskaris told the employees, "This is my facility. You're going to listen to me. I don't give a fuck who tells you; listen to me. If I tell you to jump, you ask me how high. This is my—you play by my rules." Cicinelli interjected, "as long as you adhere to the terms outlined." Laskaris responded, "I know what that is. I don't need to be reminded of that." Cicinelli agreed with that comment. Laskaris told the employees to bring their tools after 5 or 5:30 p.m. that day and Cicinelli replied that he would be filing another grievance for back pay for that day because Laskaris continued to make it impossible for the employees to bring the tools back since the storage facility closed at 5 p.m. Laskaris then told Cicinelli to have the unit employees bring them home. Cicinelli said that they did not all have trailers to transport their tool boxes and/or have room to fit them in their garages. Nor did they have the option of leaving them outside their homes since they were expensive. Laskaris said that was not his problem. He said for them to bring them in the next morning and Cicinelli replied that the storage facility did not open until 9:30 a.m. Cicinelli noted Laskaris' inconsistency in permitting employees to remove the tools on a Saturday, but now insisting it would be disruptive to bring them while the facility was open for business. He called it overly restrictive. Laskaris reminded Cicinelli that he told employees the previous day about being ready when reporting to work and that some confirmed they would be ready to go. They went through several more exchanges in which Laskaris said he was not going to do it Cicinelli's way and the latter insisting that he needed to comply with the contract. Laskaris finally relented, stating that he would run his shop in a manner consistent with the contract, and agreed to let the employees bring back their tools after 4:30 p.m. that day.²³

G. Employees Finally Return to Work on September 20

The seven reinstated employees returned to work on

²¹ Laskaris did not, in fact, issue written warnings to employees for lateness on September 19.

²² The testimony of Laskaris, Francek and Cicinelli confirmed the interaction of Cicinelli and Francek with the customer. In addition, Francek failed to refute Cicinelli's testimony that the former told the customer that the strikers "can't do shit," while Francek's testimony that Cicinelli referred to the mechanics on duty as "scabs" was also undisputed. (Tr. 72–73, 240–241, 295.)

²³ The testimony by Cicinelli, Laskaris, Francek and Towe regarding their interaction was fairly consistent. However, given Laskaris'

September 20. Later that morning, Laskaris pulled aside apprentice mechanic Patrick Towe showed him a video recording of someone walking across the entrance to the dealership. It was Towe carrying a sign and walking slowly on the stripe line in the middle of the street in front of the driveway. Towe's shenanigans enabled him to block a customer who was waiting to take a test drive. She was forced to drive very slowly behind Towe as he walked across the parking lot entrance. The customer began to accelerate as Towe had advanced to a point where he was nearly out of her way. However, Towe suddenly pirouetted and walked back towards the vehicle, causing the customer to slam her breaks.

Laskaris asked if that was him on the video recording and Towe said, "I don't think so." Laskaris was not swayed, pointed out that the prankster was wearing his sweatshirt, and comment on his harassment of a future service shop customer. He concluded with a remark that he hoped that Towe would refrain from similar conduct. Laskaris then said "I don't want any of you here." After further remarks, Laskaris said, "Well, if this is your home, you wouldn't be doing this" and he told Towe to look for another job because he wouldn't be there very long. Towe said okay and Laskaris dismissed him back to work.²⁴

H. The Company Restricts Union Officials Access to Employees

Prior to the strike, Thomas customarily visited unit employees at the dealership approximately once every 6 weeks.²⁵ Laskaris, upset after the events of September 18 and 19, contacted an attorney and, on September 21, Laskaris and Francek sent a letter to the Union limiting its previously unfettered access to employees on its premises:

This letter will serve as notice to Sam Cicinelli, Ken Thomas, and Mechanics Local 701. As a result of the intimidating and threatening behavior of union president Sam Cicinelli and B.A. Ken Thomas on Monday and Tuesday 9/18 & 9/19 towards myself, our employees, and shockingly even worse our customers. Neither Cicinelli nor Thomas will be welcome in our dealership or on property. If they choose to ignore our request they will kindly be asked to leave the property immediately. Proper authorizes will be notified to have them removed if necessary.

As a result of the actions and behavior of Local #701 representatives mentioned above and complaints received from 4 employees who felt they were being "intimidated and bullied" by B.A. Ken Thomas on Tuesday the 19th. Local #701 representatives will need to make an appointment and request access to our facility and/or our employees while they are at work. An

penchant for colorful discourse with his employees, I credit Cicinelli's version of Laskaris' vulgar-filled remarks that day. (Tr. 51–55 80–81, 240–242, 294–297.)

²⁴ The video was not a surveillance video generated by the Company and Laskaris was evasive as to its source. (Tr. 243–245.) In any event, I credit Towe's testimony regarding this conversation, which was not denied by Laskaris. (Tr. 82–84, 245.) Towe was laid off on December 2, 2017.

²⁵ The existence of this custom and practice prior to the strike was undisputed. (Tr. 57–58, 252.)

agreed upon time must be scheduled with myself or our V.P. John Francek. Failure to make such arrangements and respect our fair request will result in representatives from Local #701 being asked to leave the property immediately and return at an agreed upon scheduled time.

In closing let me be very clear. I personally will no longer be threatened or tolerate acts of intimidation by local #701 representatives in my own place of business. Nor will I tolerate such behavior towards my employees or our customers. Such behavior will be met with swift legal action going forward. I appreciate your cooperation in advance.²⁶

Union access to the facility is governed by Article 8, Section 2 of in both the Expired Contract and the Successor Contract: "A Union representative shall be permitted access to the Employer's premises for the purpose of adjusting complaints individually or collectively."²⁷

I. The September 25th Staff Meeting

On September 25, Laskaris called a staff meeting where he threatened employees with layoff. Laskaris called the meeting to express his frustration over the Union's decision to leaflet outside the dealership post the strike. During the meeting, Laskaris told the employees that the Union's leafleting was taking money out of their pockets and that if they ran out of work, all of the recalled employees would be laid off.²⁸

J. Changes to Company Rules and Practices

(1) Free water

During the term of the 2013–2017 agreement, the Company provided unit employees with free gloves and bottled water in the Parts Department. Mechanics are required as part of their job to wear gloves and were provided with free gloves as needed. Prior to the strike, the Company also provided employees with a water fountain, as well as free bottled water and Gatorade during the summer months. The water fountain broke prior to the strike, however, and the Company provided bottled water.

During the first week upon returning to work, the Company no longer provided free water bottles and removed the water fountain. They were told to remove their refrigerators and the refrigerator in the break room was removed.²⁹ The following day, the changes were posted in a sign on the wall.³⁰

(2) Attendance policy

Prior to the strike, the Company did not have a formal attendance policy. It was left up to the service manager's discretion as to how they wanted to handle call-offs or calling in late. In some

instances, the service manager simply required mechanics to either leave a voicemail message or text message him if they were going to be late.³¹ In its September 18 recall letter to seven employees, the Company inserted an attendance policy at the end of the email. About 2–3 weeks after employees returned to work, the Company revised that policy. It stated in pertinent part:

... Technicians should contact their Department Manager to report an absence at least (1) hour prior to their starting time, and lateness at least a (1/2) hour prior to their starting time so that arrangements can be made.

If any technician is absent from work for three working days without informing his or her Department Manager, it will be assumed that the employee resigned and employment will be terminated as of the last day worked by the employee. Warning letters will be issued for each day of "No Call No Show" with copies being sent to the Member and the Union.

... The following describes the disciplinary actions that may result from Unexcused Absence, Tardiness and or Early Leave.

- Unexcused absence applies to non-scheduled days off and/or non-negotiated days off.
- Tardiness applies to returning from lunch and/or break periods as well as the beginning of the workday (including not calling in the proper time for an absence.)
- Early leave applies to leaving before your scheduled workday ends.

Technicians are expected to be punched in and prepared to work no more than (5) mins past their regular start time and they be considered on time. When an employee is late beyond five (5) minutes, along with any subsequent time thereafter, they are considered tardy and shall be reprimanded or a written warning issued. Punching in and then leaving to park car, get breakfast, or other tasks are prohibited.

1st offense: Verbal reprimand (written notice for technician's personal file and Union to document the communication occurred)

2nd offense: Written warning notice (copy to employee's personnel file, employee and Union)

3rd Offense: Final written warning notice (copy to employee's personnel file, employee and Union)

4th Offense: Subject to termination after management review

Unexcused Absence/Tardiness/Early Leave warnings will be separate warnings to Discipline and Training warning letters

²⁶ Laskaris' assertion that employees complained about the conduct of Cicinelli and Thomas was neither credible nor corroborated. To the contrary, Laskaris' testimony indicated his annoyance at the fact that the union representatives were soliciting the replacement workers while they were on the job and he injected himself to break up the conversation. (Tr. 261–262, 275; Jt. Exh. 8.)

²⁷ Jt. Exh. 2 at 44.

²⁸ Laskaris did not dispute Gonzalez' credible and undisputed testimony regarding this incident. (Tr. 158.) Francek confirmed making remarks about the leafleting and its connection to potential layoffs if work did not pick up, but did not dispute Gonzalez' testimony. (Tr. 297–298.)

²⁹ Laskaris was vague as to whether the water fountain broke—"not to my knowledge"—and testified that prior to the strike free bottled water was provided in the employee lounge refrigerator with a cup next to it for contributions that the Company matched for charity. (Tr. 249–251, 260–261.) Francek testified that the Company confirmed that the Company cleaned out old items. He also referred to a technician's refrigerator causing an electrical short, but did not address the banning of refrigerators. (Tr. 300–301.)

³⁰ GC Exh. 4.

³¹ Towe and Bisbikis credibly testified that there was no written attendance policy prior to the strike. (Tr. 85, 134–135.)

except in the case of “No Call/No Show” warnings. All unexcused Absence/Tardiness/Early Leave warning shall be held for 1 year from the date of issue.

Fulltime technicians are allowed a maximum of 2 excused sick days per calendar year after first 90 days of employment. Excessive absences will be subject to discipline.³²

Upon learning of the new policy, the Union filed a grievance.

(3) Car Washing

Prior to the strike, the Company employed porters to clean, wash gas and move cars, as well as the facilities. Mechanics were not asked to wash cars. Upon returning from the strike, however, business was slow and, on at least one occasion, Towe was temporarily tasked with washing cars. The Company implemented that temporary change without notifying the Union.³³

K The October 6th Meeting

At approximately 11:00 a.m. on October 6, Klodzinski instructed the mechanics to cease work so they could have a meeting. The service managers, service advisors, parts department, John, Frank and Mark were all present. In a meeting that lasted approximately 40 minutes, Laskaris revisited the contentious events of the past several months and his labor relations approach going forward. He told the mechanics that they could take notes and tell the Union the same thing to their face.³⁴ Laskaris’ comments were secretly recorded by Towe:³⁵

I want to make something really clear. I’m going to draw you an analogy. Chuck, you own a house? You invite us all into your home, give us an opportunity to sleep, eat, share holidays, earn a little living, happy times, also you come home one day, and we’re standing on your front lawn, fucking with your neighbors, fucking with your kids, trying to keep you from putting bread on the table, going on Facebook saying how much of an asshole you are, how shitty your food is and how fucked up your house is. But once I get what I want, which is . . . out of my control, nothing to do with the contract, you got to open your house and take all of these people back in, sing kumbaya and let all of these people back in . . . I have a hard time with that . . . I think you guys were misled, severely misled, let me give you an example. You show up on Monday to come back to work and he assembles you across the street and we’re going to walk on the lot for hours of meetings and your guy who you see every four years who doesn’t give a shit about you, is in my office telling me how the fuck I’m going to run my store. . .

He’s telling me how the shit is going to go down in my house. . . . I put my name up there so I could walk around with a big dick, no, this is our place. . .

So I tell him these okay these guys are coming back. Here’s the return to work policy. I’m going to open up the doors two hours early, get your tools and be ready to get to work at 7:30, not disrupting a day’s work. He makes sure he lets you guys know, fuck that, we’re not going to do that, we’re going to do it our way . . . He starts whining we can’t get our tools today . . . So he assembles you and walks you across the parking lot . . . and you guys come walking up like West Side Story right in the front door and are going to cause a scene with the union guy who is not going to know your fucking name in a couple of months . . . “We’ll go show him, we’ll go fuck with him.” Good idea guys. . . . So what I do? I tell you guys, “we’re opening at 5:30. Bring your tools and be ready to go,” didn’t I? “Any questions?” Nope. Everybody leaves. Mark gets on the telephone with Johnny and calls every one of you guys. Spoke to most of you. What were you told? [An attendee says “between 5:30 and 7:30”] . . . and they said “no problem, I’ll be there ready to go . . . Somewhere between Monday and Tuesday you guys get misled by some guy who really doesn’t give a shit about you. Somehow he talks you into not bringing in your tools in. “We’ll just say the rental place isn’t open, storage place isn’t open.” He didn’t say, you know what guys, you’re my union guys, I’ll send the union truck over to pick them up right now and I’ll park that truck at union hall” . . . Did he do that for you guys, because I would have done that for you. He didn’t. He said “meet me across the street, we’ll go fuck with him again.” You know he cost you guys a days’ pay. He probably told you “that he’ll have to pay you on Tuesday.” No. “You said you’d be in your stall ready to go. You had plenty of notice. You weren’t in your stall ready to go so I’m not paying you” . . . “Let’s fuck with the guy more” and the result is, Mike, you don’t get another day’s pay . . . I could have been a prick and said “we’ll try it again tomorrow at 5:30.” I should of, but I didn’t. I said, fine, we’ll try it again tonight after work . . . Then I said let’s bring it in tomorrow morning and Sam said “no, the rental place isn’t open.” I have a question for you guys. You’re supposed to be in your stalls ready to go on Tuesday. You said you’d be ready to go. If your family depended on breathing on Wednesday based on the money you made on Tuesday, would those tools have been here. Chuck? You would found a way to get the tools here. So let’s

³² Jt. Exh. 9.

³³ Towe was the only witness to testify that he was directed by Towe was asked by Klodzinski to wash cars on an unspecified date. (Tr. 86–87, 102.) Gonzalez explained that washing cars potentially reduced mechanics’ earnings potential since it was not compensable as book time. He did not, however, confirm that he was actually assigned to wash cars at any time. (Tr. 163–164.) Nor do I credit Cicinelli’s testimony that the Company never bargained over an attendance policy is undisputed. However, I do not credit his uncorroborated hearsay testimony that strikers told him that they photographed unit employees washing cars. (Tr. 59–61)

³⁴ Laskaris testified that he needed to address the group because he was “getting grievances over the most frivolous, stupid things in my eyes.” (Tr. 245–246, 275.)

³⁵ The Company did not object to the authenticity and accuracy of the recording but objected to its admission on the ground that Illinois is a dual party consent state and Towe did not receive Laskaris’ permission to record the meeting. As I explained at hearing, tape recordings are typically admitted in Board proceedings, even if made without the knowledge or consent of a party to the conversation, and even if the taping violates state law. *Times Herald Record*, 334 NLRB 350, 354 (2001), *enfd.* 27 Fed.Appx. 64 (2d Cir. 2001); *Williamhouse of California, Inc.*, 317 NLRB 699 fn. 1 (1995), and *Wellstream Corp.*, 313 NLRB 698, 711 (1994).

stop the bull shit, the rental places, it's all posturing bull shit.

Why am I telling you? You can grieve whatever you want. Let me tell you about the grievance process. You put it in writing and you complain to someone here, me or management and you let the union know. That's the process. Otherwise the grievance doesn't mean shit. He can walk up on the lot and hand me whatever he wants. . . What I'm telling you is I don't give a shit about grievances. Grieve all you want. It doesn't matter. They can't do shit. . . "They're not giving us free water . . . [or] gloves anymore." . . . Grieve all you want. . . Bull shit. I don't care about grievances, grieve all you want. . . Keep putting your name on it. You look stupid saying they don't give me free water. Until this happened, you were happy working here. Grieved about water, go ask Jean who makes 20% of what you make where she gets her water, she'll tell you she gets it from her house. Be a man, grieve something important, like wages. . .

You don't know how many times I mortgaged my house to make sure you got a paycheck. . . You didn't stand there and tell the Toyota guys, "fuck with your own owner and fuck with your own customers and leave ours alone." None of you did that. Instead, you call them over and say "you blow the horn let's get him to do it" . . . You wonder why I'm pissed. . . It's not right, I'm here to tell you I don't care, I don't care on what you grieve, I don't care how much you complain, they're not going to tell me what to do. I suggest you read your little blue book that he waved in my face like a smug asshole . . . and if I follow that book your life harder will get harder . . . There's so much stuff in that book that nobody enforces. Why? Because we don't want to be that kind of place. You're going to grieve gloves, guys? Good luck. . . Why are you putting your name on that, guys? Step away from all this and go ask I'm a man first and I have a family. Why am I signing a piece of paper crying about gloves? If it's so bad go somewhere else. It's okay. You guys need to understand . . . I'm the nicest guy in the world, fuck with me and I'm going to fight harder. . . I couldn't sit back during this thing and go "ah, it will end someday, no problem, here's your paycheck . . . Mark." . . . Why don't you call the parts guy . . . ask Jim later after eating shit for all these months, running parts for you guys, . . . while you're making \$1,500, \$2,000, \$2,500 per week and he's making a fraction of that, ask him how he felt being laid off while with no paycheck you guys are playing darts outside, blowing horns, making sounds, fucking dancing. . . Ask some of these people . . . [the sales] and parts people . . . what it feels like to throw water in front of his car, videotape him instead of letting him sell cars, and then going on Facebook and saying that he's going to run me over. . . You guys should instead be angry at Johnny and Sam . . .

Every 701 member has an option. . . You could be a financial core member . . . you get everything everybody else gets. You're a member like everybody else. All your benefits are protected. You trade one thing. You never have to strike. . . But you give up your vote on the contract but you never have to strike. . . But before you strike ever again educate yourself. Because if I were you, I would have changed my membership

a week before the strike. . . "I'm going to go to work and get a paycheck while those guys throw play darts, lift weights and make assholes out of themselves" . . . By the way, your [union representative] he came in and had a meeting with a couple of guys to sign them up and they said tell me what I'm signing, he goes never mind, just sign, he bullies them. Then they said tell me about financial core. . . There's no such thing. He lies to them. Now he's calling them scabs. . .

The same person who is on Facebook saying what a horrible place to work this is . . . why do you want to be here? . . . [Shows a videotape of Towe stepping in front of an elderly customer seeking to test drive a vehicle] . . .

If they're gang raping a woman and you stood by are you about as guilty as them? . . . Keep filing shit . . . I would look for a job if I were some of you, maybe all of you. . . I wouldn't want to be where I'm not wanted. . . While you're playing darts, Pat . . . are you kidding me? . . . You guys shit on our house. . . I look out the window and I saw some of you guys. . . We were in a labor dispute. I couldn't talk to you guys. But you could have picked up the phone and called Mark, or called me or called John. You could as a group . . . walked in with your leader Johnny who led you down a shitty path and . . . could have walked in before the strike and said "what are our options" and educated yourselves. At that point I didn't know what our options were. . . .

There's a contract. We're going to follow it. But I'm not putting up with any more bullshit . . . There's more videos of behavior . . . that will make your stomach turn. . . I expected a little more loyalty towards the 70 families here . . . Refer to these guys as scabs and see what happens . . .

This shop is going to be run the way I want it to get run, not the way Sam's going to tell you . . . Gloves, water? You can't do shit about gloves or water. . . Pick a fight that's worth fighting, guys. Stop it. Or just keep it up. Call him today. Tell him that I threatened your guys to all look for jobs. . . Know what the penalty is? . . . Okay, I won't do that anymore. . . So they have you thinking they have some power over us. That's shit. . .

I own this place. . . If you think for a minute Chuck that I have to keep you here long term, you're wrong. It doesn't matter . . . I have 701 guys here who want to work, who are hungry and happy and respect coworkers jobs, so next time they face a horrible decision they'll know what they're walking into instead of obstructing customers and dealers who are trying to sell cars. . . Johnny, stay the fuck off of Facebook and stop trashing the dealership. . . and harassing people. . .

Watching a guy like Matt who came here as an apprentice and made \$120,000 last year. That's gratifying to me. And then watching him go outside and act like a complete asshole, pissing on his fucking \$10,000 a month. How smart is that? And not having a guy like Ronny and Mike and Chuck saying "Matt, fucking don't do that, chill, you want to do that, go back there and sit under a tree. That would have been good advice. . . Nobody can tell you to act like an asshole, nobody can tell you to obstruct our business, obstruct our building to make a living. . .

What you don't even know now they cost you a day's pay by giving you bad advice that day. . . . Some of you said I'll be there with my tools ready to go. Someone talked you out of it. So you start work on Wednesday instead of Tuesday. Cost you a day's pay. Right? He can fight for it. Right? Good luck. I can hear the judge now: "Let me get this right, Chuck, you're a grown man, been doing this a long time, you said you'd be there on time, it was 12 o'clock on Monday, you couldn't rent a truck and get your tools to work by Tuesday morning like you said you could?" He's not going to believe you. He's not going to be able to pay you. . . . That's your friend Sam, giving you good advice. . . .

And then they negotiated a contract. You know the first one you vote on wasn't what you were offered. I was dumfounded. I thought that could be illegal. We could have offered you \$50 an hour. . . . They didn't put the real numbers in front of you until they were ready to settle the strike. I tell you what, Sam did a great job against a real legal team, but he didn't do you guys any favors because the first contract offer was an unprecedented deal because everybody wanted to move on and keep going. Nobody wanted a strike. . . . That's not what's put in front of you. . . . I don't even know what you were offered because I stayed out of it. I didn't go to one meeting. . . . My point is, you guys get manipulated. Don't be manipulated by anybody, don't be manipulated by me, the union, anybody, look out for yourself, be smart. . . . The first thing they put in front of you was not even close to what you were offered. It was three times the historical rates that you guys got and it was voted down. Why? Because they lie to you. . . . You voted on some bullshit they put in front of you because they wanted a down vote to muscle. In the end you ended up with the same fucking deal but you sat out on the curb for six too long for \$300 a week. How's that feel? And you pissed a lot of people off. How's that feel, Mike? . . .

[The union] keeps preoccupying our time with bullshit; I'll keep you guys busy with bullshit. . . . Keep shitting on your house with stupid bullshit over water. . . . [and that you used to have] a chest on the wall, now I want it back. Really, who are you guys to anything? . . . You don't have a right to demand shit. They can write anything they want on those pieces. . . . I'll buy you guys your own pads of grievances for Christmas if you want. . . .

Keep it up and we can play this game all day because I'm not backing down. I'm not going to be bullied by Sam. He's not going to put his fucking finger in my face. . . . You guys put me on [the news]. . . I'm an asshole. . . . My kid is going to Google that shit someday. I deserve that? . . .

14 guys acted badly, misguided, misled. . . Easy decision for me. So go home every night and tell yourself, "What a cock sucker he is." It's OK. I can live with it. I can be the nicest guy in the world, you put me in a corner, I'm going to fucking eat your face. That's who I am. I'll give you a kidney, Ronnie

but you fuck with me and my people, I'm going to eat your kidney out of your body and spit it at you. That's how nasty I can be. It's not in my nature to be a prick, but when I see shit like that Pat, it's easy to be a prick to you; real easy. And they can't stop me from being a prick. So you should ask yourself a question, do you want to work for a prick? Think about it. You got anything you want to say? . . . Let's go back to work.

L. The October 27 Threat

Brian Higgins, a journeyman service technician, has been employed by the Company for about 2 years. He was not one of the unit employees not recalled on September 18. On October 27, Laskaris called Higgins to inform him that he was finally being recalled to work and if he was still interested. Higgins responded affirmatively. Laskaris, however, replied that he did not want Higgins or any of the remaining permanently replaced employees to return to work. He also warned that if Higgins returned to work it would not be long before he was gone.³⁶

M. The November 17th Recall Letters

On November 17, the Company offered recall to Higgins, Wilson, Scott, Gibbs and Mendralla from their status as "a permanently replaced employee in accordance with the recently ratified collective bargaining agreement between the NDC and Local 701:"

We expect you that you will return to work on Monday November 20, 2017. If, however, you are unable to report on Monday, November 20, 2017, as outlined in the Standard Automotive Agreement strike settlement agreement regarding recall, you will have three (3) working days to report after notice of recall. If you have reasonable excuse for being unable to report during this time period, please communicate that excuse within the three working day period to Jeremy Moritz. . . [his] assistant (Brittany Chadek) can be reached at. . . For these purposes, a communication from a union official (including Mr. Cicinelli) or the Union's attorney. . . regarding your intended return is sufficient.

If you fail to report or do not provide a reasonable excuse within the three-day period, you will be considered as having resigned from employment. Waiving your recall at this time will be permanent and will result in loss of all future recall rights as well as a break in seniority with [the Company], in accordance with the current collective bargaining agreement.

We are looking forward to having you return as a valued member of our organization and look forward to hearing from you soon.³⁷

LEGAL ANALYSIS

I THE 8(A)(1) THREATS

Under Section 8(a)(1) of the Act, an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title". 29 U.S.C. § 158. The Supreme Court described the balance between those

³⁶ Laskaris did not dispute Higgins' credible testimony regarding this conversation. (Tr. 149-150.)

³⁷ Jt. Exh. 10.

employee rights and an employer's free speech rights as codified by Section 8(c) in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969):

[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company.

Between June 29 and October 6, the Company made numerous threats and coercive statements that lacked the objective character necessary to invoke the protection of Section 8(c).

A. June 29

During a conversation initiated by Bisbikis on June 29 regarding employee concerns, Laskaris warned him that "things would not be the same" if unit employees went on strike. The statement violated Section 8(a)(1). It did not communicate any objective facts or predictions as to the effects of a potential strike. Although vague, the statement's timing is significant as it occurred just before a strike was about to begin at the dealership. See *United Aircraft Corp.*, 192 NLRB 382, 383 (1971) (Employer violated the Act with statement two days before a pending strike that "[a] lot of people are going to get hurt and a lot of people won't be coming back"). On its face, the statement cannot be viewed as anything but a threat that a strike would produce only negative consequences for the unit. *Communications Workers Local 9509*, 303 NLRB 264, 272 (1991) (employer's thinly veiled threats to an employee with respect to their union activities was unlawful); *APA Transport Corp.*, 285 NLRB 928, 931 (1987) (same); *Waterbed World*, 286 NLRB 425, 427 (1987) (same).

C. September 20

On September 20, Towe was interrogated by Laskaris about his alleged picket line misconduct, culminating with the dire prediction by Laskaris that Towe would not be at the Company very long and should find another job. The overarching theme of the conversation was not Towe's shenanigans on a particular day, but rather, Laskaris' disapproval of Towe's overall participation in the strike. Laskaris did not assert, and there is no other evidence in the record indicating otherwise, that the statement was made in jest. See *Electri-Flex Co.*, 238 NLRB 713, 716 (1978) (finding an 8(a)(1) violation where employer offered discredited testimony that the threat of discharge was a joke); cf. *Baker Machinery Co.*, 184 NLRB 358, 361 (1970) (rejecting a Section 8(a)(1) claim where foreman joked that an employee's days were numbered). Under the circumstances, Laskaris' statement of doubt as to Towe's continued employment was a threat of discharge in response to protected union activity in violation of Section 8(a)(1). *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995) (coercive threats may be implied rather than stated expressly); *National By-Products, Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991) (same).

C. September 25

On or about September 25, Laskaris held a staff meeting with

Gonzalez and other employees to address union leafletting at the dealership. At that meeting, in conjunction with his complaint about continued union leafletting in front of the dealership, Laskaris remarked that he would lay off all of the recalled employees if he ran out of work.

Pursuant to *Gissel*, the question is whether Laskaris' statements constituted an unlawful threat of retaliation in response to protected activity or a lawful, fact-based prediction of economic consequences beyond the employer's control. 395 U.S. 575, at 618–619. In this case, the Company provided no evidence that leafletting was causing such substantial economic harm as to justify the termination of a large number of employees. See *Massachusetts Coastal Seafoods*, 293 NLRB 496, 510–512 (1989) (statement by company official is an unlawful threat, not a lawful prediction, when the official gave no facts or figures to support prediction of economic effects); cf. *In Re Tvi, Inc.*, 337 NLRB 1039 (2002) (finding that supervisor made a lawful prediction of potential layoffs where company was not profitable and the statement was carefully phrased). Laskaris could have made his views about the dealership's economic condition known without threatening to terminate employees but decided to engage in the type of "brinksmanship" that the Supreme Court has observed often leads employers to "overstep and tumble (over) the brink." *Gissel*, 395 U.S. at 620, quoting *Wausau Steel Corp. v. NLRB*, 377 F.2d 369, 372 (7th Cir. 1967). Instead, he took the opportunity to once again cast union activity as inimical to unit members' employment security in violation of Section 8(a)(1).

D. October 6

The complaint alleges that on October 6, Laskaris convened a meeting on the shop floor with all of the mechanics working that day. During the meeting, Laskaris threatened employees with stricter enforcement of company rules, informed them that it would be futile to file grievances, encouraged employees to resign their membership in the union or become core members of the union, coerced employees by telling them that past employees had lost their jobs over their decision to strike, and threatened employees with physical violence. Towe recorded the meeting in full, and the Company objected to the admission of the recording based on Illinois state law, but did not dispute the substance of the recording. The recording was received in evidence consistent with Board precedent. See fn. 35, *supra*.

An employer violates Section 8(a)(1) of the Act by threatening that it will more strictly enforce rules or policy because of employees' protected activity. *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1074 (2004) (employer unlawfully threatened stricter rule enforcement and restrictions on protected activities in non-work areas in response to unionization); *Mid-Mountain Foods, Inc.*, 332 NLRB 229, 237-38 (2000), *enfd.* 269 F.3d 1075 (D.C. Cir. 2001) (supervisor unlawfully warned employees that the company would draft strict work rules that would be "followed to the letter"); *Long-Airdox Co.*, 277 NLRB 1157 (1985) (employer unlawfully threatened employees with plant closure and told them it would more strictly enforce plant rules).

During the meeting, Laskaris informed the employees that if he chose to enforce the rules as they were written, things would be much harder for them:

I suggest you read your little blue book that he waved in my face like a smug asshole . . . and if I follow that book your life harder will get harder . . . There's so much stuff in that book that nobody enforces. Why? Because we don't want to be that kind of place.

Laskaris' statement falls squarely in the *Long-Airdox Co.* line of cases as an unabashed threat of greater enforcement in response to union activity. The crux of the meeting was that there would be negative consequences for engaging in union activities. Moreover, Laskaris' statement of greater enforcement was clearly motivated by general animus towards the protected union actions that occurred at the dealership.

Laskaris' statement regarding the futility of filing grievances was premised on his aversion to letting the union tell him how to run his business. The Board has found violations of Section 8(a)(1) where an employer "conveyed the impression that the contractual grievance procedure was futile." *Prudential Insurance Co. of America*, 317 NLRB 357 (1995) (supervisor unlawfully informed employee that filing grievances would "lead to a bad situation" and "it didn't matter what happened during the grievance procedure"); *Laredo Packing Co.*, 254 NLRB 1 (1981) (personnel director unlawfully explained to an employee why the grievance he filed lacked merit and threatened discharge if he did not withdraw it). Laskaris made his views regarding the futility of filing grievances and the low merit of past grievances abundantly clear:

What I'm telling you is I don't give a shit about grievances. Grieve all you want. It doesn't matter. They can't do shit. . . "They're not giving us free water . . . [or] gloves anymore." . . . Grieve all you want. . . Bull shit. I don't care about grievances, grieve all you want. . . Keep putting your name on it. You look stupid saying they don't give me free water. Until this happened, you were happy working here. Grieved about water, go ask Jean who makes 20% of what you make where she gets her water, she'll tell you she gets it from her house. Be a man, grieve something important, like wages. . . You wonder why I'm pissed . . . It's not right, I'm here to tell you I don't care, I don't care on what you grieve, I don't care how much you complain, they're not going to tell me what to do.

In unequivocal fashion, Laskaris stated that he had no patience for past grievances, nor would he entertain any grievances that did not comport with his idea of a "real grievance." These comments crossed the line of protected employer speech under Section 8(c) and, thus, violated Section 8(a)(1).

Laskaris continued the meeting by making a pitch for why the employees should resign from the Union or become financial core members:

Every 701 member has an option. . . You could be a financial core member . . . you get everything everybody else gets. You're a member like everybody else. All your benefits are protected. You trade one thing. You never have to strike. . . but you give up your vote on the contract but you never have to strike . . . but before you strike ever again educate yourself. Because if I were you, I would have changed my membership a week before the strike. . . I'm going to go to work and get a

paycheck while those guys throw play darts, lift weights and make assholes out of themselves. . . . By the way, your [union representative] he came in and had a meeting with a couple of guys to sign them up and they said tell me what I'm signing, he goes never mind, just sign, he bullies them. Then they said tell me about financial core. . . . There's no such thing. He lies to them. Now he's calling them scabs. . .

Pursuant to *Gissel*, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." Laskaris' remarks displayed clear animus toward the union and its representatives, and overzealously encouraged the unit to consider his proposal for withdrawing union membership. *Adair Standish Corp. v. NLRB.*, 912 F.2d 854, 860 (6th Cir.), judgment entered, 914 F.2d 255 (6th Cir. 1990) (supervisor violated Section 8(a)(1) when he "took it upon himself" to "let the employees know that [he] had forms to fill out to revoke their authorization cards"); *Peabody Coal Co. v. NLRB*, 725 F.2d 357, 364 (6th Cir. 1984) (finding a Section 8(a)(1) violation where the employer "offered both the method and the means to withdraw from the union" and encouraged consideration of this option"). It is noteworthy that Laskaris openly displayed animus toward the Union and engaged in other Section 8(a)(1) violations before and after these remarks. *NLRB v. E.I. DuPont de Nemours*, 750 F.2d 524, 528 (6th Cir. 1984) ("the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees"). Given the overtly hostile context of the October 6 staff meeting, Laskaris' encouragement of union members to resign from the union or become financial core members violated Section 8(a)(1).

Laskaris also blamed unit employees for the loss of nonunit employees' jobs because they chose to strike. He admonished the strikers for disrupting the work of nonunit employees and asked the strikers how they felt about the parts and sales department employees who were laid off because of the strike. Considering the total context in which these statements occurred, Laskaris deliberately played on the sympathies of the unit employees to coerce them from exercising their Section 7 rights again in the future. *NLRB v. E.I. DuPont de Nemours*, 750 F.2d at 528. Accordingly, all statements placing responsibility on unit employees for the loss of nonunit jobs violated Section 8(a)(1) of the Act.

As the meeting wound down, Laskaris ratcheted the impact of his coercive remarks with anatomically colorful remarks that reasonably threatened physical harm if unit employees continued to engage in future union activity:

14 guys acted badly, so go home every night and say what a cock sucker he is, I'm Ok with it, put me in a corner, I'll eat your face, I'll give you a kidney, but you fuck with me and my people, Ronnie, I'm going to eat your kidney out of your body and spit it out. That's how nasty I can be. And they can't stop me from being a prick. Ask if you want to work for a prick. Anything you want to say?

Laskaris made this statement during a heated speech aimed at

returning strikers and other employees, and it was not unreasonable for the employees present to be shocked by Laskaris' comments. See *Jax Mold & Machine, Inc.*, 255 NLRB 942, 946-947 (1981) (supervisor's statement made in anger that he would shoot union supporters constituted an unlawful threat), enfd. 683 F.2d 418 (11th Cir. 1982); cf. *Strauss & Son, Inc.*, 200 NLRB 812, 822 (1972) (no violation where employees would not have believed the employer when he said he wished he could load certain employees into a truck, put some dynamite into it, and blow them all up). Laskaris' remark was not made in jest but was an act of verbal intimidation that conveyed to the employees in attendance that union activities were not to be repeated. Even if Laskaris' statements were not construed as legitimate threats to cause bodily harm, they would reasonably tend to coerce employees in the exercise of their Section 7 rights. *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, slip op. at fn. 6 (2016). For the foregoing reasons, Laskaris' threats violated Section 8(a)(1).

E. October 27

Higgins received a telephone call from Laskaris regarding his recall. During the call, Laskaris told Higgins that he did not want Higgins or any of the remaining permanently replaced employees to return to work. He then warned Higgins that if he returned to work it would not be long before he was gone.

Laskaris' statements were overtly coercive in trying to convince Higgins that returning to the Company would not be in his best interest. The expression of doubt as to Higgins' longevity with the Company violated Section 8(a)(1). See *Concepts & Designs, Inc.*, 318 NLRB at 954.

II. ALLEGED ADVERSE ACTIONS

The complaint alleges that Laskaris terminated Bisbikis' employment because he engaged in concerted union activities and to dissuade others from engaging in such activities. The Company contends that Bisbikis' discharge resulted from his use of vulgar language and, thus, insubordinate conduct, toward Laskaris. Other alleged acts of retribution include the institution of a new attendance policy, the removal of free gloves and water, the implementation of restrictions on Union access to Company facilities, the Company's tasking of unit mechanics with washing cars, Laskaris' dismissal of unit employees without pay on September 18, and the Company's four month delay in recalling five permanently replaced employees.

In determining whether Bisbikis and unit employees were subjected to adverse employer action because they engaged in protected or union activity, the appropriate test is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved at *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). The General Counsel must initially show the employee's protected activity was a motivating factor in the decision to terminate. See *Coastal Sunbelt Produce, Inc. & Mayra L. Gastume*, 362 NLRB 997, 997 (2015) ("Under *Wright Line*, the General Counsel has the initial burden to show that protected conduct was a motivating factor in the employer's decision"). Establishing unlawful motivation requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was

a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009) (unlawful motivation found where the employee became active in union activity, the employer was aware that he was leading employee meetings, and the employer singled out the employee for testing).

If the General Counsel prevails, the burden shifts to the Company to prove that it would have terminated Bisbikis regardless of his protected concerted activity. 251 NLRB at 1089; *Manno Electric*, 321 NLRB 278, 281 (1996) (employer's affirmative defenses failed to establish that it would have transferred the workers to new job sites regardless of their union activities). An employer may not offer pretextual reasons for discharging an employee. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007) (finding that employer's reliance on a minor infraction and a claim of insubordination were pretexts for discharging an employee); *Golden State Foods Corp.*, 340 NLRB 382 (2003) (noting that there is no need to perform the second part of the *Wright-Line* test if the reasons for discharge are merely pretextual.)

B. Bisbikis and Unit Employees Engaged in Concerted Protected Activity

Protected concerted activity is defined as activity which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493 (1983) (*Meyers I*), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986) (*Meyers II*), cert. denied. 487 U.S. 1205 (1988). In *Meyers II*, the Board broadened the scope of the definition to include "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. 281 NLRB at 887.

It is undisputed that Bisbikis and unit employees engaged in protected concerted and union activity and the Company had knowledge of this activity. Bisbikis prominently engaged in union activity as the union steward at the Company. On June 29, he went to Laskaris' office to discuss the costs of uniform shirts and the pending strike. Bisbikis and unit employees organized and participated in the 7-1/2 week strike that followed the failure of the union and NCDC to reach a new collective-bargaining agreement. On September 18, after the strike concluded, Bisbikis and Union Representatives Cicinelli and Thomas met with Laskaris and Francek on behalf of the unit so that they could discuss a return-to-work plan and communicate grievances.

B. The Discharge was Motivated by Animus

Common indicators of animus are a showing of "suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employee." *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

Bisbikis worked at the Company for 15 years, and by all accounts had an amicable relationship with management throughout his tenure. His relationship with Laskaris began to deteriorate, however, when he met with Laskaris on June 29 to discuss

shop issues, particularly the new requirement that employees would be required to cover the cost of their uniform shirts. At this meeting, Laskaris rejected Bisbikis' proposal and warned him that if the mechanics went on strike, "things wouldn't be the same." This threat constituted an 8(a)(1) violation which is also compelling evidence of animus. See *In Re Sunrise Health Care Corp.*, 334 NLRB 903 (2001) (veiled threat of more onerous working conditions was both an 8(a)(1) violation and evidence of animus); *In Re Casino Ready Mix, Inc.*, 335 NLRB 463, 465 (2001) (unlawful threat to move the Company or replace the drivers with owner-operators to avoid unionization was sufficient to establish animus).

Moreover, during the strike, Bisbikis and four other employees were informed that they had been permanently replaced. Neither Laskaris nor Francek offered an explanation as to why Bisbikis and the four other employees were permanently replaced while everyone else was able to return to work. At the conclusion of the strike, Laskaris ejected Bisbikis from his office when he arrived with Cicinelli and Thomas to discuss the return-to-work process on September 18. Bisbikis returned with the union representatives a short while later, ignored Laskaris' demand that he leave, and persisted in conveying the grievances of unit employees as their steward. The recitation included a reference to Laskaris' June 29 threats, which Laskaris falsely denied. After Bisbikis called him a liar, Laskaris told him to "get the fuck out," at which point Bisbikis insulted him in Greek. Laskaris banished Bisbikis for good, telling him that he was fired.

The aforementioned circumstances provide strong indications that Bisbikis' union and other protected activity was a "substantial or motivating factor" in the decision to discharge him. *North Hills Office Services*, 346 NLRB 1099, 1100 (2006) (General Counsel met its initial burden by showing that the employer instituted a new uniform policy and changed lunch schedules to curtail Section 7 activity). Evidence of animus can be inferred from the entirety of the record, looking to both circumstantial evidence and, where available, direct evidence. See e.g., *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1023-1024 (1999) (Circumstantial evidence that employer knew about and was monitoring an employee organizing campaign, combined with the suspicious timing of employee discharges, was sufficient to infer animus). In *Alternative Entertainment, Inc.*, 363 NLRB No. 131 (2016), enfd. 858 F.3d 393 (6th Cir. 2017), an employee engaged in protected concerted activity by discussing concerns about a change in the wage structure with other co-workers. Management knew about his protected activity, pulled him aside and asked that he refrain from discussing this issue with other workers. Shortly thereafter, the discriminatee was fired. The Board agreed that the timing of the discharge, in the absence of direct evidence, provided "strong circumstantial evidence" of not only knowledge of continued engagement with a protected activity, but also of a discriminatory motive. *Id.*

The timing significantly undermines the Company's assertion that Bisbikis was discharged solely for insulting Laskaris and calling him a liar. Laskaris ominously warned Bisbikis not to go

ahead with a strike, but the unit did so anyway. After the strike began, Laskaris made clear his displeasure with Bisbikis by permanently replacing him. When Bisbikis tried to get an explanation for his discharge and explain some of his coworkers' grievances, Laskaris adamantly refused to speak with him.

Moreover, the Company failed to demonstrate that Bisbikis' insult of Laskaris was such an egregious violation of company policy that it warranted immediate discharge. Bisbikis allegedly violated the Company's code of conduct, but the Company never produced evidence of such a policy. Nor did the Company produce evidence explaining its decision to permanently replace Bisbikis, the union steward, and five other employees, while recalling seven others.

Lastly, even after Bisbikis was discharged, Laskaris made a point to voice his displeasure with Bisbikis to all of the mechanics in the shop during the October 6 meeting. The cumulative weight of the credible evidence strongly supports the conclusion that Laskaris' animus toward Bisbikis' protected union activity was the primary motivation for discharging him.

The Company's contention that Bisbikis' insubordination extinguished his Section 7 protection is incorrect. An employee's right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584 (7th Cir. 1965). The Board uses a four-factor test to determine whether communication between an employee and a manager or supervisor in a workplace is so derogatory that it causes the employee to lose the protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). The four factors are: (1) the place of discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by the employer's unfair labor practice. *Id.*

The incident between Bisbikis and Laskaris took place in the midst of a heated discussion in Laskaris' office outside the purview of any other employees. Bisbikis' language, while vulgar, did not disrupt the workplace, nor did it undermine management's authority. *Stanford Hotel*, 344 NLRB 558 (2005) (highlighting that the workplace outburst occurred away from the normal working area in a closed door meeting where no other employees were present, and did not weaken management's authority). Prior to the outburst, Bisbikis was speaking about issues related to both his own replacement and the replacement of other employees, as well as other grievances held by unit employees. Bisbikis' insult occurred after Laskaris refused to explain why certain employees were permanently replaced, would not consider the grievances Bisbikis wanted to convey, and denied ever meeting with Bisbikis about worker complaints prior to the strike. Bisbikis wanted to discuss potential unlawful labor practices that affected the unit, including himself, but resorted to insulting Laskaris after the two were unable to have a productive conversation.³⁸ Considering all the *Atlantic Steel* factors together, Bisbikis' conduct was not egregiously derogatory, and thus he retained the protection of the Act. See *Syn-Tech Windows Sys.*, 294 NLRB 791, 792 (1989) (Employee did not lose

³⁸ Foul language was used at least once during the conversation prior to Bisbikis' insult when Laskaris told Bisbikis to "get the fuck out before I get you the fuck out."

the protection of the Act when he pointed his finger angrily at a manager and made an unspecified threat during a meeting about union activities); *Union Carbide Corp.*, 331 NLRB 356 fn. 1 (2000) (Employee's conduct was "at most rude and disrespectful" when he called his supervisor a "fucking liar").

C. The Adverse Actions Taken Against Unit Employees

The Company's attendance policy was first communicated to employees via the September 18 recall letters. The previously awarded benefits of free water and gloves were also taken away in the immediate aftermath of the strike. Creating these policies within days of a concluded strike is suspicious, especially since the Company gave no indication that it considered having a formal attendance policy or ending its practice of free water and gloves prior to the strike. The Company presented no evidence that it would have implemented the attendance policy regardless of the unit's protected activities. The Company continued to offer water and gloves, but at high prices, removed the shop water fountain, and banned employees from having refrigerators on the premises. The Company's price gouging, lack of a credible explanation for its conduct, and suspicious timing indicate that the decision to withdraw free gloves and water was motivated by animus towards the protected activities of the unit. See *Frierson Building Supply Co.*, 328 NLRB at 1023–1024; *Medic One, Inc.*, 331 NLRB at 475.

In the midst of a slow business period, the Company assigned Towe, an apprentice mechanic, to wash cars, a task normally completed by porters. That unspecified amount of time spent washing cars counted towards Towe's flat salary rate but not as book time. In the absence of evidence that Towe was bypassed for available book work, the claim that he suffered economic loss fails. Accordingly, this allegation is dismissed. *Manno Electric*, 321 NLRB 278.

Management instructed the recalled employees to bring their tools with them when they returned to work on September 18. Unit employees, however, were clearly not prepared to return to work that day. Rather than ask management for leeway to arrive later that morning so that they could get their tools after the storage facility opened, they arrived empty-handed with their union representatives and grievances. Laskaris was also uncooperative on September 18 and at the outset on September 19 when unit employees paraded, once again empty-handed, to the facility. He eventually relented, however, and permitted unit employees to return their tools later during the afternoon of September 19 and they returned to work the following day. Under the circumstances, considering the Company's interest in avoiding disruption of having massive tool boxes hauled back into the shop during business hours, the eventual arrangement was not unreasonable. *Manno Electric*, 321 NLRB 278. This complaint allegation is also dismissed.

III. UNILATERAL CHANGES TO WORK TERMS AND CONDITIONS

The complaint alleges that the Company violated Section 8(a)(5) and (1) of the Act by enacting a new attendance policy, removing free gloves and water that were once provided to employees, assigning mechanics to wash cars, and changing the Union access policy without going through the collective bargaining procedure. The General Counsel claims that the Strike

Settlement Agreement and Successor Contract required the Company to abide by the collective bargaining procedure with respect to changing any previously existing policies and procedures. The General Counsel also asserts that the Company's delay in recalling five permanently replaced until November was a violation of Section 8(a)(5). The Company concedes that it took these unilateral actions but asserts that it did so justifiably.

Where a unilateral change in the terms or conditions of employment is material, substantial, and significant, such a change constitutes a violation of Section 8(a)(5) and (1) of the Act. *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987) (noting that there is a statutory bargaining obligation where the unilateral change affecting the terms and conditions of employment of bargaining unit employees is material, substantial and significant); *Alamo Cement Company*, 277 NLRB 1031 (1985) (finding that a change in classification where the employee performed essentially the same function as before the change in classification was not a substantial, material, and significant change). Not every unilateral change, however, constitutes a violation of the bargaining obligation. Compare *J.W. Ferguson & Sons*, 299 NLRB 882, 892 (1990) (finding that the change was not material, substantial, and significant where the employer increased the lunchbreak by 5 minutes and decreased the afternoon break by 5 minutes; *Weather Tec Corp.*, 238 NLRB 1535 (1978) (finding the employer's decision to end paying for coffee supplies that employees used was not a material, substantial and significant change) with *Bohemian Club*, 351 NLRB 1065, 1066 (2007) (finding changes to cleaning duties material, substantial, and significant because cooks had to work an extra 30 minutes to accomplish new tasks, and involved new tasks such as wiping down walls, counters, refrigerator doors, and sweeping the floor) and *Crittenton Hospital*, 342 NLRB 686, 690 (2004); (finding a change in the dress code policy a material, substantial, and significant change to the terms and conditions of employment).

A. Attendance Policy

In its September 18 email recalling seven employees, the Company communicated, for the first time, an attendance policy. Several weeks later, the Company implemented another attendance policy without the input of the union. The Company did not have a written attendance policy prior to the strike. It neither disputed this contention nor offered any reasoning for its unilateral decision to implement a written attendance policy. Neither economic expediency nor sound business considerations are sufficient for overcoming the obligation to bargain over a material, substantial term of employment. *Van Dorn Plastic Machinery Co.*, 265 NLRB 864, 865 (1982), modified 736 F.2d 343 (6th Cir. 1984) (finding a violation of Section 8(a)(5) where the employer implemented a new attendance policy without a *compelling economic justification*) (emphasis added). An attendance policy is undoubtedly a substantial aspect of the terms and conditions of employment for an employee. *Id.*; *Steelworkers Local 2179 v. NLRB.*, 822 F.2d 559, 565–566 (5th Cir. 1987) (any subject classified as a "term or condition of employment" is a mandatory bargaining matter). Having proffered no compelling justification for its refusal to bargain over the attendance policy, the Company's unilateral creation of an attendance policy violated Section 8(a)(5) of the Act.

B. Free Gloves and Water

Approximately one week after the strike ended, the Company unilaterally ended its practice of providing free gloves and water to its employees. The Company asserted that it rescinded these privileges as a cost-cutting measure but presented no compelling economic justification for this decision. *Van Dorn Plastic Machinery Co.*, 265 NLRB at 865. The workers needed gloves to complete their work, effectively making it a part of their uniform. Any change to the dress code required the Company to bargain with the Union beforehand. *Crittenton Hospital*, 342 NLRB at 690. Employee access to clean drinking water is a material aspect of employment as dictated by OSHA regulation. 29 C.F.R. § 1910.141(b)(1)(i) (“Potable water shall be provided in all places of employment, for drinking, washing of the person, cooking . . .”). Having failed to afford the Union an opportunity to bargain over these changes, the Company’s rescission of free gloves and water violated Section 8(a)(5) of the Act.

C. Washing Cars

On an unspecified date on or after September 20, Towe was tasked with washing cars, a job that was completed solely by porters before the strike. Section 8 of the Successor Contract stipulates:

If business is slack, the Employer may assign an employee work other than that which the employee is regularly classified where such work would not be hazardous to the employee due to lack of experience and training. The employee shall receive their applicable rate.

The Company’s assertion that work was slow after the strike was not disputed. Moreover, Towe, an apprentice mechanic, was the only witness to testify that he was assigned to wash cars on an unspecified occasion(s). While there was undisputed testimony that washing cars instead of performing book work could diminish a mechanic’s earnings potential, there was no evidence indicating that Towe or any other unit employee suffered economic loss as the result of such work. Accordingly, this allegation is dismissed.

D. Union Access Policy

The Company prohibited Union representatives Cicinelli and Thomas from accessing the unit employees without notifying the Union or bargaining with the Union. Several unsubstantiated safety reasons were proffered by the Company, and none of them are compelling. The policy governing Union access to employees was strictly governed by the Successor Contract and any changes to this policy required notification and bargaining. See *Angelica Healthcare Services Group*, 284 NLRB at 853. The company had no compelling justification for its unilateral change to the Union access policy. *Id.* Accordingly, the Company’s unilateral change to the union access policy was a violation of Section 8(a)(5) and (1).

E. November Recall

During the strike, five-unit employees were permanently replaced and were not recalled to work until November. The procedure by which employees were to return to the Company was expressly governed by the settlement agreement and Successor

Contract. The settlement agreement stated that temporary replacement workers would be displaced while permanently replaced employees would be placed on a preferential hiring list in order of seniority. The Company was unable to provide any evidence showing that the five employees recalled in November had been permanently replaced during the strike. The lack of immediate reinstatement for these five employees constituted a departure from the settlement agreement and a unilateral change to a material condition of employment in violation of Section 8(a)(5). *Angelica Healthcare Services Group*, 284 NLRB at 853. Furthermore, the record is devoid of a compelling economic justification for the Company’s decision to not recall five employees for almost 2 months after the strike was over. *Van Dorn Plastic Machinery Co.*, 265 NLRB at 865. It should be noted, however, that unlike the request for a make whole remedy for Bisbikis, there is no make whole remedy requested in the complaint or by the General Counsel regarding the 2-month delay in recalling the five employees. (See GC Br. at 36.)

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening that things would not be the same if employees went on strike, telling permanently replaced employees that he did not want any of them to return to work and that if they returned to work it would not be long before they were gone, telling employees that he would not be at the Respondent very long and should find another job, telling employees, as the Union leafleted outside the facility, that he would lay off recalled employees if he ran out of work, threatening stricter enforcement of company rules, informing employees that it would be futile to file grievances, encouraging employees to resign their membership or become core members of the Union, telling employees that nonunit employees lost their jobs over the decision to strike, and threatening employees with physical violence, the Respondent violated Section 8(a)(1) of the Act.
4. By enacting new attendance policies, and removing free work gloves and drinking water because of employees’ union activity, all without notifying the Union and giving it an opportunity to bargain over the changes, the Respondent violated Section 8(a)(3), (5) and (1).
5. By prohibiting access to Unit employees at the Respondent’s facility by Union Representatives Sam Cicinelli and Ken Thomas because they engaged in union activity, and without first notifying the Union and giving it an opportunity to bargain over the changes, the Respondent violated Section 8(a)(5) and (1) of the Act.
6. By discharging John Bisbikis on September 18 because he supported the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.
7. The remaining allegations are dismissed.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the

policies of the Act.

The Respondent, having discriminatorily discharged John Bisbikis, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with the Board's decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also be ordered to compensate Bisbikis for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Additionally, the Respondent shall be required to compensate Bisbikis for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, the Respondent shall be ordered to remove from its files any reference to Bisbikis' unlawful discharge and to notify him in writing that this has been done and that the unlawful suspensions and discharges will not be used against him in any way Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁹

ORDER

The Respondent, Cadillac of Naperville, Inc., Naperville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Threatening employees that their terms and conditions of employment things would not be the same if they went on strike.
 - (b) Telling permanently replaced employees that you do not want any of them to return to work and that if they return to work it would not be long before they were gone.
 - (c) Telling employees that they would not be employed by you very long and should find another job because they engaged in strike or other union activities.
 - (d) Telling employees that, if you ran out of work, you would lay them off first because they engaged in strike or other union activities.
 - (e) More strictly enforcing company rules because of employees' union activities or support.
 - (f) Telling employees that it would be futile to file grievances.
 - (g) Encouraging employees to resign their membership or

become core members of the Union.

(h) Telling employees that nonunit employees lost their jobs over their decision to strike.

(i) Threatening employees with violence if they engage in concerted or union activities.

(j) Enacting attendance policies and removing free work gloves and drinking water because employees engage in strike or other union activity, without first notifying the Union and giving it an opportunity to bargain over such changes.

(k) Prohibiting access to unit employees at your facility by Union representatives without first notifying the Union and giving it an opportunity to bargain over such changes.

(l) Unilaterally changing the terms and conditions of employment of unit employees by implementing an attendance policy and charging employees for the cost of work gloves and drinking water.

(m) Discharging employees because they supported the Union.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer John Bisbikis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

(b) Make Bisbikis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Compensate Bisbikis for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Notify all employees that written attendance policies issued on and after September 18, 2017, and policies issued on or after September 25, 2017, charging employees for the cost of work gloves and drinking water, have been rescinded.

(f) Before implementing any changes to attendance policies, work gloves, drinking water or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All of Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

³⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Within 14 days after service by the Region, post at its facility in Naperville, Illinois copies of the attached notice marked "Appendix."⁴⁰ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 29, 2017.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 19, 2018

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you if you support a Union or engage in Union activities.

WE WILL NOT threaten you that your terms and conditions of employment things will not be the same if you go on strike.

WE WILL NOT tell you, if you go on strike and subsequently to return to work, that we do not want you to return to work and that if you do return to work it would not be long before you were gone.

WE WILL NOT tell you that will not be employed by us very long and should find another job if you engage in strike or other union activities.

WE WILL NOT tell you that, if we run out of work, that we will lay you off first because you engage in strike or other union activities.

WE WILL NOT more strictly enforce company rules because your union activities or support.

WE WILL NOT tell you that it would be futile to file grievances.

WE WILL NOT encourage you to resign your union membership or become a core member of the Union.

WE WILL NOT tell you that non-unit employees lost their jobs over your decision to strike.

WE WILL NOT threaten you with physical violence.

WE WILL NOT enact attendance policies and charge you for work gloves and drinking water because you engage in strike or other union activity, without first notifying the Union and giving it an opportunity to bargain over such changes.

WE WILL NOT prohibit access to you at your facility by Union representatives without first notifying the Union and giving it an opportunity to bargain over such changes.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer John Bisbikis full reinstatement to his former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

WE WILL make Bisbikis whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Bisbikis for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Bisbikis, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind, and have rescinded, written attendance policies issued on and after September 18, 2017, and policies issued on or after September 25, 2017, charging employees for the cost of work gloves and drinking water.

WE WILL, before implementing any changes to attendance policies, work gloves, drinking water or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of

⁴⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

employees in the following bargaining unit:

All of Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

CADILLAC OF NAPERVILLE, INC.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/13-CA-207245 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

