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**Nexteer Automotive Corp. and Local 699, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO.** Case 07-CA-215036

August 27, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

On December 10, 2018, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party each filed an answering brief, and the Respondent filed a reply brief.

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, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

AMENDED REMEDY

In addition to the remedies provided in the judge's decision, we shall order the Respondent to compensate Nuffer-Bauer for his search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016), *enfd.* in rel. part 859 F.3d 23 (D.C. Cir. 2017). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, 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).

We shall also order the Respondent to compensate Nuffer-Bauer for any adverse tax consequences of

receiving a lump-sum backpay award and to file a report with the Regional Director for Region 7 allocating the backpay award to the appropriate calendar years. *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Nexteer Automotive Corp., Saginaw, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting Local 699, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, or any other labor organization.

(b) 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 Joshua Nuffer-Bauer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Joshua Nuffer-Bauer 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 as amended in this decision.

(c) Compensate Joshua Nuffer-Bauer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, 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 the unlawful discharge, and within 3 days thereafter, notify Joshua Nuffer-Bauer in

<sup>1</sup> 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 they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In applying *Atlantic Steel*, 245 NLRB 814 (1979), the judge found that the "provocation" factor weighed slightly against continued protection. No party excepted to this finding.

We do not condone Joshua Nuffer-Bauer's intemperate outburst during his December 13, 2017 meeting with management. As found by the judge, Nuffer-Bauer stood within 12 to 16 inches of plant manager Taylor, pointed his finger at Taylor, and said angrily, one to three times, "fuck you" or "go fuck yourself." Under other circumstances, we would

find that an outburst of this character exceeds the limits of what an employer should be expected to endure, even during the exercise of Sec. 7 rights. Under the particular circumstances of this case, however, we do not find that the "nature of the outburst" factor weighs against Nuffer-Bauer retaining the protection of the Act under *Atlantic Steel*, *supra*. In reaching this result, we note that the judge, based on credibility determinations, found that Nuffer-Bauer did not engage in any threatening conduct during the meeting, and that the record established that profanity was common in this workplace. In fact, supervisors had directed profanity at Nuffer-Bauer personally, telling him that he was "being an asshole" for presenting grievances in his capacity as a union representative.

<sup>3</sup> We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

writing that this has been done and that the discharge will not be used against him in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its facilities in Saginaw, Michigan, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, 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 facilities 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 December 19, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 7 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.

Dated, Washington, D.C. August 27, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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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 discharge or otherwise discriminate against any of you for supporting Local 699, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, or any other union.

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 Joshua Nuffer-Bauer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joshua Nuffer-Bauer 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 Joshua Nuffer-Bauer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 7, 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.

<sup>4</sup> 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."

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharge of Joshua Nuffer-Bauer, 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.

NEXTEER AUTOMOTIVE CORP.

The Board’s decision can be found at [www.nlr.gov/case/07-CA-215036](http://www.nlr.gov/case/07-CA-215036) 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.



*Scott R. Preston, Esq.*, for the General Counsel.  
*Kim F. Ebert, Esq. and Sarah M. Rain, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.)*, of Indianapolis, Indiana, for the Respondent.  
*Stuart S. Shoup, Esq.*, of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Detroit, Michigan, on August 6, 2018. Local 699, International Union, United Automobile and Agricultural Implement Workers of America (UAW), AFL–CIO, (Union or Charging Party) filed the charge on February 16, 2018, and the amended charge on March 5, 2018. The General Counsel issued the complaint on April 9, 2018. The complaint alleges that Nexteer Automotive Corp. (the Respondent) discharged Union Representative Joshua Nuffer-Bauer (Bauer) in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (NLRA or Act) because he assisted the Union and engaged in concerted activities, and/or in violation of Section 8(a)(4) and (1) of the NLRA because he filed charges and gave testimony in a matter before the National Labor Relations Board (Board or NLRB). The Respondent filed a timely answer in which it denied committing any of the violations alleged.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures, assembles, and sells automotive parts at its facilities in Saginaw, Michigan, from which it annually sells and ships goods valued in excess of \$50,000 directly to points outside the State of Michigan. The Respondent 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 NLRA.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent manufactures and sells parts for the automotive industry. Its operations include seven plants on a campus in Saginaw, Michigan. The Union represents a bargaining unit of approximately 3200 production and maintenance employees at the Respondent’s Saginaw facilities. The Union has 14 elected district committee persons who assist unit members by, inter alia, addressing contractual disputes with management and by guiding employee grievances through the contractual process. Bauer—who the Respondent is alleged to have discriminatorily and unlawfully discharged—became a district committee person in July 2014 after working for the Respondent for 3 years as a machine operator. Once Bauer became a district committee person he was no longer assigned production or maintenance duties, but rather worked full time on union business at Saginaw plants 3 and 6. During the relevant time period, Bauer’s superior in the union organizational structure was JoAnn Reyna-Frost (Frost), whose title was “shop committee person.”

B. Respondent’s Policies

The parties referenced a number of employer policies during their presentations in this case. Two of these, which are also referenced in the complaint, are found in the “Shop Rules” section of the relevant collective-bargaining agreement (CBA). The Shop Rules, of which there are a total of 38, provide in relevant part:

Violation of any of the following Shop Rules will be sufficient grounds for disciplinary action ranging from reprimand to immediate discharge, depending on the seriousness of the offense in the judgment of Management.

...

9. Assaulting, threatening, intimidating, coercing or interfering with supervision.

...

13. Abusive language to Supervision or other employees.

The Respondent also has a written “Global Workplace Violence Prevention Policy,” which provides that disciplinary action may be imposed for a variety of activities defined as violence, including: possessing weapons or dangerous devices, bullying, stalking, making threats, causing harm to people or property, or “creat[ing] an intimidating, offensive, or hostile environment.” In 2017, the Respondent provided training to employees during

which it stated that under the “code of conduct” it “will not tolerate any acts or threats of violence, including inappropriate verbal or physical threats, intimidation, harassment, or coercion,” and that violations “may result in disciplinary action—up to and including termination.”

The article in the CBA that pertains to “discipline, suspension, or discharge,” contains a section entitled, “cooling off period.” This section provides, in part, that:

The Union expressed concern that some disciplinary interviews escalated into confrontation because tempers flared. . . .

The Company and the Local Union agreed that contemplated discipline should be discussed in a calm manner allowing for an objective evaluation of the facts. In those situations where emotions preclude this from happening, the parties agreed that as a matter of practice and when possible such discussions should be postponed until such time that, in the opinion of Management, a constructive exchange of information could occur.

There is no language in this section that makes mention of using the “cooling off period” when tempers flare outside the context of disciplinary interviews.

In their briefs, the General Counsel and the Charging Party contend that the Respondent has a progressive discipline policy that bears on the validity of the disciplinary action against Bauer. Neither of those parties identifies any language in the CBA or any other company document that sets forth a progressive discipline policy, and no such language can be found in the CBA article titled, “discipline, suspension or discharge.” General Counsel’s Exhibit 2 (GC Exh. 2 at pp. 31–32) (art. VII). Allison Bell, the Respondent’s human resources business partner for plant 3, testified that the Respondent had a progressive discipline policy, but not in the sense of setting forth a schedule of specific disciplinary “steps.” Transcript at pages (Tr. at pp. 99–100.) Denny Getgood, who preceded Bell as plant 3 human resources business partner, testified that the Respondent used progressive discipline “to some extent” “depending on the case.” (Tr. 164.) The record indicates that these references to progressive discipline only mean that the Respondent has a range of disciplinary responses available to it—from reprimand to discharge—and that it chooses which to apply based on the “seriousness of the offense.” (Ibid.; see also GC Exh. 2 at p. 155) (Violation of any shop rule “will be sufficient grounds for disciplinary action ranging from reprimand to immediate discharge, depending upon the seriousness of the offense in the judgment of Management.”). The record does not show that the Respondent had a formal progressive discipline policy in the sense of a schedule of disciplinary actions based on the type and number of infractions.

Article VII, Section 3(A) of the CBA states that “[i]n imposing discipline on a current charge, Management will not take into account any prior infractions which occurred more than twenty-four months previously,” and will “eliminate from an

employee’s record any infractions where there was a lapse of time of greater than 18 months between infractions.” (GC Exh. 2 at p. 32.)

The CBA states that when management is considering discipline the employee will be interviewed “to allow for answering the charges before being required to leave the plant.” (Id. at 31.) There was credible and uncontradicted testimony that when an employee is accused of making a threat, the Respondent’s customary response includes suspending that employee pending investigation. (Tr. 66–67.)

### C. Prior Discipline Against Bauer

In its brief, the Respondent repeatedly makes reference to prior infractions by Bauer in an effort to justify his termination. (R. Br. at pp. 3–4, 9–10, 21–22.) This is puzzling because the Respondent concedes that none of that prior conduct was, or properly could be, taken into account to justify the Respondent’s challenged decision to terminate Bauer. (See Tr. 57, 166, 169–171.) All of the prior conduct either had occurred more than 24 months in the past, and thus article VII of the CBA prohibited the Respondent from considering it (GC Exh. 2) or had been withdrawn and expunged by the Respondent (GC Exh. 4.) The General Counsel also discusses prior discipline against Bauer, although the General Counsel does so as part of an argument that the Respondent followed progressive discipline with respect to Bauer prior to when he filed NLRB charges, but then skipped straight to discharge for the same type of conduct after Bauer filed charges.<sup>1</sup>

As noted previously, Bauer became a union official in July 2014. Prior to that time, he was disciplined twice in 2013. The first time was on April 30 when he called his supervisor a “pompous jackass” and was cited for violating shop rule number 9 (the rule that prohibits “assaulting, threatening, intimidating, coercing or interfering with supervision”). It appears that the Respondent initially suspended Bauer for 2 weeks, but after he grieved the discipline the suspension was reduced to 1 week. In May of 2013, the Respondent cited Bauer for violating a shop rule against wasting time during working hours. Initially, the Respondent suspended Bauer for 30 days, but after he filed a grievance, the suspension was reduced to 1 week.

The first discipline to be imposed on Bauer during the period after he became a union official came on March 4, 2015. The Respondent cited him for violating shop rule number 9 and another shop rule regarding failure to follow a supervisor’s instructions. In that instance, Bauer had a disagreement with a supervisor who objected when Bauer engaged in a 5-minute discussion with an employee who had requested union assistance. Bauer notified the supervisor in advance that he would be doing this and had arranged for the employee’s position on the production line to be covered. At some point during the ensuing disagreement, Bauer yelled, “bullshit” at the supervisor. Bauer received a 1-week suspension in that instance. On July 30, 2015, the Respondent suspended Bauer for 2 weeks, citing him for

<sup>1</sup> The Respondent contends that although the prior infractions were not a basis for the discharge, I should consider them as evidence of the “pattern of [Bauer’s] behavior.” (Tr. 57.) The relevance of a pattern of behavior is not clear to me under the circumstances here. While there is a factual dispute about some of the particulars of the key December 13

meeting between Bauer, Taylor, and Bell, the disciplinary history is no more supportive of one version than of the other. I do conclude, however, that the prior discipline should be examined to determine whether management’s response to Bauer’s conduct was demonstrably more lenient before he filed NLRB charges than it was afterwards.

violating a shop rule prohibiting “abusive language” by making a derogatory remark about a supervisor’s sex life. On October 15, 2015, the Respondent cited Bauer for interfering with production by having a discussion with an employee without properly coordinating with a supervisor. The initial action taken by the Respondent was to discharge Bauer, but the discipline was subsequently reduced to a 30-day suspension. As indicated previously all of the above discipline occurred more than 24 months prior to the December 2017 incident that the Respondent relies on to justify Bauer’s removal, and therefore the Respondent was prohibited, under the CBA, from considering that discipline when it discharged Bauer.

The most recent disciplinary action against Bauer was imposed on August 15, 2016, but was subsequently withdrawn and expunged by the Respondent. The record indicates that Bauer and a plant 3 supervisor had a disagreement about the schedule for grievance-related employee interviews. The supervisor threatened to interview the employees without Bauer present, and Bauer responded that his response was “still going to be ‘fuck no.’” The Respondent initially suspended Bauer for 30 days for violating shop rule 13 (abusive language to a supervisor). Bauer filed unfair labor practices charges with the Board and the matter was settled with the Respondent agreeing to, *inter alia*, retract the challenged discipline and expunge all references to it from the Respondent’s files. The Respondent also provided backpay to Bauer.

The Respondent has no information indicating that Bauer had ever been physically violent. (Tr. 94, 115–116.)

#### *D. November 9 Meeting*

In the latter part of 2017, Bauer was concerned that the treatment he was receiving from supervisors and managers at plant 3 was interfering with his ability to represent bargaining unit employees. Group supervisors in plant 3 had reacted to Bauer’s attempt to resolve employee grievances by telling him that his “grievances were bullshit” and that he was “being an asshole.” Supervisors objected to Bauer talking to employees who had requested union assistance. Benny Taylor—the area manager for the plant—had threatened to eject Bauer from the plant on the basis that Bauer was not wearing the proper safety shoes. In another instance, Dean Storm, a supervisor, threatened to eject Bauer for reasons unrelated to his shoes. Bauer discussed his concerns with Frost, a higher level union official. Frost arranged for Bauer and herself to have a meeting with Dereon Pruitt, the human resources manager for the Respondent’s entire “steering division,” on November 9, 2017. Also present at the meeting was Bell, who reported to Pruitt, and who had become a human resources business partner for plant 3 just a month earlier in October 2017. This meeting was the first time that Bell and Bauer met.

Some aspects of the November 9 meeting are not disputed. Specifically, the evidence establishes that the meeting took place in Bauer’s office and the only attendees were Bauer, Frost, Pruitt, and Bell. Bauer described the problems he was having at plant 3. In particular Bauer discussed that his attempts to resolve plant 3 grievances had met with resistance, dismissive comments, and threats to eject him from the plant. Pruitt asked whether Bauer had discussed these issues with Benny Taylor, who was the area

manager for plant 3. Bauer said that he had not, and Pruitt stated that Bauer’s problems should be dealt with first at the plant level. He directed Bell to arrange a meeting between Bauer and Taylor.

There was conflicting testimony regarding other elements of the November 9 meeting. Most importantly, there was conflicting testimony about alleged statements criticizing Bauer’s prior use of the NLRB processes. Bauer testified that Pruitt said that he “couldn’t believe” that Bauer had gone to the NLRB regarding matters about which the parties “had a grievance settlement.” Bauer also testified that when he explained that plant 3 managers were not communicating with him, Pruitt responded that this was the case because they “don’t want to end up in front of the NLRB.” Frost reported Pruitt saying something similar to this—i.e., that Pruitt was “not surprised that [plant 3 supervisors and managers] won’t communicate with [Bauer] because they’re afraid that they would end up down in Detroit in front of the Labor Board.” In addition, Frost testified that during the meeting Bell said, “when she hears the name Josh Bauer, she thinks NLRB.”

Pruitt testified that he was aware of Bauer’s prior NLRB charges and their resolution, but he denied that either himself or Bell made any mention of the NLRB during the November 9 meeting. Similarly, Bell denied that she said that when she heard Bauer’s name she thought of the NLRB and also denied that Pruitt made any mention of the NLRB during the meeting.

Regarding the references to the NLRB, I do not find a basis on the record here to credit Bauer’s and Frost’s testimony over Pruitt’s and Bell’s, or vice versa. None of these individuals were disinterested witnesses and all of them presented their testimony on this subject in a clear and certain manner. No significant inconsistencies were demonstrated in this aspect of their testimonies. The parts of the meeting that are not disputed do not show that the disputed statements regarding the NLRB were necessary to the November 9 discussion. If anything, the alleged statements are, to my ears, strangely gratuitous and suspiciously clueless coming from human resources staff, especially a senior human resources official like Pruitt. The parties did not introduce any contemporaneous written accounts, or other writings, that might provide a basis for crediting one set of witnesses over the other. Neither Bauer nor Frost claimed to have made a contemporaneous record of the alleged statements of hostility towards Bauer’s NLRB activity, nor was either Bauer or Frost shown to have taken issue with such statements by filing an NLRB charge or pursuing any other course of action. As regards the statement about the NLRB attributed to Bell (when she hears “Josh Bauer” she thinks “NLRB”), I note that Bauer did not corroborate Frost’s testimony that such a statement was made. On balance, I cannot conclude that the disputed statements by Pruitt and Bell more likely than not were made or were not made.

#### *E. December 13 Meeting*

As noted above, the upshot of the November 9 meeting was that Pruitt directed Bell to set up a meeting between Bauer and plant manager Taylor. That meeting was held on December 13, 2017, in Bell’s office. Present for the meeting were Bauer, Taylor and Bell. Bell’s office was approximately 9.5 feet by 12 feet, with most of that space being occupied by Bell’s desks and work area. During the meeting Bauer and Taylor were sitting in a

narrow and cramped area on the visitor side of Bell's main desk.<sup>2</sup> Bauer was in the corner of that area, away from the door out of the office. Taylor was sitting about a foot away from Bauer—positioned between Bauer and the door. The part of the facility where Bell's office was located was one that bargaining unit employees were generally unable to access during the time the meeting took place. There were, however, a number of salaried, nonbargaining unit, engineers working outside Bell's office.

While Bauer and Taylor were waiting for Bell to arrive at the office, they had a friendly discussion about their pets. Once Bell arrived, the meeting lasted about 10 minutes. During the meeting Bauer did most of the talking and raised a range of issues in a short period of time. Taylor and Bell felt that Bauer was cutting them off and not allowing them a reasonable opportunity to address his concerns. The concerns that Bauer raised included: supervisors interfering with his ability to talk to unit employees; supervisors requiring him to leave their departments; supervisors refusing to "deal with" him; the frequency with which supervisory or managerial employees were doing bargaining unit work; and safety.

Bauer became more emotional when the parties discussed unit employees' safety. Bauer stated that supervisors were setting a bad safety example by talking on their cell phones while walking in proximity to plant equipment. Taylor responded that, while Bauer was always complaining about safety, Bauer himself was setting a bad safety example by not wearing the right type of shoes while in the plant. At that point during the meeting, Taylor tried to inspect Bauer's shoes, but Bauer would not permit him to do so. Another safety issue raised by Bauer concerned management's response when a unit employee vomited in her work area and on herself. Bauer complained that management had forced this employee to continue working for 2 hours without the opportunity and/or assistance to clean the vomit from her work area and from her person. Bauer's understanding was that Taylor had been approached about this employee's predicament and responded "she puked, she can clean it up."<sup>3</sup> Bauer appears to have found the discussion regarding the treatment of this employee particularly upsetting. At various points Taylor and Bell both told Bauer to "calm down." Taylor commented to Bell, "This is why we can't get anything done . . . ; [Bauer is] just so hostile." At that point Bauer stood up, began pointing at Taylor, and yelled, "fuck you" or "go fuck yourself" at Taylor approximately one to three times. Bauer was 12 to 16 inches away from Taylor during this portion of the meeting, but, as discussed earlier, the visitor area of Bell's office was a tight fit such that Bauer and Taylor had already been only about 12 inches apart. Thus the proximity does not suggest that Bauer moved aggressively into Taylor's personal space after he stood up. Taylor leaned back in his chair, away from Bauer. The door to Bell's office had been closed for most of the meeting, but after Bauer stood up, Bell proceeded towards the door in order to open it. The meeting ended and Bauer left the office. It is undisputed that during this exchange, Bauer did not touch Taylor. In addition, Bauer did not make any statements threatening physical or other harm to Taylor, Bell, or anyone else. There is no claim that he attempted to

strike anyone or raised his hands as if preparing to do so. Bauer had not refused a direction from Taylor or Bell to leave the meeting or otherwise end the confrontation.

The above account of the December 13 meeting is largely consistent with the testimonies of all three of those present. There were, however, a number of respects in which the accounts of the three witnesses were contradictory regarding potentially relevant aspects of the meeting. One contradiction concerns Bauer's testimony that while he directed profanity at Taylor in the office, he did not do so in the presence of the salaried engineers outside Bell's door. Bell and Taylor, on the other hand, testified that Bauer continued yelling "fuck you" in the presence of those employees as he walked out into the area beyond Bell's office door. As is discussed later in this decision, and as counsel for both parties recognize in their briefs, the question of whether an employee's outburst towards supervisors or managers takes place in the presence of other employees is a factor that may bear on whether the employee's otherwise protected activity forfeits that protection. In this case, I credit Bauer's testimony that he did not yell profanities at Taylor while in the presence of other employees. (Tr. 36–37.) The credibility of Taylor's and Bell's contrary trial testimony was undermined by the written accounts that they prepared close in time to the event. In the written account that Taylor prepared the day after the meeting, he states that Bauer directed profanity at him, then said "this meeting is done and walk[ed] out the door." Respondent's Exhibit 7 (R. Exh. 7). In the account that Bell prepared the same day as the meeting, she states that after Bauer cursed at Taylor, "I stood up, opened the door to my office and told him that this meeting is done and that he needs to leave and Josh [Bauer] stormed out." Respondent's Exhibit 3 (R. Exh. 3). In neither statement did Taylor or Bell claim, as they did at trial, that Bauer cursed or yelled in the presence of the employee's outside Bell's office, or even after Bell opened the door to the office. In addition, I note that the Respondent did not provide corroborating testimony or statements from any of the engineering employees who they suggest would have heard Bauer yelling and cursing. They did not even identify any such employee by name. For these reasons, I find the trial testimony of Taylor and Bell that Bauer cursed at Taylor while in the presence of other employees to be less credible than Bauer's contrary testimony.

There was also contradictory testimony on the subject of who declared an end to the meeting. According to Bauer, he was the one who stated that the meeting was over. (Tr. 36.) Bell testified that she was the one who ended the meeting. The written statement that Taylor, the Respondent's other witness on this point, completed shortly after the event supports Bauer's testimony, rather than Bell's testimony, in this regard. (R. Exh. 7.) At trial, Taylor reversed himself and aligned himself with Bell, stating that Bell was the one who declared that the meeting was over. (Tr. 116.) Under the circumstances here, I credit Bauer's testimony that he was the one who stated that the meeting was over. At any rate, even if I were to find that Bell was the one who declared the meeting over, the evidence would show that Bauer complied by immediately leaving the office. There was no

<sup>2</sup> The area was a tight fit for Bauer, who is 5'11" and weighs 250 pounds, and Taylor, who is 5'10" and weighs 260 pounds.

<sup>3</sup> Taylor did not testify about his own recollection of the incident involving the sick employee.

testimony that Bauer refused to end the confrontation after being directed to leave the office or otherwise end the meeting.

In its brief, the Respondent's counsel asserts again and again that at the end of the meeting Bauer was standing over Taylor with his "fists balled up." (R. Br. pp. 5, 7, 17, 18.) The idea that Bauer made fists as he stood over Taylor is completely the invention of Respondent's counsel. The only mention in the trial transcript of Bauer "balling up his fists" is in counsel's own opening statement. (Tr. 14–15.) The supposedly supporting transcript citations that counsel provides in the Respondent's brief—to transcript pages 80 and 108—refer instead to Bauer pointing at Taylor, not to him making fists. In response to a leading question by Respondent's counsel, Bell did agree that at some point during the 10-minute meeting Bauer "clenched" his fists. (Tr. 81.) This bit of testimony, even if credited, does not provide evidence for the picture that Respondent's counsel tries to paint, because the testimony does not relate to the time when Bauer was standing and addressing Taylor. In fact, Bell's contemporaneous written account explicitly states that Bauer was sitting when he clenched his fists (R. Exh. 3), and her more spontaneous trial testimony had Bauer squeezing a pen with both hands during the meeting. (Tr. 76, 79.) In any case, even assuming that Bauer clenched his fists while sitting at the meeting, there is no testimony that he raised his fists or otherwise gave any indication that he was preparing to use clenched fists to strike Taylor.

Taylor testified that he was concerned that Bauer would assault him during the December 13 meeting. Under relevant precedent, the Board determines whether conduct is threatening by applying an objective standard, and so Taylor's claim that he subjectively felt threatened, even if credited, would be of little, if any, relevance.<sup>4</sup> At any rate, Taylor's testimony that he felt threatened with physical violence is self-serving and not credible based on the record here. While Taylor claims he felt threatened with physical violence when Bauer stood, Taylor did not himself stand up or raise his hands in a protective gesture. (Tr. 87.) Indeed in the written statement Taylor prepared shortly after the incident, and well before testifying, he reported that he remained calm during the confrontation with Bauer. (R. Exh. 7.) Taylor conceded that he knew of no conduct by Bauer involving physical violence during Bauer's 8 years with the Respondent. The two men are comparable in height and weight. See, *supra*, fn. 2. After the meeting, Taylor did not contact security or law enforcement officials to report the incident or request protection from Bauer. Although the Respondent's standard procedure when an employee is suspected of making a threat is to suspend the offending employee pending an investigation, the Respondent did not find it necessary to suspend Bauer after the meeting and the Respondent makes no claim that Taylor asked that Bauer be suspended. Rather, Bauer continued to have his usual access to the facility until the time that the Respondent discharged him 6 days later. I also find that Taylor palpably strained to describe Bauer's

behavior in the most inflammatory terms. For example Taylor testified, regarding the complaints that Bauer made during the meeting, that Bauer "came in firing, firing, and firing." (Tr. 106.) Taylor's effort to somehow equate a union official verbalizing union concerns with that official's use of a firearm is overreaching. Moreover, Taylor's testimony that Bauer was being "so aggressive" as soon as the meeting started, *Id.*, is hard to square with his testimony that when Bauer and himself first arrived at Bell's office they had a conversation about things outside of work and had no issues. (Tr. 113.) For these reasons, and based on the record as whole, I consider Taylor a particularly biased witness, prone to exaggeration.

#### *F. Respondent Discharges Bauer*

After the December 13 meeting in her office ended, Bell contacted Pruitt and told him that Bauer had been threatening and intimidating during the meeting. Pruitt advised Bell to "get some statements together." Bell prepared a statement after discussing the matter with the Respondent's labor attorney, Tamika Frimpong. In addition, Bell obtained a statement about the meeting from Taylor. Subsequently, the Respondent had a conference call about the matter. The participants were Bell, Pruitt, Frimpong, and Tony Biermann (general director of human resources for North America). They decided that Bell would hold a "fact finding" interview with Bauer, that she would report back, and a group decision would be made about discipline.

On December 15, Bell held a fact finding interview with Bauer that was also attended by Frost. During this interview, Bauer admitted that, at the December 13 meeting, he had raised his voice. Bell asked Bauer what was said. Bauer responded "words." According to Bell's notes of the interview (R Exh. 4), Bauer explained that he used those "words" because management had been "failing to acknowledge the Union wanting a safe and sanitary work environment" and that he was "trying to defend" union members. Bell reported back to Pruitt about the interview. Pruitt testified that "we weighed the information, came to a group decision on what needed to be done." According to Pruitt, he concluded that Bauer had "stepped over the line."

At a meeting on December 19, 2017, the Respondent informed Bauer that the Respondent had decided to terminate his employment. The discharge meeting was conducted by Bell and Savannah West, who like Bell was a human resources business partner. Bauer and Frost were present at the meeting. The Respondent provided Bauer with paperwork stating that he was being discharged for violating shop rule 9 and the Company's workplace violence policy.<sup>5</sup> During the 6-day period leading up to the discharge, the Respondent had not taken any action to protect Taylor or others from Bauer. Pruitt conceded that Bauer did not pose an immediate danger and that it was not necessary to suspend him or contact security or law enforcement about his statements or actions on December 13. (Tr. 183,186.)

The record evidence regarding the Respondent's disciplinary responses to conduct similar to Bauer's is very thin and does not

<sup>4</sup> The Board uses an objective standard, rather than a subjective standard, to determine whether the conduct in question is threatening. *Plaza Auto Center, Inc.*, 360 NLRB 972, 974 (2014).

<sup>5</sup> Shop rule 9 prohibits "assaulting, threatening, intimidating, coercing or interfering with supervision." The Respondent's global workplace

violence policy prohibits a variety of activities defined as violence, including: possessing weapons or dangerous devices, bullying, stalking, making threats, causing harm to people or property, and "creat[ing] an intimidating, offensive, or hostile environment."

demonstrate that its rules or policies were, or were not, applied selectively in this case. While testifying, Bell and Pruitt both made conclusory statements that the decision to discharge Bauer was consistent with the way the Respondent had handled other cases. Both also denied that Bauer was discharged because he was a union official or because he raised workplace concerns. (Tr. 88–89, 91–92.) On the other hand, Frost, who was a union official at the Respondent from 2011 until June 2018, testified that employees and supervisors at the plant use profanity at the facility every day and that discipline is imposed for this “very rarely.” Frost discussed one instance in which a human resources staffer told her that the grievance she was presenting was “bullshit” and “fucking ridiculous.” Frost complained about the staffer’s remarks to Pruitt, and Pruitt later told Frost that the matter was “resolved.” According to Frost, the staffer was not disciplined and, in fact, received a promotion a few months later. In 2013, Bauer himself, prior to becoming a union official, called his supervisor a “pompous jackass” and was cited under shop rule 9. For that conduct, Bauer’s punishment was a 2-week suspension, later reduced to a 1-week suspension.

The Respondent introduced disciplinary reports from 2016 and 2017, which indicated that 13 individuals other than Bauer were discharged under the shop rules and policy against workplace violence.<sup>6</sup> The record does not reveal whether, as had been the case with Bauer’s prior disciplines, the Respondent subsequently reduced the level of discipline imposed on these individuals. Moreover, these reports are very bare bones and do not provide details sufficient to show that the conduct involved in any of the cases was comparable to Bauer’s. To the extent that the details provided in some instances do permit a comparison, they indicate that the conduct involved was more severe than Bauer’s—involving either an actual assault or an express threat. See, e.g., R. Exh. 24 (employee Hood sent text threatening to “beat the fuck out of” coworker); (R. Exh. 25) (noting that employee Brown admitted to assaulting a member of management); Id. (employee Williams assaulted his group leader); Id. (employee Allen threw water at his supervisor); Id. (employee Smith makes physical contact with a manager while making vulgar comments).

### III. DISCUSSION

#### A. Section 8(a)(3) and (1): Discharge of Bauer

The General Counsel alleges that, pursuant to the framework set forth in *Atlantic Steel*, 245 NLRB 814 (1979), the Respondent’s discharge of Bauer violated Section 8(a)(3) and (1) of the Act because that action was taken based on Bauer’s protected activity at the December 13 meeting and nothing Bauer did in the course of that activity caused him to forfeit the the Act’s protection. The Respondent does not dispute that it discharged Bauer for his conduct in the course of his otherwise protected union activity on December 13,<sup>7</sup> and agrees that the *Atlantic*

<sup>6</sup> The disciplinary reports submitted by the Respondent include one additional report, but that report makes no reference to violent or threatening conduct or to the rules concerning such conduct. See R Exh. 24 (Boykins).

<sup>7</sup> I agree that Bauer was engaged in protected union activity at the December 13 meeting. Bauer attended the meeting in his capacity as a

*Steel* framework is applicable but argues that under that framework Bauer’s outburst caused him to forfeit NLRA protection. The determination about whether an employee’s conduct in the course of otherwise protected activity is “sufficiently egregious or opprobrious” to forfeit NLRA protection is based on a balancing of 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, in any way, provoked by an employer’s unfair labor practice. 245 NLRB at 816; see also *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 fn.2 (2018) (same), *Postal Service*, 360 NLRB 677, 677 fn. 2 and 683 (2014), and *Stanford Hotel*, 344 NLRB 558 (2005) (“When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act.”). This framework balances employees’ rights under Section 7 of the Act and the employer’s interests in maintaining workplace order and discipline. *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014), aff’d. 629 Fed.Appx. 33 (2d Cir. 2015); see also *Piper Realty*, 313 NLRB 1289, 1290 (1994) (“[E]mployees are permitted some leeway for impulsive behavior when engaging in concerted activity, [but] this leeway is balanced against an employer’s right to maintain order and respect.”). After considering the relevant factors, I find that Bauer’s conduct during the course of otherwise protected activities on December 13 fell well short of being so egregious or opprobrious as to cause him to forfeit the protection he was otherwise entitled to as a union official engaged in protected union activity.

The first factor, the place of the discussion, weighs heavily in favor of continued protection. The conduct that the Respondent points to—Bauer’s profane language, raised voice, pointing—all took place in the private office of Bell (a human resources official) with only Bauer, Bell, and Taylor present. The door to the office was closed during the discussion. To the extent that the door may have been open at the very tail end of Bauer’s interaction with Taylor, this would be because Bell, not Bauer, chose to open it. In such circumstances, the Board has repeatedly found that the location of the discussion weighs against forfeiture of the NLRA’s protection. “An employer’s interest in maintaining order and discipline in his establishment is affected less by a private outburst in a manager’s office away from other employees than an outburst on the work floor witnessed by other employees.” *Plaza Auto Center*, 360 NLRB 972, 978 (2014). Therefore, the Board has “regularly observed a distinction between outbursts under circumstances where there was little if any risk that other employees heard the obscenities and those where that risk was high.” Id., quoting *NLRB v. Starbucks Corp.*, 679 F.3d 70, 79 (2d Cir. 2012); see also, *Success Village Apartments*, 347 NLRB 1065, 1069 (2006) (protection not forfeited when union representative yells and uses crude language during meeting in

union official and discussed union issues such as the processing of grievances, his access to employees for representational purposes, unit member safety, and the Respondent’s use of non-unit employees to perform bargaining unit work.



manager's private office) and *Stanford Hotel*, 344 NLRB at 558 (where outburst occurred in secluded area behind a closed door, this weighs in favor of continued protection, even though one other employee overheard the outburst). There were no unit employees, or other rank-in-file employees, present in the room as spectators to Bauer's profane statements to Taylor. There were some salaried, nonbargaining unit employees, working in the area outside Bell's office, but none of those employees stated that they heard, or otherwise witnessed, Bauer's conduct. Indeed, the Respondent does not name a single individual, other than Bell and Taylor, who it claims witnessed the conduct. I find that it is unlikely that any other employee heard the conduct. Moreover, as demonstrated by some of the cases cited above, the location of a profane outburst weighs in favor of continued protection as long as there is "little if any risk that other employees" heard it, even if the outburst is, in fact, inadvertently overheard. See *Plaza Auto*, supra, and *Stanford Hotel*, supra.

There is, moreover, no indication on the record that Bauer expected or hoped that other employees would witness his conduct. His outburst was impulsive and not the result of an improper motive to undermine discipline by making a show of challenging a supervisor on the shop floor. The fact that Bauer's obscenities were impulsive rather than the product of an improper motive weighs in favor of continued protection. *Prescott Industrial Products Co.*, 205 NLRB 51, 51-52 (1973) (continued protection when outburst results from "animal exuberance" not an improper motive), enfd. 500 F.2d 6 (8th Cir. 1974); see also *Plaza Auto*, 360 NLRB at 978 (employee's right to engage in protected activity permits some leeway for impulsive behavior).

I find that the second *Atlantic Steel* factor—the subject matter of the discussion—also weighs heavily in favor of continued protection. The meeting had been arranged for the purpose of addressing important issues related to the interests and welfare of bargaining unit employees, including: Bauer's allegation that supervisors were interfering with his ability to provide representation to bargaining unit employees, the employer's frequent use of nonunit individuals to perform bargaining unit work, and safety. In addition, the subject matter of the discussion provides context that favors continued protection. Specifically, I note that the subject matter that the December 13 meeting was called to address included Bauer's frustration with what he considered to be the Respondent's dismissive treatment of his efforts to represent employees. However, Taylor's dismissive treatment of Bauer's concerns at the meeting did nothing to calm that frustration, but rather aggravated it. When Bauer expressed concern about safety, Taylor, by his own account, did not propose a way of addressing those concerns, but rather dismissed the safety concerns by stating that while Bauer was always talking about safety he himself was not wearing the proper type of shoes. Taylor even attempted to subject Bauer to an impromptu inspection of his shoes. When Bauer became emotional while discussing a unit employee who had reportedly been forced, with Taylor's knowledge, to continue working in her own vomit, Taylor did not express concerns or an interest in improving the employer's approach, but dismissed Bauer by commenting to Bell that he could not "get anything done" because Bauer was "just so hostile." When Taylor made these dismissive comments to Bauer on December 13, during the very meeting that was called to discuss

Bauer's frustration over the Respondent's dismissive treatment of him, it arguably constituted a provocation. The nature of an employee's outburst is examined in the context in which it occurred, and here the subject matter of the discussion provides context that weighs in favor of continued protection.

I find that the third factor, the nature of the outburst, also weighs in favor of continued protection. Bauer used crude language, but he did not engage in any physical violence, or even touch, anyone at the December 13 meeting. He did not make a threat, either express or implied. Moreover, he did not improperly prolong the confrontation, or refuse a direction to end it. Although the Respondent claims that Bauer's behavior was threatening, the Respondent did not act consistently with that claim. It did not, for example, suspend Bauer pending investigation as is its practice when an employee is suspected of making a threat. The Respondent was sufficiently unconcerned with Bauer's outburst, that it did not contact its own security, much less law enforcement. This is not surprising given that Bauer, during his 8 years with the Company, had sometimes been verbally volatile, but had never been known to be violent. See *Plaza Auto Center*, 360 NLRB at 976 (outburst not threatening where, inter alia, employee had no history of violent behavior).

Bauer's outburst was a spontaneous expression of his frustration with management's response to the concerns he was raising on December 13, and not a premeditated diatribe that was calculated to, or that reasonably would, either intimidate Taylor or undermine discipline. It is true that Bauer directed profanity at Taylor, a supervisor, during his outburst. However, this is a type of outburst for which employees are granted leeway when, as here, it occurs in the course of otherwise protected activity. As the Board explained in *Plaza Auto*, such leeway is warranted because the language of the industrial workplace "is not the language of polite 'society,'" and "[t]he protections [that] Section 7 affords would be meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." 360 NLRB at 978 (internal citations omitted).

In its brief, the Respondent repeatedly makes reference to the fact that Bauer and Taylor were in close proximity during Bauer's outburst and gives the impression that Bauer had moved towards Taylor in a threatening way. However, the record indicates that Bauer had no choice but to be close to Taylor given the tight confines of the office. Bauer was 12 to 16 inches away from Taylor when he engaged in the conduct that the Respondent cites to justify his termination, but throughout the meeting the two had already been only 12 inches apart while sitting in two guest chairs in Bell's office. Photographs of Bell's office show that the area for visitors was very confined. Under these circumstances, I reject the Respondent's suggestion that the proximity of the two men indicates that Bauer moved into Taylor's personal space in order to threaten or intimidate him. Under similar circumstances, in *Plaza Auto*, the Board found that the fact that an employee's outburst had included standing and pushing his chair aside was, when viewed objectively, not threatening given that the tight confines of the office would have made it difficult for the employee to stand up without pushing the chair. 360 NLRB at 976. In another similar case, *Alton H. Piester, LLC*, an

employee retained the protection of the Act even though he rose and took a step towards the employer's agent given that the tight confines of the office rendered it difficult to move without approaching that individual. 353 NLRB 369, 374 (2008), enfd. 591 F.3d 332 (4th Cir. 2010).

In its brief, the Respondent cites cases in which it was found that an employee who, like Bauer, used profanity during otherwise protected activity, forfeited the protection of the Act. (R. Br. at pp. 15 ff.) Those cases, unlike the instant one, concerned profane outbursts made in the presence of others and under circumstances that threatened to undermine the employer's authority. For example, the Respondent cites *Waste Management of Arizona, Inc.*, 345 NLRB 1339 (2005). In that case, the Board's decision that protection was forfeited specifically relied on the fact that, even after a manager repeatedly told the employee to move the profane confrontation to a private office, the employee prolonged the confrontation in an area where employees and supervisors were gathered. *Id.* at 1340. Bauer and Taylor, on the other hand, were already in Bell's private office out of the presence of other employees, and Bauer did not refuse an order to move or end the confrontation. The Respondent also relies on *Aluminum Company of America*, 338 NLRB 20, 20–22 (2002). The employee who forfeited protection in that case was still a probationary employee and his profane outburst occurred in a break room where he was surrounded by multiple employees and a supervisor. Some of the employees not only heard the profane outburst, but found it disturbing enough that they complained about it to the employer. Moreover, profanity was not common or tolerated in the workplace involved in that case. In *Piper Realty*, 313 NLRB at 1289–1290, another case relied on by the Respondent, the employee continued his profane outburst towards a supervisor even after the supervisor repeatedly directed him to end the confrontation and leave to perform a work assignment. His profane outburst, moreover, was made within the hearing of employees who testified that they were disturbed by it and who, in one case, relocated to escape hearing it. Additionally, in *Piper* the employee not only called his a supervisor a profane name, but also asked the supervisor if he “had a problem”—a question that, under the circumstances, smacked of an invitation to escalated, possibly physical, conflict. In the instant case, Bauer outburst was not heard by other employees, he did not persist after being directed to end the confrontation, and he did not make any statements that suggested an invitation to escalated conflict.<sup>8</sup>

The Respondent also relies on *Trus Joist MacMillan*, 341 NLRB 369 (2004), a case in which an employee forfeited protection, but under circumstances that are far removed from Bauer's. In *Trus Joist* the employee engaged in a premeditated diatribe for the express purpose of undermining and embarrassing an assistant manager in front of others. *Id.* at 370–372. Indeed in *Trus Joist*, the employee had arranged for the presence of others during the meeting as part of his plot to “call [the

assistant manager] a liar and embarrass him.”<sup>9</sup> Moreover, unlike Bauer, the employee continued his profane outburst even after the employer repeatedly directed him to end the confrontation. In *Trus Joist*, the employee's outburst was not the sort of impulsive behavior to which the Board permits “leeway,” but rather was a calculated attempt to undermine the employer's ability to maintain order and respect in the workplace. See *Piper Realty*, 313 NLRB at 1290 (“employees are permitted some leeway for impulsive behavior when engaging in concerted activity”) and *Prescott Industrial Products Co.*, 205 NLRB at 51–52 (continued protection for outburst resulting from “animal exuberance” as opposed to improper motive); see also *Plaza Auto Center v. NLRB*, 664 F.3d 286, 292–293 (9th Cir. 2011) (distinguishing *Trus Joist* on the basis that “the employee in that case instigated the meeting for the express purpose of embarrassing a manager, which “accentuate[d] and exacerbate[d] the disruptive effect of [the employee's] outburst”).

It is telling that the Respondent, in order to argue that the nature of Bauer's outburst weighs against continued protection, relies on cases such as *Waste Management of Arizona*, supra, *Aluminum Company of America*, supra, *Piper Realty*, supra, and *Trus Joist*, supra, that concern conduct that was so different than Bauer's. In fact, the Board has not been unrealistic or prudish about the use of foul language in industrial settings, including about the use of variations on the word “fuck.” In *Pier Sixty*, an employee retained NLRA protection after, in a Facebook post attacking a manager's conduct, he called the manager a “nasty mother fucker,” and added “[f]uck his mother and his entire fucking family!!!” 362 NLRB 505, 506 (2015), enfd. 855 NLRB 115 (2d Cir. 2017). In *Coors Container Company*, an employee who engaged in protected activity did not forfeit protection by calling two agents of the Respondent “mother-fuckers.” 238 NLRB 1312, 1320 (1978). Although Bauer's outburst was intemperate in nature, it was not so egregious or opprobrious as to warrant stripping his union activity of the protection to which it was otherwise entitled under federal law. The third *Atlantic Steel* factor weighs in favor of continued protection.

The fourth and final *Atlantic Steel* factor is whether the misconduct was provoked by the employer's unfair labor practices. The analysis under this factor is not confined to circumstances in which the employer's provocation is actually alleged to be an unfair labor practice, but rather includes circumstances in which the employer evinced an intent to interfere with protected rights or escalated the confrontation. See *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 13; *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007); *Overnite Transportation Co.*, 343 NLRB 1431, 1438 (2004). In this case, Bauer was present at the meeting to complain about employer conduct that, if proven, would arguably constitute an unfair labor practice. However, that potential unfair labor practice was not alleged in a Board complaint and was not fully litigated before me. The record in

<sup>8</sup> The Respondent does not cite *Stanford Hotel*, supra, but I note that in that case the Board, while finding that the employee retained NLRA protection, also stated that the employee's calling a supervisor a “fucking son of a bitch” weighed against retaining protection. In that case, however, the Board's assessment of the language was based on a finding that the employer—a hotel—was a work setting where profanity was inappropriate and uncommon. 344 NLRB at 559. Bauer, on the other hand,

used profanity in an industrial setting, where the Board recognizes that the language of “polite society” does not prevail, and in a facility where profane language was, in fact, widely used and generally tolerated.

<sup>9</sup> In that case, the employee called the assistant manager a liar, a “lying bastard,” and, repeatedly, a “prostitute.” At one point he also grabbed his crotch and said “I have your manhood hanging right here.” *Trus Joist MacMillan*, 341 NLRB at 370–371.

this case is insufficient to permit a finding as to whether the supervisory dismissiveness and interference and other conduct that Bauer was complaining about constituted unfair labor practices. That being said, I do find, as discussed above in reference to the second *Atlantic Steel* factor, that Taylor's responded somewhat dismissively to concerns raised by Bauer during the December 13 meeting. I find that Bauer's outburst in response to dismissive comments at a meeting held to discuss, inter alia, Bauer's frustration about the Respondent's prior dismissive comments, was not wholly unprovoked. Given that it has not been alleged or proven that the conduct Bauer was complaining about at, or that he experienced during, the December 13 meeting constituted unfair labor practices, I find that this final factor weighs in the Respondent's favor. However, Bauer's outburst was not wholly without provocation and this factor weighs only lightly in the Respondent's favor.

The first two *Atlantic Steel* factors weigh heavily in favor of Bauer retaining NLRA protection, and the third factor also weighs in favor of continued protection. The fourth factor weighs in favor of forfeiture of protection, but it does so only lightly. I find that the three factors favoring the retention of protection outweigh the one factor marginally favoring forfeiture. Therefore, I find that Bauer retained the NLRA's protection for his actions during the December 13 meeting, and that the Respondent violated Section 8(a)(3) and (1) of the Act when, on December 19, 2017, it terminated him for those actions.

*B. Section 8(a)(4) and (1): Discharge of Bauer*

Section 8(a)(4) and (1) of the NLRA makes it unlawful for an employer "to discharge . . . an employee because he has filed charges or given testimony under this Act." The General Counsel alleges that Bauer's discharge violated the NLRA not only because, as found above, the Respondent based the discharge on Bauer's protected union activity during the December 13 meeting, but also because the discharge was discriminatorily based on Bauer's prior charges and testimony under the NLRA. The Board applies the analysis set forth in the *Wright Line* decision to allegations that an employer violated Section 8(a)(4) and (1) by discriminating against "an employee because he has filed charges or given testimony" in a Board proceeding. *Verizon*, 350 NLRB 542, 546–547 (2007), *American Gardens Mgmt. Co.*, 338 NLRB 644, 644–645 (2001), *McKessen Drug Co.*, 337 NLRB 935, 936 (2002); *Gary Enterprises*, 300 NLRB 1111, 1113 (1990), enfd. mem. 958 F.2d 368 (4th Cir. 1992). Under the Board's *Wright Line* analysis, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by considerations prohibited by the NLRA. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds 383 Fed.Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274–

1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

In this case, the record demonstrates that Bauer filed prior unfair labor practices charges against the Respondent and that the Respondent was aware of those charges. However, I find that the General Counsel has not established the third element of its initial *Wright Line* burden, i.e., that the Respondent bore animosity towards Bauer's participation in NLRB proceedings. To establish this element, the General Counsel relies primarily on statements regarding Bauer's NLRB activity that Pruitt and Bell allegedly made at the November 9 meeting. For the reasons that are discussed above in the statement of facts, the record does not demonstrate that Pruitt and Bell more likely than not made those statements. In addition, the General Counsel did not establish animus by demonstrating that the Respondent gave significantly more favorable treatment under its shop rules to employees who had comparable profane outbursts, but who had not previously filed charges with, or given testimony to, the NLRB. The General Counsel and the Charging Party argue, in particular, that the Respondent failed to follow its progressive discipline policy in addressing Bauer's December 13 conduct, whereas it followed its progressive discipline policy when he had been rude or profane in conversations with supervisors during the period prior to his involvement with the NLRB. The record does show instances, discussed above in the statement of facts, that occurred before Bauer filed his NLRB charges and in which he used profanity during disagreements with supervisors and was suspended rather than discharged. The evidence regarding the details of those incidents was insufficiently developed to allow a determination about whether the infractions were comparable or whether the shop rules were applied selectively to Bauer's December 13 conduct. To the extent that the General Counsel's contention is that the Respondent departed from a progressive discipline policy when it discharged Bauer, I find that the record does not show any such departure. The Respondent was not shown to have a formalized progressive discipline policy with a schedule of infractions and punishments, or other meaningful parameters, from which it departed when it discharged Bauer, or which even shed light on the discharge.

The record does not establish that the Respondent discharged Bauer because he filed charges or gave testimony under the NLRA. Therefore, the allegation that the Respondent violated Section 8(a)(4) and (1) of the Act must be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the NLRA.

2. Local 699, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act on December 19, 2017, when it

discharged Bauer based on his protected union activity during a meeting on December 13, 2017.

4. The record does not show that the Respondent selectively enforced shop rules because Bauer filed charges or gave testimony under the NLRA, or otherwise discriminated in violation of Section 8(a)(4) and (1) of the Act when it discharged Bauer.

#### REMEDY

Having found that the Respondent 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 Joshua Nuffer-Bauer, must offer him full and immediate 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). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and 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 recommended Order.<sup>10</sup>

#### ORDER

The Respondent, Nexteer Automotive Corp., Saginaw, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting Local 699, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, or any other labor organization.

(b) 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 the Board's Order, offer Joshua Nuffer-Bauer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Joshua Nuffer-Bauer 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 decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Joshua Nuffer-Bauer in writing that this has been done and that the discharge will not be used

against him in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its facilities in Saginaw, Michigan, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region Seven, 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 December 19, 2017.

Dated, Washington, D.C. December 10, 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 do anything to prevent you from exercising the above rights.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 699, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, or any other union.

<sup>10</sup> 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.

<sup>11</sup> 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."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Joshua Nuffer-Bauer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joshua Nuffer-Bauer whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Joshua Nuffer-Bauer for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Joshua Nuffer-Bauer, 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.

NEXTEER AUTOMOTIVE CORP.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/07-CA-215036](http://www.nlr.gov/case/07-CA-215036) 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.

