

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

---

**GENERAL MOTORS, LLC,**

**Respondent,  
and**

**CHARLES ROBINSON**

**Charging Party.**

---

**Case Nos. 14-CA-197985  
14-CA-208242**

---

**BRIEF *AMICUS CURIAE* OF  
LIUNA MID-ATLANTIC REGIONAL ORGANIZING COALITION**

---

Brian J. Petruska  
LIUNA Mid-Atlantic Regional Organizing  
Coalition  
11951 Freedom Drive, Ste. 310  
Reston, Virginia 20190  
(tel) 703-860-4194  
(fax) 703-860-1865  
bpetruska@maliuna.org  
Counsel to LIUNA MAROC

**TABLE OF CONTENTS**

STATEMENT OF INTEREST OF THE *AMICUS*..... 3

**INTRODUCTION**..... 4

**I. ENACTING A CODE OF ETIQUETTE UNDER WHICH EMPLOYEES WOULD LOSE PROTECTION UNDER THE ACT BASED SOLELY ON SPEAKING CERTAIN UTTERANCES WOULD BE ARBITRARY AND CAPRICIOUS BECAUSE IT WOULD PLACE ETIQUETTE BEFORE THE TRUE PURPOSES OF THE ACT.** ..... 6

**II. GRAFTING A CODE OF ETIQUETTE ONTO THE NLRA WOULD CONSTITUTE AN IMPERMISSIBLE REGULATION OF SPEECH THAT LACKS A SUFFICIENT GOVERNMENT PURPOSE.**..... 9

**III. UNLESS THE BOARD INTENDS TO APPLY AN ETIQUETTE CODE TO DEPRIVE EMPLOYERS AND ANTI-UNION EMPLOYEES OF PROTECTION UNDER THE ACT, THE PROPOSED RULE WILL BE EXPOSED AS AN UNEQUAL ATTEMPT TO REGULATE THE SPEECH OF TARGETED PARTIES, I.E. UNIONS AND EMPLOYEES WHO SUPPORT THEM.**..... 11

**IV. THE PRESIDENT'S FREQUENT USE OF CRUDE AND PROFANE LANGUAGE UNDERSCORES THAT THE ENACTING A CODE OF ETIQUETTE ONTO THE NLRA IS INCONSISTENT WITH MODERN CULTURAL TRENDS AND LONG-STANDING INDUSTRIAL REALITY.** ..... 12

**V. THE EXAMPLE OF PUBLIC UNIVERSITIES, WHICH ARE SUBJECT TO BOTH ANTI-DISCRIMINATION AND FREE-SPEECH MANDATES, DEMONSTRATES THAT THESE DUAL MANDATES ARE NOT IRRECONCILABLE.** ..... 13

**VI. A RULE THAT PLACES CERTAIN WORDS OFF LIMITS CANNOT ACCOUNT FOR NON-DEROGATORY USES OF RACIAL SLURS AMONG MINORITY GROUPS, SUCH AS AFRICAN-AMERICANS.** ..... 14

**VII. A MANDATE THAT STRIKING WORKERS BE SUBJECT TO A CODE OF ETIQUETTE WILL ABRIDGE THE RIGHT OF STRIKING WORKERS TO COMMUNICATE ON THEIR OWN BEHALF.** ..... 14

**CONCLUSION**..... 16

**TABLE OF AUTHORITIES**

*Atlantic Steel*, 245 NLRB 814, 816 (1979)..... 6

*Cooper Tire*, 363 NLRB No. 194 (2016), enf’d 866 F.3d 885 (8th Cir. 2017)..... 4

*Crown Central Petroleum Corporation*, 177 NLRB 322 (1969), enfd. 430 F.2d 724 (C.A. 5, 1970)..... 7

*F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749–50 (1978)..... 11

*Hawaiian Hauling Serv., Ltd.*, 219 NLRB 765 (1975)..... 7

*Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001)..... 5, 10

*Medité of New Mexico, Inc.*, 314 NLRB 1145, 1146 (1994)..... 15

*Pier Sixty, LLC*, 362 NLRB 505 (2015)..... 4, 9

*The Bettcher Manufacturing Corporation*, 76 NLRB 526, 527 (1948)..... 7

*Widmar v. Vincent*, 454 U.S. 263 (1981)..... 5, 10, 13

## **STATEMENT OF INTEREST OF THE *AMICUS***

Founded in 1903, the Laborers' International Union of North America (hereinafter, "LIUNA") is a general workers union representing over half a million employees in the construction industry and in public service in the United States and Canada. As the union of record in both Canada and the United States holding undisputed jurisdiction over the craft of construction laborer, LIUNA represents the men and women throughout North America who are responsible for constructing the buildings, roads, bridges, highways, energy and other critical infrastructure that makes life in the United States and Canada possible.

LIUNA MAROC is a coalition of Laborers' District Councils within the Mid-Atlantic Region of the LIUNA formed for the purpose of coordinating and leading LIUNA's organizing efforts in the Region. MAROC's jurisdiction consists of Pennsylvania, West Virginia, Virginia, Maryland, Washington DC, and North Carolina, and includes nearly 40,000 members.

## INTRODUCTION

The Board requested comments regarding whether it should overrule *Plaza Auto Center*, 360 NLRB 814 (1979), *Cooper Tire*, 363 NLRB No. 194 (2016), enfd 866 F.3d 885 (8th Cir. 2017); and *Pier Sixty, LLC*, 362 NLRB 505 (2015). In requesting whether these cases should be overruled, the Board does not suggest what alternative rules would replace these precedents. Based upon the five questions posed by the Board, however, it appears likely that the Board is considering whether to graft onto the Act a “labor relations code of etiquette,” i.e., a set of per se rules under which employees always would lose protection under the Act for uttering certain categories of profane or racially or sexually offensive speech.

Based upon that understanding of what the Board seeks to do, LIUNA MAROC argues that the Board should not establish a rule under which employees would necessarily lose protection under the Act for saying specified profane or racially or sexually offensive speech. Indeed, it would be arbitrary and capricious for the Board to create a “code of etiquette” that would place the goal of deterring potentially offensive speech before the statutory purposes and protections of the Act. Any attempt by the Board to fashion a labor-relations “code of etiquette” would ignore the “realities of industrial life,” constitute an unlawful regulation of speech, and seriously abridge employee’s rights under the Act to petition the public and each other for support. The Board has the responsibility to be expert in labor relations and to protect the exercise of rights under the NLRA. It is not charged with attempting to restore Victorian-era manners. Accordingly, this initiative should be abandoned.

This brief makes the following points:

- 1.) **Enacting a code of etiquette under which employees would lose protection under the Act based solely on speaking certain words would be arbitrary and**

**capricious because it would place etiquette before the true purposes of the Act.** The current standard requires an examination of the context of the profane or offensive statements precisely for the purpose of determining whether or not the purposes of the Act require that protection be maintained. If that contextual examination is removed, then etiquette will be elevated above the Act's statutory purposes.

- 2.) **Grafting a code of etiquette onto the NLRA would constitute an impermissible regulation of speech that lacks a sufficient government purpose.** Supreme Court precedent establishes that conditioning a government benefit upon accepting a restraint on speech is a regulation of speech. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001). Furthermore, Supreme Court precedent is clear that codes of decorum and civility can constitute impermissible restrictions on the communication of ideas. *See Widmar v. Vincent*, 454 U.S. 263 (1981). Based upon these precedents, an attempt by the Board to graft a code of etiquette onto the NLRA would constitute an unconstitutional regulation of speech, by conditioning legal protection under the Act based solely on the content of the speech used.
- 3.) **Unless the Board intends to apply an etiquette code to deprive employers and anti-union employees of protection under the Act, the proposed rule will be exposed as an unequal attempt to regulate the speech by parties disfavored by the current Administration, i.e. unions and employees who support them.** If the Board establishes an etiquette code that will cause employees to lose protection under the Act, the Board must be prepared to apply the same doctrine in an even-handed manner against employers and anti-union employees. If the rule adopted by the Board has application only against pro-union employees, then it will be clear that this is an effort by the Board to regulate language it disfavors from disfavored parties.
- 4.) **The President's frequent use of crude and profane language underscores that enacting a code of etiquette onto the NLRA would be inconsistent with the modern cultural trends and long-standing industrial reality.** Everything from the popularity of adult-themed television to the frequently coarse and profane language from the current President demonstrates that profane language is becoming more accepted in everyday life, not less. It would be contrary to this trend for the Board to now, after nearly 85 years, impose upon workers a code of etiquette that they must follow in order to retain protection under the Act.
- 5.) **As is demonstrated by the example of public universities, which are subject to both anti-discrimination and free-speech mandates, the dual mandate is not irreconcilable.** Public universities are required to comply with anti-discrimination laws, while also being prohibited from enacting broad speech and etiquette codes due to First Amendment limitations. As public universities are able to comply with both mandates, private employers will not be harmed by being compelled to tolerate some bad language occasionally during the course of concerted activity, collective bargaining, or during labor disputes.

- 6.) **A rule that places certain words off limits cannot account for non-derogatory uses of racial slurs among minority groups, such as African-Americans.** The fact that African-Americans use what ordinarily is a racial slur in a non-derogatory manner complicates the establishment of a policy whereby racially or sexually offensive words will per se forfeit protection under the Act.
- 7.) **The Board should not impose a code of etiquette upon striking workers.** Under the Act, employees must be free to advocate robustly for support from the public, their co-workers, and employees of other employers, and the Board should not prohibit appeals that rely upon strong, highly emotional language, including profane language. Applying an etiquette code to striking workers would inhibit workers from making highly emotional appeals to communicate their anger, sense of injustice, and determination. Absolutely nothing in the Act suggests that imposing such limitations is consistent with the purposes of the Act.

Each of the above points is addressed more fully within.

**I. ENACTING A CODE OF ETIQUETTE UNDER WHICH EMPLOYEES WOULD LOSE PROTECTION UNDER THE ACT BASED SOLELY ON SPEAKING CERTAIN WORDS WOULD BE ARBITRARY AND CAPRICIOUS BECAUSE IT WOULD PLACE ETIQUETTE BEFORE THE TRUE PURPOSES OF THE ACT.**

In its requests for briefs, the Board reports that it is exploring whether the nature of an outburst, standing only, should be dispositive on whether an employee forfeits protection under the Act. Presumably, therefore, the Board is considering adopting a rule under which contextual factors, like those represented by the *Atlantic Steel* test,<sup>1</sup> would be deemed irrelevant to whether an employee retains protection under the Act depending upon what the employee actually said. This is an extraordinarily bad idea because, in labor relations, the context of a profane or offensive utterance matters quite a lot.

For instance, employees often undertake different roles in different labor relations contexts. At times an employee may serve as a union steward, at which time the employee is an agent of the union. When serving this role, it would be inappropriate for an employer to be able to set the boundaries over what the employee says. Under the Act, an employer is prohibited

---

<sup>1</sup> 245 NLRB 814, 816 (1979).

from exercising control over a labor organization, *see* 29 U.S.C. § 158(a)(2) (prohibiting an employer from “interfer[ing] with the ... administration of any labor organization”). This is why the Board previously has ruled that stewards cannot be disciplined for engaging in conduct during the grievance process that would be insubordinate outside of that process and outside of that role. *See Crown Central Petroleum Corporation*, 177 NLRB 322 (1969), *enfd.* 430 F.2d 724 (5th Cir., 1970).

Employees also may serve as members of the Union’s negotiating committee. This again is a context in which the Employer should not be able to discipline an employee for using language or making statements that ordinarily might be grounds for discipline, such as accusing the employer of greed or of lying or using charged language to communicate the plight of employees in seeking to persuade the employer to make additional concessions. *See Hawaiian Hauling Serv., Ltd.*, 219 NLRB 765 (1975). As the Board has written:

A frank, and not always complimentary, exchange of views must be expected and permitted the negotiators if collective bargaining is to be natural rather than stilted. The negotiators must be free not only to put forth demands and counter demands, but also to debate and challenge the statements of one another without censorship, even if, in the course of debate, the veracity of one of the participants occasionally is brought into question. If an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method or retaliation), or employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives.

*The Bettcher Manufacturing Corporation*, 76 NLRB 526, 527 (1948).

Establishing a rule that ignored these important contextual factors would be contrary to the Act because it would abridge the ability of workers to engage in collective bargaining while furthering no other purpose of the Act. For instance, if the Board establishes a list of prohibited dirty words that would cause employees to lose protection under the Act, employees who used

any of those words in any context, such as during a grievance, or during negotiations, or on social media while communicating with other union members, would lose protection from employer retaliation. Every employee would therefore be made less safe in performing any of those roles, all of which are protected by the Act.

Indeed, if the Board established a list of prohibited dirty words, the Board would effectively be making the prohibition of using those dirty words the highest priority of the Act, because any employee's protection under the Act would depend on not saying those words. Nothing in the text, structure, or history of the Act suggests that censoring employee speech is a legitimate purpose of the Act. Accordingly, it would be arbitrary and capricious for the Board to adopt a policy that caused employees to forfeit protection under the Act simply for uttering certain offensive words.

Similarly, it would undermine the purposes of the Act to not afford greater protection for employees who use profane or offensive language in response to unlawful conduct by an employer. Quite simply, the Board has an obligation to enforce the Act, and it should not shirk that statutory responsibility because an employee has used bad language. It is not the Board's responsibility to enforce etiquette or civility. The Board's responsibility is to protect employees in their exercise of the rights under the Act, and to deter employers from interfering with the exercise of those rights. The Board has no responsibility to serve as censor.

The Board's interest in overruling *Plaza Auto* implies that the Board believes that the employee's conduct in that case crossed a line. This focus on the employee's conduct, however, should not remove the focus from where it should be, namely, on the employer's conduct. In *Plaza Auto*, the employer was credibly accused of violating state minimum wage laws and engaging in other conduct that can reasonably be described as wage theft. *See* 360 NLRB at 973. The employee

outburst at issue occurred *after* the employer threatened the employee's job in response to the employee's conduct alerting other employees of the employer's apparent misconduct. *Id.* Cursing at one's employer may not be laudable conduct, but the point of the Board's decision in *Plaza Auto* was that the employer's conduct was not only worse, but it was worse in a way that implicated the Act's core purposes. By contrast, the employee's cursing is, at best, tangential to any interest that the Act protects. Any reasonable balancing of these factors should come out in favor of vindicating the Act's core purposes by protecting an employee who was being mistreated by his employer and worked collectively with his coworkers to address the problem. The issue of an employee cursing at his or her employer should not be deemed important enough to counterbalance these interests and prevent the Board from actually enforcing the Act. After all, enforcing the Act is the Board's primary responsibility.

Under current doctrine, context matters, and context needs to remain relevant. Illegal conduct, such as threats of violence, should be unprotected. Sexual and racial harassment also is illegal, and instances of conduct that qualifies as sexual or racial harassment should be unprotected. An employee's use of profane language in the presence of customers or clients should be a strong factor against protection. The use of profane or offensive language during the grievance process, or during collective bargaining negotiations, or during demonstrations or strikes should enjoy a stronger presumption of protection. But what the Board should not do is set out a *per se* rule guaranteeing the loss of protection under the Act based solely on the words used.

**II. GRAFTING A CODE OF ETIQUETTE ONTO THE NLRA WOULD CONSTITUTE AN IMPERMISSIBLE REGULATION OF SPEECH THAT LACKS A SUFFICIENT GOVERNMENT PURPOSE.**

Supreme Court precedent establishes that conditioning a government benefit upon accepting a restraint on speech is a regulation of speech that will be struck down if it cannot be

justified by a legitimate government interest. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (striking down a restriction to challenging to the validity of federal statutes during the course of federally-subsidized representation). Furthermore, Supreme Court precedent is clear that codes of decorum and civility can constitute impermissible restrictions on the communication of ideas. *See Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down a campus speech code that prohibited use of the word “motherfucker” on the grounds that “the mere dissemination of ideas -- no matter how offensive to good taste -- on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”). Based upon these precedents, an attempt by the Board to graft a code of etiquette onto the NLRA would constitute an unconstitutional regulation of speech, by conditioning legal protection under the Act based solely on the content of the speech used.

Here, the Board apparently proposes to condition legal protection under the NLRA based upon the content of the words used by the employees. Under such a doctrine, the Board’s decision to afford protection to employees would be analogous to the subsidies provided by Congress in the *Valasquez* case. *See Velazquez*, 531 U.S. at 549. Consequently, the Board’s decision to withdraw the benefit of legal protection based upon the content of the employee’s speech would constitute a regulation of that employee’s speech, just as in *Valasquez* Congress’ threat to withdraw government funding if lawyers challenged the validity of federal laws constituted a regulation of those attorneys’ speech. *Id.*

In *Valasquez*, the Supreme Court ruled that the government’s purpose of insulating statutes from constitutional challenge was illegitimate, and it therefore struck down that restriction. *Id.* Here, although the Board’s purpose of deterring profane or offensive language is not inherently illegitimate, the Board lacks a compelling government purpose for regulating

speech in this manner. Nothing in the text, structure, or history of the NLRA suggests that Congress had a purpose to promote employee etiquette. In other contexts, the Supreme Court has recognized as legitimate government purposes the protection of children from profane speech or of the general public from invasive profane speech that is beamed into the public's homes in broadcasts over the public airwaves. *See F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749–50 (1978).

Here, none of those recognized government interests is at stake. In labor relations, no children are present, and no broadcasts are being made. Instead, there are fully-grown adults trying to navigate their sometimes competing interests and rights. The Board lacks any compelling government interest to condition protection under the Act solely on the specific words used in conversations between fully-grown individuals. Accordingly, the Board should maintain its current doctrine requiring a contextually-based analysis of whether an employee outburst is so opprobrious as to forfeit protection under the Act, and not attempt to identify specific language that will automatically result in the loss of protection for employees.

**III. UNLESS THE BOARD INTENDS TO APPLY AN ETIQUETTE CODE TO DEPRIVE EMPLOYERS AND ANTI-UNION EMPLOYEES OF PROTECTION UNDER THE ACT, THE PROPOSED RULE WILL BE EXPOSED AS AN UNEQUAL ATTEMPT TO REGULATE THE SPEECH OF TARGETED PARTIES, I.E. UNIONS AND EMPLOYEES WHO SUPPORT THEM.**

If the Board establishes an etiquette code that will cause employees to lose protection under the Act, is the Board prepared to apply the same doctrine in an even-handed manner against employers and anti-union employees? Will employers whose representatives use profane or offensive language forfeit protection under the Act, for instance, by losing protection from secondary boycotts? Will employers lose the right to hire temporary replacements if supervisors engage in intemperate speech during a strike? Will non-union employees lose the right to raise

*Beck* objections if they use profane or offensive language when communicating to the Union?

Can a union discriminate against dissident employees if those employees use foul language when communicating with union representatives?

If the rule adopted by the Board has application only against pro-union employees, then it will be clear that this is an effort by the Board to regulate language it disfavors from disfavored parties. Such a rule would violate the First Amendment as a government attempt to suppress a disfavored point of view. It also would violate the Board's responsibility to protect unions and employees who support them with respect to their rights under the Act.

**IV. THE PRESIDENT'S FREQUENT USE OF CRUDE AND PROFANE LANGUAGE UNDERSCORES THAT THE ENACTING A CODE OF ETIQUETTE ONTO THE NLRA IS INCONSISTENT WITH MODERN CULTURAL TRENDS AND LONG-STANDING INDUSTRIAL REALITY.**

From the popularity of adult-themed television to the frequently coarse and profane language of the current President, current cultural trends demonstrate that profane language is becoming more accepted in everyday life, not less. It, therefore, would be contrary to these current trends for the Board to now, after nearly 85 years, impose upon workers a code of etiquette that they must follow in order to retain protection under the Act.

To use the U.S. President as an example, he frequently uses coarse and profane language in his public appearances and in meetings with members of Congress. For example, the *New York Times* has reported that:

In a single speech on Friday alone, [the U.S. President] managed to throw out a "hell," an "ass" and a couple of "bullshits" for good measure. In the course of just one rally in Panama City Beach, Fla., earlier this month, he tossed out 10 "hells," three "damns" and a "crap." The audiences did not seem to mind. They cheered and whooped and applauded.

Peter Baker, *The Four-Letter Presidency: Trump Masters the Cuss*, N.Y. TIMES, A17 (May 20, 2019). The President also famously referred to African countries as "shithole" countries during a

meeting with members of Congress. *Id.* The *Times* further has reported that this trend has affected its editorial standards. Prior to the current President's Administration, the *Time* published the word "bullshit" only 14 times in its entire history. The paper has published the word 26 times since January 2017. *Id.*

Popular culture also reflects this trend. Many of the most popular television shows aired now are broadcast on cable and involve adult themes and profane language that cannot be aired and depicted on broadcast television. In addition, streaming services, such as Amazon, Netflix, and YouTube make profane television, movies, and music available to the general public in ways that previously never were available in broadcasts over the television and radio airwaves.

For all of these reasons, this is an especially paradoxical moment for the Board to choose to impose an etiquette requirement or speech code upon employees in order to retain their protection under federal labor law. A change in the law now to make the Board more censorious not only ignores industrial reality, it flies in the face of current national politics and culture.

**V. THE EXAMPLE OF PUBLIC UNIVERSITIES, WHICH ARE SUBJECT TO BOTH ANTI-DISCRIMINATION AND FREE-SPEECH MANDATES, DEMONSTRATES THAT THESE DUAL MANDATES ARE NOT IRRECONCILABLE.**

Public universities are required to comply with anti-discrimination laws, while also being prohibited from enacting broad speech and etiquette codes due to First Amendment limitations. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981). This example serves to rebuff the Board's suggestion that some kind of speech code is necessary to comply with anti-discrimination laws. As public universities are able to comply with both mandates, private employers will not be harmed by being compelled to tolerate some bad language occasionally during the course of concerted activity, collective bargaining, or during labor disputes.

**VI. A RULE THAT PLACES CERTAIN WORDS OFF LIMITS CANNOT ACCOUNT FOR NON-DEROGATORY USES OF RACIAL SLURS AMONG MINORITY GROUPS, SUCH AS AFRICAN-AMERICANS.**

The fact that African-Americans use what ordinarily is a racial slur in a non-derogatory manner complicates the establishment of a policy whereby racially or sexually offensive words will per se forfeit protection under the Act. It is simplistic to say that only a bigot would use this kind of racial slur, because African-Americans use this slur between themselves in a non-derogatory fashion. *See, e.g., Gary Suarez, When Latinx People Use the N-Word*, N.Y. TIMES (Oct. 17, 2019)<sup>2</sup> Yet it would be wholly unfounded to promulgate a rule in which African-Americans would forfeit protection under the Act due to the conclusion that use of the slur shows they are bigoted against their own race. At the same time, the Board obviously cannot establish a rule in which African-Americans can use the slur, but all other groups are barred from doing so. The only thing worse than establishing a rule that discriminates based upon the content of speech would be to establish a content-discriminatory rule that also discriminates based upon race.

All of this points to the foolishness of establishing any rules that would lead to the forfeiture of protection under the Act without closely examining the broader context of what an employee said and under what conditions the employee said it.

**VII. A MANDATE THAT STRIKING WORKERS BE SUBJECT TO A CODE OF ETIQUETTE WILL ABRIDGE THE RIGHT OF STRIKING WORKERS TO COMMUNICATE ON THEIR OWN BEHALF.**

Under the Act, employees must be free to advocate robustly for support from the public, their co-workers, and employees of other employers, and the Board should not prohibit appeals that rely upon strong, highly emotion language, including profane language. Profane language sometimes may be offensive, but it also communicates strong emotion. For employees who are

---

<sup>2</sup> Available at <https://www.nytimes.com/2019/10/17/opinion/gina-rodriguez-n-word-latinx.html>

communicating outrage to the public or who are exhorting their co-workers to maintain solidarity, profane language often is necessary to communicate the conviction of the striking employees' message. Striking workers also should be free to appeal to non-striking employees or replacement workers to not cross a picket line by every legal means at their disposal, including the use of highly emotionally charged language necessary to communicate the sense of betrayal and injustice that the striking employees feel when their entreaties are ignored. Profane language can cause greater stress and also evoke stronger feelings of guilt. Cursing at another individual frequently draws greater attention and leaves a deeper impression than polite language can. These are legitimate and lawful tools that should be left to the disposal of striking workers when they are struggling for better working conditions. Applying an etiquette code to striking workers would inhibit workers from making highly emotional appeals to communicate their anger, sense of injustice, and determination. Absolutely nothing in the Act suggests that imposing such limitations is consistent with the purposes of the Act.

In the past, the Board has held that striking employees must engage in misconduct that could "reasonably tend to coerce and intimidate employees in the exercise of their Section 7 rights," *see Medite of New Mexico, Inc.*, 314 NLRB 1145, 1146 (1994), in order to forfeit protection under the Act, by engaging in threatening conduct, property destruction, or violence. The Board should adhere to this policy, and not attempt to impose a code of etiquette upon striking workers.

## CONCLUSION

Based upon the foregoing, the Board should adhere to current doctrine regarding when profane or offensive language will cause an employee to lose protection under the Act.

Dated: November 12, 2019

Respectfully submitted,

/s/Brian J. Petruska  
Brian J. Petruska  
LIUNA Mid-Atlantic Regional  
Organizing Coalition  
11951 Freedom Dr., Rm. 310  
Reston, Virginia 20190  
(703) 860-4194 (tel)  
(703) 860-1865 (fax)  
bpetruska@maliuna.org

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a copy of the foregoing BRIEF AMICUS CURIAE was served on the parties identified below by Regular Mail:

Leonard (Pete) Perez (Via Regular US Mail)  
Regional Director, Region 14  
1222 Spruce Street  
Room 8.302  
St. Louis, MO 63103-2829

Lauren Fletcher  
Counsel for General Counsel  
8600 Farley Street Ste. 100  
Overland Park, KS 66212  
[Lauren.Fletcher@nlrb.gov](mailto:Lauren.Fletcher@nlrb.gov)

William F. LeMaster  
Counsel for General Counsel  
8600 Farley Street Ste. 100  
Overland Park, KS 66212  
[William.LeMaster@nirb.gov](mailto:William.LeMaster@nirb.gov)

Charles Robinson  
Charging Party  
3229 N. 123rd St.  
Kansas City, KS 66109-4202  
[chuckeejay@aol.com](mailto:chuckeejay@aol.com)

BARNES & THORNBURG LLP  
Attorney for Respondent  
By: Keith E. White (ID# 2073-49)  
Thomas C. Payne (ID# 34727-49)  
11 South Meridian Street  
Indianapolis, IN 46204-3535  
Telephone: (317)236-1313  
Facsimile: (317) 231-7433  
Email: [keith.white@btlaw.com](mailto:keith.white@btlaw.com)

Dated: November 12, 2019

/s/Brian J. Petruska

Brian J. Petruska