IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LION ELASTOMERS, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Case No. _____ May 29, 2020 369 NLRB No. 88

PETITION FOR REVIEW

Lion Elastomers ("Petitioner") hereby petitions the Court for review of, and respectfully requests that the Court set aside and vacate, the Decision and Order of the National Labor Relations Board ("NLRB" or the "Board") entered on May 29, 2020 in NLRB Cases 16-CA-190681, 16-CA-203509 and 16-CA-225153. A copy of the Decision and Order, reported at 369 NLRB No. 88, is attached.

The Court has jurisdiction because the Board's Decision and Order is a final order within the meaning of Section 10(f) of the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. § 160(f), and Petitioner is an aggrieved party.

Venue properly lies in this Court under 29 U.S.C. § 160(f). The Board's Decision and Order against Petitioner is unsupported by substantial evidence and contrary to the law.

Petitioner respectfully requests that this Court review and set aside the Board's Decision and Order and that Lion Elastomers receive any further relief to which it may be entitled.

Dated: June 17, 2020.

Respectfully submitted,

/s/Jaklyn Wrigley
Steven R. Cupp, Esq.
Jaklyn Wrigley, Esq.
FISHER & PHILLIPS LLP
2505 14th Street, Suite 300
Gulfport, Mississippi 39501
(228) 822-1440 - Telephone
(228) 822-1441 - Facsimile
scupp@fisherphillips.com
jwrigley@fisherphillips.com

Counsel for Petitioner
Lion Elastomers

EXHIBIT A

May 29, 2020 Decision and Order
Cases 16-CA-190681, 16-CA-203509, and 16-CA-225153

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Lion Elastomers LLC *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 228. Cases 16–CA–190681, 16–CA–203509, and 16–CA–225153

May 29, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On April 25, 2019, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union each filed answering briefs, and the Respondent filed a reply brief. In addition, the General Counsel and the Charging Party Union each filed limited exceptions, and the Respondent filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and to adopt the recommended Order as modified and set forth in full below.[4]

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 5 and renumber the subsequent paragraphs accordingly.

"5. The Respondent violated Section 8(a)(3) and (1) by disciplining Colone on July 20, 2017, for engaging in protected union activity."

ORDER

The National Labor Relations Board orders that the Respondent, Lion Elastomers LLC, Port Neches, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] The Respondent has excepted to the judge's denial of its request for a copy of an affidavit given to the regional office by a witness who was called to testify by the Respondent and not by the General Counsel or the Charging Party, or an adverse inference regarding that affidavit. For the reasons stated by the judge, we affirm his denial of the Respondent's request.

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

We agree with the judge that the Respondent violated Sec. 8(a)(1) by threatening employee Joseph Colone with discharge when the Respondent's production manager, James Mosley, pointing his finger at Colone, said: "You ain't gonna make it." Colone asked Mosley what he said, and Mosley repeated it. We rely particularly on the facts that Colone, a union representative of many years' standing, is an active grievance filer, and Mosley made and repeated the statement during a heated argument at a grievance meeting where he and plant manager Tony Wisenbaker openly expressed their hostility toward Colone's grievance-filing activity.

Contrary to his colleagues and the judge, Member Emanuel would not find that Mosley's comment to Colone was unlawful. Member Emanuel finds that the statement is open to interpretation and too vague to constitute a threat of discharge. See *Phoenix Glove Co.*, 268 NLRB 680, 680 fn. 3 (1984) (reversing the judge and dismissing an allegation that the employer issued a threat when a supervisor told an employee that employees did not need a union and would be "messing up" if they got one; the statement was "too vague and ambiguous to rise to the level of a violation . . .").

In addition, we agree with the judge that the Respondent violated the Act by disciplining Colone on July 20, 2017, for his conduct at the July 12, 2017 safety meeting. Unlike the judge, however, we do not pass on whether Colone engaged in protected concerted activity at that meeting under the *Meyers Industries* cases. 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Instead, we find, consistent with the complaint allegations, that Colone was acting in his protected capacity as a union representative when he raised concerns about the employees' working conditions to the Respondent's safety manager at the safety meeting. See *Entergy Nuclear Operations, Inc.*, 367 NLRB No. 135, slip op. at 1 fn. 1, 12 (2019) (finding that union steward Amaral engaged in union activity when she raised concerns about a working condition to the respondent's employee concerns program coordinator). We also agree with the judge, for the reasons he states, that Colone did not lose the Act's protection by his conduct at the meeting. As a result, we find that the Respondent violated Sec. 8(a)(3) and (1) by disciplining Colone for his protected union activity at that meeting. See, e.g., *Success Village Apartments*, 347 NLRB 1065, 1069 (2006).

Finally, we agree with the judge, for the reasons he states, that the Respondent violated Sec. 8(a)(3) and (1) by discharging Colone on June 8, 2018, because he engaged in union activity.

[4] In his limited exceptions, the General Counsel correctly observes that the judge failed to properly remedy the Respondent's unlawful July 20, 2017 discipline of Colone. We thus amend the judge's conclusions of law to reflect the violation found and amend the remedy to require the Respondent to rescind that disciplinary action, remove from its files any reference to it, and notify Colone in writing that this has been done. We deny, however, the Charging Party's request for a notice-reading remedy because we find that the Board's standard remedies are sufficient to effectuate the policies of the Act. Further, in adopting the judge's remedial provisions regarding adverse tax consequences and Social Security reporting requirements, we rely on *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), not *Latino Express, Inc.*, 359 NLRB 518 (2012), cited by the judge in the remedy section of his decision. Finally, we shall modify the judge's recommended Order to conform to the violations found, the amended remedy, and the Board's standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020); and we shall substitute a new notice to conform to the Order as modified.

(a) Threatening employees with discharge if they engage in activities on behalf of the Union.

(b) Issuing disciplinary warnings to employees because of their support for and activities on behalf of the Union.

(c) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(d) 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, rescind the unlawful discipline issued to Joseph Colone on July 20, 2017.

(b) Within 14 days from the date of this Order, offer Joseph Colone 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.

(c) Make Joseph Colone 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.

(d) Compensate Joseph Colone for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, 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.

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

(f) 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.

(g) Post at its Port Neches, Texas facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 16, 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 24, 2016.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 16 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. May 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

[5] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge if you engage in activities on behalf of the Union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization.

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, rescind the unlawful discipline issued to Joseph Colone on July 20, 2017.

WE WILL, within 14 days from the date of the Board's Order, offer Joseph Colone 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 Joseph Colone 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 Colone whole for his reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Joseph Colone for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

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

LION ELASTOMERS LLC

The Board's decision can be found at http://www.nlrb.gov/case/16-CA-190681 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.

Bryan Dooley, Esq., for the General Counsel.
Steven Cupp, Esq. and *Jaklyn Wrigley, Esq. (Fisher & Phillips, LLP)*, of Gulfport, Mississippi, for the Respondent.
Sasha Shapiro, Esq. (United Steelworkers), of Pittsburg, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Houston, Texas, on February 26, 2019. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 228 (the Union) alleges that Lion Elastomers (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by threatening to terminate employee and Union Leader Joseph Colone during a grievance meeting on October 24, 2016.[2] The Union further alleges that the Respondent violated Section 8(a)(3) and (1) by warning Colone on July 31, 2017, and discharging him on June 8, 2018, because he filed numerous grievances pursuant to a collective-bargaining agreement between the Respondent and the Union. The Respondent denies the allegations and asserts: (1) Colone was given numerous opportunities to improve his inappropriate conduct, but it persisted; and (2) he was presented with an opportunity to remain employed pursuant to a last chance agreement, but he refused to sign and was lawfully discharged.

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

[1] 29 USC §§ 151-169.

[2] The complaint alleged that this incident occurred "[a]bout November 24, 2016," but the undisputed proof established that the meeting occurred on October 24, 2016.

[3] The Respondent's motion to correct the transcript, dated April 23, 2019, is granted with the exception of the proposed change on page 358, line 58, which the parties agree should be "argument" instead of "arm." In addition, the bound exhibits inadvertently included R. Exh. 33, which was neither identified nor received in evidence. As such, I have not considered that document.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company with an office and place of business in Port Neches, Texas, where it is engaged in the manufacture and the nonretail sale of petrochemicals and synthetic rubber products, and annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Texas. 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 the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

The Respondent operates a "24/7" manufacturing facility where it produces styrene butadiene rubber (SBR). It has approximately 207 employees at the facility, which operates four 12-hour rotating shifts—A, B, C and—each of which has a shift superintendent. David Davenport is the production supervisor for the C shift, which has 20 employees. Work shifts vary. A 4-day shift consisted of 4 workdays consecutively followed by 7 days off, then 4 work nights followed by 3 days off, then 3 workdays followed by 1 day off, then 3 work nights followed by 3 days off, and then back to 4 days again. Employees were supposed to work 36 1 week and 48 the next.

The Respondent's admitted statutory supervisors and agents pursuant to Section 2(11) and (13) of the Act include: Tony Wisenbaker—plant manager; Trudy Lord—human resources director; Paula Sharp—senior director of human resources; Brad Dean—safety and security manager; James Mosley—production manager; and Randy Watson—warehouse supervisor. Within the production department are shift superintendents with responsibility for each of the four 12-hour shifts: Luke Wolfford, Robert Burnett, David Davenport, and Phillip Parks. Below them are four shift supervisors: Carl Tarver, Trey Priest, Russel Hinkle, Darrik Reynolds.

Prior to his termination, Joseph Colone had been employed by the Respondent for 41 years. At the time of his termination, he was working as a pigment/soap senior tech operator making latex for synthetic rubber on the C-shift. Colone had a good work record. He served multiple terms as a union steward, committeeman, group chairman, and member of the Joint Resolution Committee. In those capacities, Colone participated in contract negotiations and actively advocated on behalf of bargaining unit employees, filing more grievances than any other committeeman.

B. The Respondent's Plant Rules[4]

The Respondent's plant rules, provide, in pertinent part, the following policies governing employee conduct, safety and work performance, as well as penalties for violating the rules:

> To maintain orderly, safe and efficient plant operations, general rules of conduct, safety, attendance and work performance are established for all employees. It is the responsibility of each employee to know the rules, to have a thorough understanding of one's job, to share information needed for orderly, safe and efficient operations, and to notify management of training needs. Violation of plant rules and performance standards by exhibiting unsatisfactory behaviors may result in disciplinary action up to and including termination of employment.
>
> Following is a listing of unsatisfactory behaviors with respect to the general rules and performance standards for the site. This listing is not intended to be all-inclusive and may be supplemented or modified as required.
>
> *SAFETY*
>
> Safety and Operating procedures are designed to protect personnel in the plant from injury and facilitate efficient operation. All employees are expected to be knowledgeable of these procedures and follow them. If for any reason procedures cannot be followed, approval from supervision and plans to insure safety must be obtained and documented, if at all possible, before proceeding.
>
> FAILURE TO FOLLOW LIFE CRITICAL SAFETY RULES will (unless modified by the Plant Manager) result in termination. These Life Critical Procedures/Rules include:
>
> - Making entry into a confined space
> - Working on energized equipment (LOTO)
> - Working at heights
> - Performing hot work
> - Line breaks
> - Excavations
> - Rail car movements
> - Disabling safety interlocks
>
> Unsafe acts caused by negligence, carelessness, or failure to observe all safety rules or generally accepted safe work practices as outlined in the plant's Standard Practice Instructions (SPI's) are unacceptable. The list below consists of unsafe behaviors and is not intended to be all-inclusive.
>
> 1. Failure to report immediately to your supervisor any observed unsafe condition or unsafe practice
> 2. Failure to report all incidents, including near hits, and all occupational injuries/illnesses to your supervisor and/or safety representative, regardless of severity, on the shift it occurs or when it first recognized
> 3. Unsafe act(s) that lead to serious or excessive accident(s), incident(s), unsafe act(s) or near miss(es)
> 4. Failure to follow Lockout (LockOut/TagOut—LOTO), Confined Space Entry, Hot Work, Line breaking or Hazardous Work procedures with permits
> 5. Failure to wear the proper personal protective equipment required for the area of the plant in which you visit or work, as outlined in the Standard Practice Instructions (SPI's).
>
> This includes, but is not limited to flame retardant clothing (FRC), hard hats, safety
> glasses, respiratory protection and hearing protection

[4] GC Exh. 2.

. . .

11. Operating a forklift truck, cherry picker, track-mobile, or utilizing other specialized equipment without formal training and/or certification . . .

18. By-passing safety switches, reaching around safety guards or disabling safety devices anywhere in the plant or making any modifications without appropriate management of change (MOC) documentation and approval

. . .

20. Failure to immediately report defective, damaged or empty fire extinguisher to your supervisor and/or a safety department representative

. . .

34. Other unsatisfactory safety performance that could result in an employee injury, environmental incident or equipment damage

CONDUCT AND WORK PERFORMANCE

1. Failure to observe standards of conduct and practices

2. Insubordination, abuse, or disrespect of your supervisor(s) or failure to follow the legitimate instructions of your supervisor(s) or site security

. . .

5. Willful damage of machinery, equipment, material, records, documents or Company property

6. Disorderly conduct such as, but not limited to: engaging in or provoking a fight, horseplay, practical jokes

7. Harassment or unwelcome conduct, whether physical, verbal, or visual, that is based on sex, color, race, religion, national origin, age, physical or mental disability or other protected status

8. Behavior, threats or other indecent, inappropriate or obscene conduct that creates an intimidating, hostile, or offensive working environment

. . .

10. Falsifying, providing false information, or causing others to falsify a Company record, work document, information on an application for employment, job resume, medical history form, attendance & overtime report, time sheet/card or electronic time keeping/payroll system, process documentation or log, laboratory documentation or other Company report. This includes misrepresentation through omission

. . .

22. Engaging in illegal work stoppages, illegal work slowdowns, sabotage, espionage, terrorism, or un-American activities

. . .

25. Unsatisfactory job performance

. . .

26. Neglect of job duties created by distraction or inattention to work responsibilities, including gambling on plant property, sleeping during work hours, bringing or playing unauthorized TVs, working on hobbies or crafts, interfering with another person's work or pursuing personal business. This includes reading of non-work related publications in operating area of the plant, including labs and control rooms, or playing games, electronic or other, anywhere in the plant

. . .

29. Failure to follow standard work practices or assigned procedures

. . .

DISCIPLINE POLICY[5]

INTENT

To provide guidelines for issuing progressive discipline to employees of the Port Neches Plant. The policy will be applied when employees deviate from the appropriate code of conduct, work standards, safe work practices, attendance, or when deemed appropriate by management.

SCOPE

This policy applies to LION ELASTOMERS employees assigned to work at the Port Neches Plant and supersedes all prior site discipline policies or practices. The purpose of the policy is to encourage corrective action of employees demonstrating behavior which interferes with them or other employees achieving company work standards, safe work practices, or proper workplace behavior.

POLICY

Employee Responsibilities

Each employee is considered a responsible individual who is expected to manage his/her time and work skills to accomplish his/her assigned job tasks and make a contribution toward achieving plant objectives. To this end, each employee is responsible for complying with all applicable policies, procedures, and expected standards of behavior and performance. In addition, any employee who observes or becomes aware of a safety or environmental problem that may negatively influence the plant is expected to bring this to the attention of the individual(s) involved, the individual's supervisor, or to their own supervisor's attention. Each employee is also responsible for ensuring that contractors or visitors to their work area comply with all applicable policies, procedures and expected standards of behavior at all times. Employees are expected to fully cooperate with all company investigations and failure to do so may result in discipline.

Supervisor Responsibilities

Supervisors are responsible for implementing the Discipline Policy and holding employees accountable for their behavior

[5] R. Exh. 3.

relative to the applicable policies, rules, procedures and the performance management process. Supervisors will issue discipline to their subordinates. As required, the Human Resources Manager or Department Manager will provide counsel to supervision regarding the application of these guidelines.

Procedure

When an employee fails to perform at the expected performance standard by violating one or more Company policy, rule, or standard, discipline may be warranted. Any infraction will result in discipline and employees will advance within the progression regardless of the nature of the violation (in other words, each type of violation does not result in a separate progression). The appropriate discipline to be taken will depend upon the seriousness of the issue.

In addition to the circumstances surrounding the problem or incident, other factors that may be considered include:

- Work history of the employee who is involved
- Nature of the problem
- Actual or potential impact, in terms of plant safety, product quality, work productivity, or other factors

Discipline may be administered as a Counseling Only, Verbal Warning, Written Warning, 2nd Written Warning, Last Chance Agreement/Suspension or Termination. These forms of discipline are not necessarily progressive. Depending on the seriousness of an incident or work situation as determined by the facts, the Company reserves the right to determine the appropriate disciplinary action

Counseling Session Only

In an effort to increase awareness and achieve understanding, a discretionary, informal meeting with the employee may be conducted by the supervisor to discuss the work performance problem and stress the importance of the work rule or performance standard. The work performance problem may involve attendance, safety, conduct or other work related situation. The supervisor may counsel the employee to help him/her recognize that a problem exists and coach him/her to comply with the work rule and/or performance standards.

Verbal Warning

In a private, formal documented meeting with the employee the supervisor may discuss the work performance problem and stress the importance of the work rule or performance standard. The work performance problem may involve attendance, safety, conduct or other work related situation. The supervisor may counsel the employee to help him/her recognize that a problem exists and emphasizes the importance of compliance with the work rule and/ or performance standards, The Verbal Warning is active for 12 months (defined as the time period in which the employee is actively working).

Written Warning

A Written Warning documents a formal meeting between supervision and an employee about a serious or continuing performance problem that requires immediate correction (see LION ELASTOMERS Plant Rules, Policies and Procedures). The employee must make a commitment to correct the problem. Supervisors have the option of including their immediate supervisor, the Human Resources Manager, or other appropriate member of site management in the disciplinary meeting. The Written Warning is active for 12 months (defined as the time period in which the employee is actively working).

Second Written Warning

A Second Written Warning documents a formal meeting between supervision and an employee about a serious or continuing performance problem that requires immediate correction (see LION ELASTOMERS Plant Rules, Policies and Procedures). The employee must make a commitment to correct the problem. Supervisors have the option of including their immediate supervisor, the Human Resources Manager, or other appropriate member of site management in the disciplinary meeting. The Second Written Warning is active for 12 months (defined as the time period in which the employee is actively working).

Last Chance Agreement

A Last Chance Agreement is a more severe form of discipline that can lead to termination of employment. It may be used when an employee has demonstrated more serious performance problems or has failed to improve or correct a prior problem. The Last Chance Agreement consists of a written agreement prepared and signed by plant management, which must also be signed by the employee and the Union, if applicable. In the agreement, the employee acknowledges that the Company has just cause for termination based on the employee's performance problem(s) but that the Company agrees to give the employee one last chance to retain his/her employment. As a condition of continued employment, the employee agrees to demonstrate improved work performance and satisfactory conduct that is acceptable to the Company for the next 24 months. This is defined as the time period the employee is actively working on the job. Failure by the employee to abide by all provisions of the agreement will result in termination of employment. The supervisor and employee will review the employee's progress midway through the 24-month period. If the employee has demonstrated improvement for the 12-month period and not received any additional discipline, the Last Chance Agreement may be deactivated and so documented (this is a discretionary option that management may invoke).

Termination of Employment

Termination of employment for an employee may occur when:

Other discipline efforts have failed to bring about a positive change in an employee's behavior or work performance, or

A single offense of a major consequence is committed such as, but not limited to, a serious safety or environmental offense, insubordination, theft of property, fighting or other unruly conduct, consumption of alcoholic beverages or use of illegal drugs on company property, disclosure of classified Company information, etc.

Blatant or willful disregard of LION ELASTOMERS Plant Rules, policies and/or procedures has occurred.

In making the decision whether to terminate or not, the Company may consider such factors as length of company service, total employment record, and the nature and seriousness of the violation(s) or performance problem(s).

Suspension

Suspension may be used when an employee's behavior is so serious that immediate removal from the plant is necessary. It may also be used in conjunction with an investigation where management determines that it is appropriate for an employee to be out of the workplace during the course of the investigation. In the context of potential disciplinary action, the Company may suspend an employee without pay and the employee shall be required to leave the plant pending completion of the investigation. Examples of behavior requiring suspension include: safety or environmental offenses, insubordination, theft or destruction of company property, violence or threats of violence, and other serious violations of Lion Elastomers Plant Rules. This list is not all inclusive, but merely represents examples of behavior that could warrant a suspension.

Probationary Employees

The first one hundred eighty (180) days of employment for hourly employees is a probation period. During this period such employees are subject to removal from Company employment without regard to, the disciplinary procedures discussed above. Such removal, however, must be reviewed in advance with the proper levels of management.

C. The Collective-Bargaining Relationship

The Respondent and the Union have been parties to collective-bargaining agreements for some period of time prior to July 2016. The most recent collective-bargaining agreement (CBA), effective from July 1, 2016 to June 30, 2020, covers wages, hours and other terms and conditions of employment for the approximately 85 to 90 employees in the following bargaining unit:

> All hourly employees employed as operating employees in job classifications set forth in Article VI,[6] but excluding all other employees such as shipping and receiving clerks, engineering stockroom clerk's, machine shop and tool room clerks, all office clerical and secretarial employees, plant protection employees, laboratory employees, all professional and technical employees, research and development unit employees, and all supervisory employees with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees.

Pertinent portions of the CBA include a provision setting forth management's rights with respect to various functions, unless otherwise stated within the agreement:

> Section 2.1 (a) Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives, and functions are retained and vested exclusively in the Company, including, but not limited to, the rights, in accordance with its sole and exclusive judgment and discretion: to reprimand, suspend, or otherwise discipline employees; to discharge employees for cause; to determine the number of employees to be employed; to hire employees, determine their qualifications and assign and direct their work, to promote, demote, transfer, lay off, and recall to work employees; to set the standards of performance and productivity, the products to be produced, and/or the services to be rendered; to determine the amount and forms of compensation for employees; to maintain the efficiency of operations; to determine the personnel, methods, means, and facilities by which operations are conducted; to set the starting and quitting time and the number of hours and shifts to be worked; to use independent contractors to perform work or services; to subcontract, contract out, close down, or relocate the Company's operations or any part thereof; to expand, reduce, alter, combine, transfer, assign, or cease any job department, operation, or service; to control and regulate the use of machinery, facilities, equipment, and other property of the Company; to introduce new or improved research, production, service, distribution, and maintenance methods, materials, machinery, and equipment; to determine the number, location and operation of departments, divisions, and all other units of the Company; to issue, revise, eliminate, and enforce policies, rules, regulations, and practices, including but not limited to drug and alcohol testing policies; and to take whatever action is either necessary or advisable to determine, manage and fulfill the mission of the Company and to direct the Company's employees.
> (b) The Company has the right to manage its facility and direct its employees in its sole discretion, unless restricted by the express language of this Agreement. This management rights Article is not all inclusive and does not exclude any other rights of management not specified herein.
> (c) The Company's failure to exercise any right, prerogative, or function in a particular way, shall not be considered a waiver of the Company's right to exercise such right, prerogative, or function or preclude it from exercising the same in some other way not in conflict with the express provisions of this Agreement.

The grievance and arbitration process consists of three steps. Grievances are directed to the immediate supervisor at Step 1 and, if not resolved, referred to the superintendent and department head at Step 2. If not resolved at that point, the grievance can be appealed to the human resources manager at Step 3. Finally, if still not resolved, the Union may arbitrate.

Prior to the most recent union election on November 2017, Colone was on the Union committee along with Joseph Wells, Duane Newman, Gerald Richard and Mark Vickers. After the election, Colone served with Bobby Rodgers, Robert Griggs and Terrence Young.

D. The Protected Concerted Activities at Issue

1. The October 24, 2016 meeting

On October 24, 2016, Colone was called to a meeting by Mosley and Wisenbaker. He assumed that the subject related to the

[6] "Poly VAR, Recovery Technician, Reactor Technician, Tank Farm Technician, Pigment/Soap Technician, utility Technician, Unloader, Process VAR, Coagulation Technician, Blend Technician, Packaging Operator, or Lift Truck Operator (Warehouse)."

process of putting on and taking off protective gear. After learning that none of the other Union committeemen were invited, he got Vickers and Griggs to attend. When the meeting started, the subject (donning and doffing) did not come up. Instead, Wisenbaker complained that Colone was the only one filing grievances and asked why he filed a grievance about the diversion of certain unit work to contractors in place of newly hired forklift drivers. During the exchange that followed, Colone insisted the new drivers were qualified to perform the overtime work, and the unit employees were being displaced and having riskier duties imposed on them. Mosley and Wisenbaker said that Colone was hurting the Union by filing such grievances and pointed to letter agreements resolving the issue by the two absent committeemen—Joe Wells and Jordan Johnston. Colone countered that the agreement of only two committeemen was ineffective on behalf of the union committee.

At some point, Vickers left the meeting, but Griggs remained. Colone and Mosely then became involved in a heated argument. During that discussion, Mosley pointed his finger at Colone and said, "[y]ou ain't gonna make it." Colone asked what he said, and Mosley repeated the statement. Colone replied that he had "been making it out here for 39 years. You better watch how you talking to me." He then asked Wisenbaker about the grievances, which the latter proceeded to deny.[7] In response to Mosley's remarks, Colone filed a grievance.

Lord handled Colone's grievance regarding Mosely's comment by speaking to the employees present at the meeting and took notes. She received a written account of the meeting from Wisenbaker on November 3, 2016. Lord also interviewed Griggs on November 3, 2016. Her notes confirmed Griggs rendition of a dysfunctional meeting in which Wisenbaker, Mosley and Griggs all acted inappropriately: "Most dysfunctional meeting I have ever been to out here. No resolution b/c of anger & frustration by James, Tony, & KC."

Griggs told Lord there was friction from the start. Regarding the first grievance, Griggs stated that Colone's "beef" should be with the Union Committee. As for the meeting, he felt that it "wasn't good" and he "didn't think anything about it other than there were no resolutions." Griggs also told Lord that he did not perceive Mosley as being threatening. Lord noted her opinion that "it's (sic) sounds like KC was the aggressor," a remark inconsistent with the other entries and one that was not conveyed to her by Griggs.[8]

Lord interviewed Griggs again by telephone on January 17 and 18, 2018. Her notes of the January 18 interview confirmed Mosely's remark at the October 24 meeting that Colone "ain't gonna make it."[9]

2. The March 22 and 23, 2017 grievances

On March 22, 2017, Colone filed a grievance form regarding the staffing of the reactors on behalf of two production employees – Gerardo Zamora and Willian Fobbs—with an occurrence date of March 21, 2017:

> The Union charges the Company with a specific violation of . . . Letter of understanding Health and Safety [and] Sec. 17.2 Entire Agreement and any other provisions of the Agreement that may be found to apply . . . The Union and the Company had agreement on staffing the reactors on a start-up. 8CC Reactor Operator were dropping reactors and blowdowns and also maintenance, preparing for a start up in 8CC and also maintaining 8CA reactor job duties at the same time. This is multitasking jobs in a PSM area. It's a unsafe act, and unfair to the operator. . .

The "remedy requested" stated that the "agreement in the JRC meeting was to staff a operator for a reactor start-up. The Union main concerns or the safety and well being of four co-workers and the quality of the product we make."

After filing the grievance, however, Colone was informed that it was actually Tim Taylor, the shift foreman, who was multitasking. He withdrew the grievance the following day and verbally apologized to Taylor. Colone also wrote a note to management apologizing for the incorrect information, indicating that he was "corrected by" Zamora and Fobbs, and replaced it with grievance 03-2017 on behalf of "USW Workers." That grievance alleged the same safety concerns based on staffing. The grievance was denied at Step 1 on the grounds that it did not list the name of a specific aggrieved employee. It was then then resolved at Step 2, however, with an explanation by Mosley that Colone accepted "the explanation of this being a scheduled then

[7] The Respondent notes that Colone omitted any mention about being misled about the purpose of the meeting in his *Jenks* affidavit, but his impression was confirmed by Griggs. (Tr. 77–88, 174–176; R. Exh. 9; R. Exh. 32 at 01590.) Wisenbaker did not recall, but Colone's detailed description of the discussion is consistent with the testimony of Griggs and Mosely that the latter made the statement about Colone not "making it." (R. Exh. 32 at 001595.) Mosely insisted that he was referring to the Union, not Colone. He also conceded that he failed to act professionally and Colone did not act in an aggressive manner. Griggs, on the other hand, understood it to refer to Colone's job security, but discounted the remark at the time on the belief that Colone had nothing to worry about because of his good work performance and position as a Union representative. (Tr. 363–364, 374–375, 405–406, 409–414, 417–424, 428–433, 452–454, 465–467, 470–479; R. Exh. 4–5, 7, 11, 31–32, 46.)

[8] Griggs credibly testified that portions of Lord's notes were incorrect notwithstanding his earlier affirmative response to counsel 's leading and hypothetical question as to whether he would have any reason to doubt the accuracy of her notes. (Tr. 339–340, 361–375; R. Exh. 32 at 2–3.)

[9] The Respondent's continued insistence that it was entitled to production of Grigg's *Jenks* affidavit or alternatively an adverse inference is a non-issue since it is undisputed that Griggs did not consider Mosley's remark to be a threat at the time. In any event, I sustained the General Counsel's objection to the production of Grigg's *Jencks* affidavit pursuant to *Clear Channel Outdoor, Inc.*, 346 NLRB 696 fn. 1 (2006), on the ground that he was not called by the General Counsel but by the Respondent. (Tr. 376–382.) The Respondent sought production of the affidavit because the General Counsel inquired about it on cross-examination. However, it was the Respondent that initially asked if Griggs provided an affidavit to the Region and the General Counsel followed-up by asking if management had ever questioned him about that affidavit and how management would have known that he gave one. (Tr. 362, 371–372.) Thus, the General Counsel's inquiry did not relate to the substance of a prior statement, but rather, reasonably appeared to elicit whether the Respondent engaged in unlawful questioning of protected activity in preparation for the hearing pursuant to *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964).

non scheduled start up . . . would like further dialogue in JRC meeting to discuss more details and LOU or MOU.[10]

3. Lord's response to the March 22–23 grievances

In response to the March 22 and 23 grievances, Wolfford interviewed Zamora. At some point, Wolfford presented Zamora with a typed statement or report containing Wolfford's version of the interview, followed by Zamora's handwritten comments. The statement or report confirmed that Colone had indeed spoken with Zamora about the staffing of the reactors *before* filing the grievance and that Colone's concerns were not baseless:

- I asked G. Zamora if he was aware of the grievance and he said that K.C. Colone *said he was going to file one but Zamora was not aware that it was going to be filed on his [behalf].* (emphasis supplied) Zamora did state that while talking with K.C. Colone, Mr. Colone said that the company did have the manpower to cover the job but chose not to.
- I did explain to Zamora the company could not staff extra due to the only reactor operators available were working days (W. Fobbs and G. McCray). Mr. Zamora then made to comment that Mr. Colone lied to him.
- We went line by line of the content of the complaint section and Zamora agreed that what was written about the activities of Wednesday 3/22/17 were not the activities he performed.[11]
- Under the remedy requested section safety and quality were in question. Zamora agreed that he was not asked to do anything unsafe. Zamora does not agree with the charges in the grievance.

Below that typed portion of the report, Zamora's handwritten comment pushed back on the notion that Colone lied to him, but without clarification as to what Colone lied about:

> I did say K.C. lied to me however, he was misinformed and did not know the entire situation. I believe he was misinformed and later realized the entirety of everything going on that day.[12]

On April 3, Lord replied to Colone's filing of the March 22 grievance and his withdrawal of that grievance, warning him about the accuracy of his allegations and tone going forward, and the possibility of discipline:

> We have received your note dated March 23, 2017, apologizing 'for being misinformed on the multitasking in 8CA reactors.' The grievance underlying that issue, dated March 22, attributed the grievances to Gerardo Zamora and William Fobbs.[13] As we investigated that grievance, we learned they were unaware of the grievance you filed on their behalf and they did not agree with the allegations you attributed to them. Before we could take any action on this apparent falsification, you sent us your apology note and a revised grievance.
>
> This letter is not a formal warning or reprimand, as you appear to have discovered your error before disciplinary action could be taken. However, I must caution you about what you say in these grievances, particularly when you attribute the complaints to people who have not complained. Situations like this seriously affect your credibility as we deal with you on issues affecting the plant. In a worst case scenario, your actions could be viewed as a direct fabrication or falsification, which would be grounds for termination.
>
> As noted above, we received the revised grievance, # 03–2017, initially dated March 23, regarding failure to staff reactors at start-up. That grievance was denied because you failed to identify who was aggrieved. We need that information so we can properly investigate the grievance. In your March 29 statement attached to the grievance, you accuse Mr. Mosley of having "amnesia" and asking him "three times do we have an agreement yes or no. He would not answer." Let me ask you a question. How would you respond to a person who accuses you of having amnesia and asking you the same question three times in your usual argumentative tone? How would you respond if told, as you said in your March 30 statement, that "people in the position of leadership have no integrity? Using inflammatory and insulting language of this sort inhibits our attempts to create a cooperative working relationship and atmosphere. Furthermore, your continued personal attacks and false statements on a member of the management team is in direct violation of Lion Elastomers' Plant Rules—Conduct and Work Performance #2, #8, #10 and #14.
>
> #2—disrespect of your supervisor(s)
> #8—Behavior, threats...or conduct that creates an intimidating, hostile, or offensive working environment
> #10—Falsifying, providing false information...or other Company report. This includes
> misrepresentation through omission
> #14—Actions of an employee that bring into disrepute the image or reputation of LION
> ELASTOMERS or its employees
>
> In closing, I encourage you to be more careful by checking your information sources before filing a grievance and tempering your remarks in a manner consistent with how you want to be treated yourself. It will save both of us a lot of time and aggravation if you do.[14]

Lord also sent a copy of the April 3 letter to Union officials

[10] Colone's credible testimony that he was informed that the reactor functions in question were actually performed by Taylor was not disputed. (GC Exh. 3-5; Tr. 86—88).

[11] The grievance listed the date of occurrence as March 21, not March 22, 2017.

[12] Wolfford did not testify but his report reflected the suggestive nature of the interview. (R. Exh. 48.)

[13] There is no documentation as to what Fobbs told Lord or any other manager. (Tr. 278.)

[14] Lord denied that management was "not fond of Mr. Colone and the way that he conducted Union business." She also denied that her letter suggested that Colone could be disciplined if the allegations in a grievance turned out to be wrong, as opposed to the filing of "false statements and misstated information." However, her explanations for the warnings that followed this letter were not credible, and her responses were vague and contradicted information conveyed to her by unit employees. In fact, cross-examination of her explanations for this letter and many of her subsequent determinations in response to Colone's steward activities were evasive, longwinded and nonresponsive. (GC Exh. 2; Tr. 37–49.)

on the same day, requesting their "assistance in helping him to understand the importance of following the contract."[15]

4. The July 12 safety meeting

On July 12, Dean conducted a monthly safety meeting with about twenty C-shift unit employees. Wolfford, supervisor Arthur Finley and scheduler Gary Richards were also present. The meeting started with a discussion about incidents from the previous month. After several minutes discussing a screw press fire investigation, the conversation shifted to open questions and answers. Chris Cleary asked why employees were forced to work longer than the twenty-five hours of overtime permitted by company policy. When Dean disputed that assertion, Jonathan Bailey and others confirmed that they too were working overtime hours in excess of 72 hours per week. Dean initially denied the assertion but relented when others confirmed Cleary's assertion and conceded that the Respondent planned to increase work hours to 84 hours per week. Colone, who typically asked questions at safety meetings, followed up asking about for information about the standards and asserting that the employees were fatigued and working in a dangerously hot environment for too many hours. He also warned that the Respondent could face liability for injuries resulting from those conditions and asked Dean several times as to how the Company planned to deal with these questions. Dean agreed to provide the paperwork and initially said he did not know the answer. Colone persisted, however, and repeated his question several times. Dean tried to ignore Colone but finally relented by saying that the increased overtime would be on a case by case basis, at one point mentioning the "API standard."

Sherman McCray was in the meeting and tried to walk out because he was frustrated from the discussion, but Colone implored him to stay. Eventually, McCray became frustrated and got up again to leave, and Colone, also frustrated, told him to "just go ahead and leave. We don't need you anyway." After the meeting ended, Dean sat down at his desk to work at his computer and employees left the room. As he was leaving, Colone asked Dean for the "paperwork" relating to the new overtime policy. Dean, visibly annoyed, replied by offering to show Colone how to find the information on the internet. Colone replied that Dean was not doing his job and asked if Dean was upset. At that point, Dean became angry, stood up and argued briefly with Colone asking if Dean was calling him a liar, to which Dean replied by asking if Colone was calling him a liar.[16]

After the meeting, Dean reported the encounter with Colone to Wisenbaker and Lord. Notwithstanding Colone's penchant for questioning him during past safety meetings, Dean had never reported Colone's conduct in a safety meeting before. Wisenbaker issued Dean a verbal warning and asked Lord to investigate Colone's conduct at the safety meeting.[17]

Within the next week, Lord interviewed several people in connection with the investigation. Lord and Wisenbaker interviewed Colone on July 18. They took a confrontational approach in the questioning Colone and he became angry. In addition to asking Colone what happened at the July 12 meeting, Wisenbaker challenged the legitimacy of several questions that Colone asked, for example:

> What were you intending with your question[?] . . . We had JRC meeting day before I asked 4 or 5 times is there anything else from a safety perspective we need to discuss. Why didn't you bring these questions up at the JRC? . . . Do you think that in any way you created animosity or disruption.[?] . . . No, I'm not [calling you a liar]. What I said was that I find it hard to believe that no one brought up the 73 hrs prior or that no one had the conversation. There's a time and place to ask questions. . . The way KC asked the questions is what started the meeting down the path it went? . . .

Lord's interview notes of Dean and others essentially confirmed Colone's version of the meeting, including the fact that his questions followed those of other unit employees concerned about work hours:

> Gary Richard—"Brad brought some of this on his own." Wolfford—"Brad could have controlled it better. He played in to KC's hand and KC won that battle." . . . "[t]ypical KC probing. But Brad was dodging the questions, not making . . . Brad was pushing back, but KC was asking simple questions at first. He seemed [legit], never raised his voice – at first, . . . Original 3 ques were not inappropriate there were okay for open topic section. . . . liable question I thought was inappropriate." Findley—"everybody was being contentious about working 73 hours. [Dean's] message basically was that "it could be worse." . . . [the discussion between Dean and Colone] "went back and forth . . . Brad was getting agitated and the other guys were still throwing questions at him" [while Colone] "kept saying that you said you were going to get me that [the paperwork]." Herb Smith—[Dean] "seemed to have gotten a little frustrated with all the questions being thrown at him" [and] "more than one person was asking b/c they were frustrated . . . KC . . . asked you for the paperwork . . . Brad said, 'Well I got it & I'm going to get it to you." Cleary—"KC was trying to emphasize that with the heat and, # of days working . . . KC asked the question about do you think it's safe to work 73 hrs

[15] R. Exh. 34.

[16] The testimony of Dean, Colone, Bailey and McCray was fairly consistent about what happened during the safety meeting. Dean, as he typically did, stood during the meeting while everyone else sat. He had a vague recollection as to what Clearly and others told him, but conceded that he and Colone became loud and frustrated when Colone accused him of not doing his job after the meeting ended. Moreover, McCray' confirmed that Colone told him that he "can go ahead and leave" as he stood up to leave. Bailey credibly testified that Colone, who typically asked questions at these meetings, was calm and sitting the entire time that he interacted with Dean, while Dean appeared frustrated by the questions and there was "bickering, moaning and complaining." With respect to what transpired after the meeting between Dean and Colone, I found Dean's explanation more credible than Colone's paraphrased and inconsistent versions as to what Dean said and did when asked for the "paperwork." However, I do credit Colone's unrefuted testimony that their argument caused Findley to ask what was going on. (Tr. 13–30, 89–99, 115–119, 211–215, 341–349, 386–394; R. Exh. 1.)

[17] Mosely's recollection that Dean complained about Colone's questioning during the meeting was not credible. Dean only reported concern over Colone's comment to McCray during the meeting and the argument after the meeting. Moreover, in contrast to the Colone's documented discipline, there was no evidence that the warning issued to Dean was also documented. (Tr. 53, 393–394, 460–463.)

a week? Brad seemed to get irritated b/c KC kept asking do you think it's safe, do you think it's safe? [Dean replied,] The Company is looking to go to 84 hrs. . . [Cleary also commented that], I don't think the Company comes in and talks to us enough. Needs to tell us what is going on so I can understand why we are doing what we are doing." Bailey—"Brad seemed frustrated that we were frustrated. We caught him off guard. He wasn't rude or unprofessional. McCray—[When told that Colone said that he disrupted the meeting and complained about overtime: "KC is a liar. . . . KC asked 'Where are you going ? 2nd time, just go on out of here then."[18]

Lord and Wisenbaker met with Colone and his Union representative on July 20, 2017. During this meeting, Lord issued Colone a "Performance Correction Notice" memorializing a verbal discipline based on "Policy/Procedure Violation" and "Behavior/Conduct Infraction" at the July 12 meeting. Colone became angry. He was sitting close to Wisenbaker and the latter asked him to move his chair back:[19]

> In a letter dated and sent via certified mail on April 3, 2017, you (Mr. Colone) were cautioned about your actions pertaining to use of inflammatory and insulting language which inhibits our attempts to create a cooperative working relationship and atmosphere. During the C Shift monthly safety meeting on Wednesday, July 12, 2017; you exhibited that same unacceptable conduct with a line of questioning that was provoking, misleading, and inappropriate. You continued to ask the questions repetitively thereby creating an intimidating work environment for the Safety Manager and an offensive, uncomfortable environment for your coworkers attending the meeting. In addition, during the follow up interview conducted with you on Tuesday, July 18, 2017 you provided information that was in direct conflict with statements from other employees who attended the meeting. You were also cautioned in the April 3rd letter about providing fabricated or false information and you were informed that behavior, in a worst case scenario, would be grounds for termination. This behavior, which is in direct violation of our Plant Rules is not acceptable and will not be tolerated. As a result of your continued inappropriate and disorderly conduct, you are receiving a formal Verbal level of discipline.[20] [Below are the Plant Rules and Enforcement of Standards/Mutual Respects from the C8A that you are in direct violation of: in the Conduct and Work Performance section of the Plant Rules: #2. . . . disrespect of your supervisor(s) or failure to follow the legitimate instructions of your supervisor(s) or site security; #6 Disorderly conduct such as, but not limited to engaging in or provoking a tight, horseplay, practical jokes; #8 Behavior, threats . . . or conduct that creates an intimidating; hostile, or offensive working environment; #10 Falsifying, providing false information...or Company report. This includes misrepresentation through omission. #14 Actions of an employee that bring into disrepute the image or reputation of LION ELASTOMERS or its employees. In the Enforcement of Standards/Mutual Respect of the CBA . . . the Union agrees to do everything in its powers to enforce the Company's rules and regulations through advice, instruction, and example in order to maintain the highest standard of work. The Company and the Union also recognize that the success of the company is aided by a strong working relationship with the Union and that all will benefit from continuous peace and by adjusting any differences in a rational, common-sense manner. . . .]

After meeting with Colone on July 20, Lord issued a letter to Colone the following day chastising him for his conduct during that meeting:

> We met with you on Thursday, July 20, 2017, to administer a verbal corrective action notice resulting from your inappropriate interaction with Brad Dean during the Wednesday, July 12, 2017 shift safety meeting. During our meeting on Thursday, you became visibly agitated and used an elevated, accusatory tone while addressing others in the meeting. This is the same form of behavior we cautioned you about in the certified letter dated April 3rd and the same behavior for which you were receiving the verbal corrective action notice.
>
> During the meeting, efforts were made to impress upon you the importance of conducting oneself in a civil and professional manner. However, those appeals were unsuccessful due to your continued interruptions, elevated voice, and refusal to allow anyone else in the room to complete their statements. And [i]nstead of remaining calm and seated, carrying on a professional and respectful discussion; you interrupted, raised your voice, became argumentative, got up front your chair, paced the room and at one point attempted to leave before you were asked to stay and complete the meeting.
>
> By way of this letter, you are being notified that from this point forward, no member of management will meet with you on an individual basis until you have demonstrated the ability to conduct yourself in a respectful, civil and professional manner. This is in no way an attempt to refrain you from performing your duties as a union representative and/or from bringing forward concerns or issues that need to be addressed. We just want

[18] Other than editorial comments in her notes, Lord produced no documentation or other credible evidence to support her conclusion that Colone disrespected or berated Dean during the safety meeting. Moreover, her testimony, as well as that of Wisenbaker, that Colone provide false information in contrast to what other meeting attendees told them, was not credible since their interview statements were essentially consistent with what Colone said during his July 18 interview. (Tr. 289-290; R. Exh. 35.)

[19] Lord's testimony that Colone became angry during the July 18 meeting was not credible, as it was contradicted by Wisenbaker's testimony that he became angry at the July 20 meeting, and she omitted any reference to such behavior in her otherwise detailed notes of the meeting. In any event, Wisenbaker credibly testified that Colone became angry at some point during both meetings, was sitting close to Wisenbaker on July 20 and Wisenbaker asked Colone to move his chair back. (Tr. 55–56, 463–465.)

[20] Lord conceded that she did not know at what point employees became frustrated, baselessly asserted that Colone stood up during the meeting, focused on Colone's repeated, but unanswered questions, and speculated that the other employees "understood that it is not [Dean's] call to make regarding those hours." Moreover, her warning made no mention of Colone badgering Dean after the meeting. (Tr. 51–57, 289–294; R. Exh. 15–17.)

> you to understand that having an additional member of management will likely happen when you approach a management person to have a discussion.[21]

5. The August 14, 2017 discipline

On August 14, Colone received his first written warning for a "performance transgression" on July 7 when he failed to apply steam to a line after making up a flexone batch. The oversight resulted in 2 days of downtime to clean the pipe and reapply steam. The corrective plan called for the "employee/supervisor" to "make rounds and verify that process and equipment are performing as required." Colone grieved that discipline, asserting that "he opened valve for steam—no procedure in place to violate," but it was denied.[22]

6. The October 20, 2017 discipline

On October 20, 2017, Wisenbaker issued Colone a second written warning for a performance transgression and procedural violation on September 30, 2017. Specifically, Wolfford charged that Colone made up a soap batch with an excessively "high pH level resulting in 458,000 gallons of off spec latex that shut down the facility reactors and has taken in excess of 19 days to rework all of the "out of spec" material. The warning also noted that Colone failed to notify his superintendent that he had a soap bath with a high pH. The performance improvement plan called for Colone to notify his supervisor when the pH was high and that proper adjustments were made. The remarks concluded with a stark warning:

Mr. Colone this is our second major operational error and wo are concerned about your recent inconsistent performance. Both of these operational errors have been of a serious nature, and white they are very serious inconsistencies in your performance, we have elected to only move to the next step of the disciplinary process. You must immediately understand the seriousness of your unsatisfactory job performance and take steps to eliminate it. Please do not hesitate to ask us for assistance if you believe we can help.

In his written explanation during the investigation, Colone blamed the problem on several factors. He asserted that the system was new and "all new [systems] will have problems, he had "checked the pH and adjusted it like this for years." However, he did not deny failing to notify his supervisor of a high pH.[23]

7. The November 13, 2017 grievance

On November 13, Colone was informed that the employees on a previous shift could not get the automated "shortstop" system to pump. The system is used to stop reactions in the reactors. Mike Barnett was called in to repair the related computer program and initially said over the radio that the problem was an empty tank. Colone heard the comment, went over to check the system and said that the tank was full. Barnett replied that he checked the computer system and said that someone must have turned off the switch. That switch, however, was nonfunctional since the system was now automated. At some during the conversation, Mosely came on the radio and asked Barnett if "they sabotaging it, Mike?" Barnett replied, "[y]eah, it looks like they sabotaging it." Following those remarks, Colone complained to his foreman, Glen Judices and then filed grievance 14–2107 alleging that management personnel wrongly accused him of sabotaging operations.

Colone's grievance was denied at first and second steps. At first step, Lord merely stated that "[a]n investigation was completed with the facts presented and no violation of article 17.1 occurred. At meeting, Mr. Colone provided names of employees to talk to. We agreed to promote grievance to Step 2 for further investigation." At second step, Lord stated that "no additional information presented validated slanderous remarks were made. Mr. Colone became annoyed and walked out of the meeting."[24]

8. The February 15, 2018 grievance

On February 15, 2018, Colone filed a grievance on behalf of another employee, Wilbur Butler, who got into an argument with his supervisor, Randy Watson, after the latter accused Butler and another employee, Burton, of loading the wrong truck. The grievance alleged that Watson created a hostile work environment when Butler disagreed and walked away, then Butler followed him and "put his hand into Butler face." The grievance made no reference to cursing by either individual. Colone based it on statements made to him by Butler and another employee, Burton. The requested remedy section indicated that neither Butler nor Watson was blameless:

> Everyone is working hard and a lots of changes in shipping. We all make mistakes Watson and the workers. [B]oth men [are] at fault, be men and apologize to each other, and move on. [B]e more professional."

This grievance was submitted to and denied at first step by Watson on March 1. There was no indication on the form that Lord investigated the allegations before or after it was denied. However, she became involved and spoke to Watson, Burton and several other people who had been working in the area at the time

[21] Lord conceded that the Respondent's attitude towards Colone changed after the July 12, 2017 meeting: "We really kind of basically handled him with kit gloves out of respect for his time in the plant. But at some point I think other people looked to us as why do you let this person continue to get away with this, you know." (R. Exh. 16.)

[22] The Respondent introduced evidence that this warning factored into Colone's subsequent discipline and the Region dismissed Colone's charge that it was motivated by antiunion animus. (R. Exh. 18, 29; Tr. 256–257, 294, 438–439, 481.) That determination, however, is not controlling in this proceeding but does serve as relevant background on the issue of motivation for Colone's eventual discharge. See *News Printing Co*, 116 NLRB 210 (1956) (evidence of conduct preceding the six-month period for bringing charges before the Board may be used to evaluate later conduct as long as it is not given independent and controlling weight); *Delta Finishing Co.*, 111 NLRB 659, 665 (1955) (same).

[23] Similarly, the Respondent, but not the General Counsel, contends that this discipline factored into Colone's eventual discharge and the Region's dismissal of Colone's charge precludes a finding that it motivated his discriminatory discharge. (R. Exh. 23–24; Tr. 256–257, 441–442, 482.) Once again, this evidence, introduced by the Respondent, opened the door to consideration of adverse action as relevant background in determining bias on its part.

[24] Colone credibly testified that the switch was nonfunctional and that he heard Mosely make the remark about sabotage. (Tr. 99–104; GC Exh. 9.) While Mosely denied making the comment, he did not deny that someone made the sabotage accusation over the radio. (Tr. 443; R. Exh. 25.)

of the incident. She was informed by Colone that an employee overheard Burton curse in the course of telling Watson to get his hand out of his face and that Burton told him that Watson had also cursed. In the course of her investigation, Lord's focus turned to Colone's statement that Burton told him that Watson cursed during the incident. She interviewed Burton three times. Each time he denied hearing Watson curse but did hear Watson tell Butler not to curse. During the third interview, Lord had Burton sign a statement to the effect. At the conclusion of her investigation, Butler was disciplined for cursing at Watson, but no action was taken regarding Watson's conduct during the incident.[25]

9. The March 23, 2018 grievances

Christopher Granlee began his employment in April 2017 but was injured on the job in June 2017. He was out of work on workers' compensation for 5 months. On March 20, he was terminated for violating lockout/tagout procedures. On March 23, 2018, Colone grieved Granlee's discharge on the ground that Greenlee should have received service credit while on workers' compensation due to a heat related injury. He also grieved Mosley's denial of Granlee's *Weingarten* rights when discharged. Finally, Colone grieved the failure to provide Greenlee with refresher safety training. In the remedy section, he added that supervisor "Silas Ancelet told a group of Baler operators and material handlers they could not lockout equipment if they were not trained and probationary employees."

On March 27, Colone submitted a statement in support of the discharge and safety training grievances. He asserted, among other things, that Greenlee informed him that Cheryl Benoit from human resources told Greenlee that he would have been required to undergo retraining if he had been out of work for 6 months, and that Dean had given Greenlee a blue hat upon returning to work, thus indicating that he was a permanent employee. In addition, Colone said that "some Baler area workers" told him that Ancelet said "they would have to be trained, qualified and a permanent worker to sign off on [lockout/tagout] permits." Colone concluded that statement by asking, "Is this a OSHA standard."

On April 6, 2018, the Respondent denied the grievances. The discharge grievance was denied on the grounds that Granlee "was terminated for repeated violations of critical safety procedures," while the *Weingarten* grievance was denied on the ground that Mosley's March 20 meeting with Granlee was not an investigatory interview. Finally, the Respondent's denial of the safety training grievance at first step stated: "No member of the safety department made the statement cited in this grievance (04–2018). Mr. Granlee did not express a need for refresher training." Mosley's denial of the grievance at second step repeated the basis for termination based on violations of critical safety procedures. Each denial was followed by Colone's comments.[26]

e. Colone's Additional Protected Concerted Activities

In addition to the aforementioned grievances, Colone engaged in other protected activities between August 2016 and June 2018.[27]

1. The August 26, 2016 grievance

Colone submitted grievance no. 13–2016 on August 26, 2016 regarding the pigment automation project. It was withdrawn and resubmitted.

2. The October 15, 2016 grievance

Colone submitted grievance no. 16–2016 on October 15, 2016 regarding a letter of understanding related to the use of contract employees. This grievance was denied at Step 3 on October 24, 2016.

3. The October 12, 2016 grievance

Colone submitted grievance no. 17–2016 on October 12, 2016 regarding the pigment automation project. This Grievance was denied at Step 3 on October 24, 2016.

4. The January 5, 2017 grievance

Colone submitted grievance no. 1-2017 on January 5, 2017 regarding a staffing issue in the Baler area. This grievance was satisfactorily resolved at Step 1.

5. The January 30, 2017 grievance

Colone submitted grievance no. 2–2017 on January 30, 2017, regarding the Respondent's alleged failure to pay two employees the appropriate wage rate. This grievance was satisfactorily resolved at Step 1.

6. The June 23, 2017 grievance

Colone submitted grievance no. 5–2017 on June 23, 2017 regarding an alleged threat by Mosley toward unit employee Ronald Jones. This grievance was denied at Step 1.

[25] Neither Watson nor Butler testified, but Colone's credible testimony that Butler called him to report the incident was unrefuted. (Tr. 105–107; GC Exh. 10.) Lord's selective memory of the investigation, on the other hand, was not credible. She testified that she took notes of investigatory interviews "most of the time" and referred to having taken "statements" regarding this grievance. Lord also conceded that Colone told her that another employee heard Butler tell Watson to get his hand out of his face, but could not recall whether it was during that statement that Butler cursed. Nor did she recall even asking Burton that question, simply relying on the fact that Watson denied the allegation. Yet, with the exception of a brief statement that she had Burton sign denying that he heard Watson curse, Lord produced no other notes of her discussions with Colone, Butler or anyone else. (Tr. 268–269, 322–326; R. Exh. 38.)

[26] Lord's rationale in concluding that Colone misstated the facts, based on the denials of the grievance allegations by Benoit, Dean and Ancelet, was not credible. In doing so, she misconstrued Colone's March 27 statement as either stating or implying that he had *personal* knowledge of Benoit's remarks to Granlee or Dean's providing Granlee with a blue hardhat. However, the grievance merely alleged that Benoit and Dean made the statements to Greenlee. Moreover, Colone credibly testified that he based the grievances on the information he received from Greenlee and there is no evidence that Lord spoke with Greenlee about the source of Colone's allegations. Similarly, with respect Ancelet's alleged remarks, Colone's statement stated that he got the information from Baler area employees. Once again, Lord relied solely on the denial of Ancelet, but produced no evidence that she spoke to Baler area employees in order to determine whether they did in fact make those statements to Colone. (Tr. 65–66, 109–114, 308–312, 450–451; GC Exh. 11–13; R. Exh. 27–28.)

[27] The Respondent introduced these grievances as proof of Colone's other protected activities for which he did not incur repercussions.

7. The July 12, 2017 grievance

Colone submitted grievance no. 7–2017 on July 12, 2017, again alleging that Mosley threatened Jones. This Grievance was denied at Step 1.

8. The July 27, 2017 grievance

Colone submitted grievance no. 9–2017 on July 27, 2017 regarding the verbal warning he received. This grievance was denied at Step 3.

9. The August 21, 2017 grievance

Colone submitted grievance no. 12–2017 on August 21, 2017 regarding alleged slanderous remarks toward him by an unidentified member of management. This grievance was denied at Step 1.

10. The March 18, 2018 grievance

Colone submitted grievance no. 5–2018 on March 18, 2018 alleging that Lord violated the grievance process. This grievance was denied at Step 1.

F. The June 8, 2018 Discharge

On June 8, 2018, Lord presented Colone with a "Last Chance Agreement" (LCA) that would have been effective for 12 months:[28]

> Job Performance
> In April and July 2017, we sent you letters cautioning you to conduct yourself in a civil and professional manner, along with warning you to cease from actions that could be viewed as direct fabrications or falsifications of information. However, since that time, you have continued to make false accusations using inflammatory and insulting language both verbally and through submission of grievances. Examples of tins ongoing unacceptable behavior are as follows:
>
> On Tuesday, November 7, 2017 Mr. Colone reported that the soap line going into the Flexzone make up tank in 9C building was plugged. When questioned about the lineup by the Area Engineer, Mr. Colone ensured him that the valve line-up was correct, which in fact was incorrect and untruthful. As a result of Mr. Colone's report, two maintenance contractors were dispatched to remove the piping and open the line to clear the reported plug. After two hours spent removing the piping from the area identified by Mr. Calcine, no plug in the line was found. In addition, Mr. Colone told the Capital Projects Coordinator that the issue was probably in the 3 inch piping. After tracing the line out, it was determined not to be the area of concern as the line resulted in a dead end. Then, upon tracing the 1 inch line that comes off the discharge piping of the pump, the Capital Projects Coordinator identified that a gate valve on the discharge pipe exiting from the Soap charging pump was closed. At that point, Mr. Colone opened the valve, along with the control valve which resulted in a full flow of soap. Mr. Colone's failure to properly trouble shoot the line and correctly identify the root cause for no flow within the line resulted in extra downtime and in inefficient usage of Lion employee and contractor resources. Mr. Colone also provided false information during the initial troubleshooting as well as during the investigation. In fact, he called another employee a liar and contradicted testimony with his own version that did not coincide with the outcome of the investigation.[29]
>
> On November 15, 2017, Mr. Colone submitted a grievance citing that slanderous remarks were made on the radio by management and the engineering department. Mr. Colone specifically stated that he heard James Mosley on the radio say that he (Mr. Colone) was sabotaging operations. Mr. Colone also stated that James Mosley is a liar if he denies that he said it. At no point during the investigation did anyone corroborate Mr. Colone's allegation. No one has come forward and validated the allegation or state that they heard lames Mosley on the radio say that Mr. Colone was sabotaging operations.[30]
>
> On February 15, 2018, Mr. Colone filed a grievance on behalf of Wilbert Butler. In the grievance, Colone cited that Randy Watson, Warehouse Supervisor created a hostile work environment by accusing W. Butler and L. Burton of loading trucks incorrectly. In addition, during the investigation, Colone stated that Burton told him that Randy cursed Wilbert and put his finger in Wilbert's face during the incident in the Shipping Office. Upon follow up, Burton stated that he did not witness Randy Watson's hand or fingers in Butler's face. He stated that all he could see was that they were in close proximity. More importantly, Mr. Burton stated that he did not tell Mr. Colone or

[28] Lord testified that the LCA was presented due to "multiple issues" as an option of last resort to Colone and "out of respect for his time in the plant and his position we probably gave him more chances than we should have to address that behavior." (GC Exh. 7; Tr. 312–317.) The record established that her problem was with numerous grievances filed by Colone. When asked to elaborate, Lord speculated that Colone "would take a complaint and I think he created his own facts about what he believed about the complaint, and he would make these statements, and when I investigated them, they were never what he said they were . . . Sometimes when he would write a grievance, . . . he was very broad and I would have to follow up and ask him to please give me the names of who he was referring to, or the dates of the incidents, or things like that. He wasn't very clear. And so then he would go back and he would try to write a statement and give me the information . . . I just know they were not true statements." (Tr. 65–66.) Wisenbaker confirmed that the action was premised on Colone's grievances: "It was more around false information." (Tr. 485–486.)

[29] The Respondent provided no documentation of this incident other than its inclusion in the LCA; nor is there any indication that he was disciplined. In any event, it is undisputed that Colone "[failed] to properly trouble shoot the line and correctly identify the root cause for no flow within the line." On the other hand, although undisputed that Colone provided the engineer with "incorrect" information, Lord's reference to the oversight as "untruthful" was an overdramatization; there is no credible evidence to support an inference that Colone, after detecting the problem and apprising his supervisor of it, intentionally misled his supervisor about its source. Moreover, Lord conceded that the November 7 incident alone was insufficient to warrant the issuance of a last chance agreement. (Tr. 62–63.)

[30] Lord produced no credible evidence to confirm that Colone lied about what he heard over the radio. In fact, her characterization of Colone's allegations as misstatements was premised solely on a slew of denials or lack of knowledge on the part of employees that she spoke to. In fact, she knew that "it basically came down to one person's word against another." (Tr. 63–65, 296–299.)

Mr. Butler that he witnessed Randy Watson cursing Wilbert. He stated that all he heard was Randy telling Wilbert, "We don't need the cursing." Again, Mr. Colone provided false information during an investigation that was invalidated by the witness.[31]

On March 27, 2018, Mr. Colone submitted a handwritten attachment for grievances 02–2018 and 04–2018. In the statement, Mr. Colone cited that Cheryl Benoit questioned Mr. Chris Granlee about the length of his absence and the possibility of retraining. Upon being questioned during the investigation, Mrs. Benoit stated that she has never had a conversation with Chris Grantee about the length of his absence nor a conversation regarding training requirements. In addition, the statement from Mr. Colone cited that Brad Dean gave Mr. Granlee his blue hat upon his return and not an orange hat signifying permanent versus probationary employment). When questioned, Mr. Dean stated that he does not distribute hardhats of any color to employees. Finally, Mr. Colone stated that he had spoken to Baler area workers regarding a statement made by Mr. Si Ancelet. When questioned about this statement, Mr. Ancelet was very adamant that Ile has a strict script that he follows when training or discussing the LOTO/Control of Hazardous Energy (SPI-10). He reads from the procedure: "Persons must have 6 months experience at the Port Neches Elastomers Facility before being eligible to be classified as an authorized person to energize, de-energize and isolate electrical equipment located at an MCC." Mr. Ancelet stated that he does not discuss whether a person is a "permanent employee or not" as Mr. Colone alleged in his handwritten attachment to Grievances 02–2108 and 04–2018.[32]

> Prior to this performance transgression, Mr. Colone had progressed through the disciplinary process [counseling, verbal, written, 2nd written] due to violations of Company Policy/Plant Rules for unacceptable behavior and/or job performance transgressions.
>
> Mr. Colone recognizes that in view of his serious misconduct, just cause exists for his discharge. Nevertheless, the Company agrees to provide Mr. Colone with one last chance to preserve his employment with the Company under the terms and conditions of the parties' collective bargaining agreement ("CBA") and past practices, except as modified by this Agreement. Mr. Colone's continued employment will be governed by his strict compliance with the following conditions:
>
> - Mr. Colone, at all times, must demonstrate satisfactory job performance and conduct that is acceptable to management. His job performance and conduct must comply with all Company rules, policies and procedures, including those relating to attendance, the union labor contract, and any other written rules and policies.
> - Mr. Colone will not be eligible for promotion for the duration of this Last Chance Agreement unless expressly agreed to by the Union and Company.
>
> The conditions set forth above are effective for a period of twelve (12) months. If Mr. Colone violates any of the provisions set forth in this agreement, no matter how minor the infraction may be, he will be subject to immediate discharge. If, during the period of twelve (12) months from the first day Mr. Colone returns lo work, Mr. Colone engages in any conduct that would reasonably warrant any form of counseling and/or discipline for misconduct, the parties agree that Mr. Colone shall be terminated immediately and that his termination shall be considered for all purposes to be final. In that respect, this Agreement eliminates the just cause provision as it applies to Mr. Colone during this probationary period. The twelve (12) month period shall include vacations, holidays, and other forms of paid leave under the CBA, but shall exclude any other periods when Mr. Colone is on leave of absence or otherwise not actively working for any reason. No other mitigating factors or mitigation of the penalty shall be considered by the parties, any arbitrator, or any other adjudicator.
>
> The terms of this Agreement are without precedent or prejudice to future similar cases, involving employees other than Mr. Colone, and the terms of this Agreement will be of no value as evidence in any arbitration proceedings involving other employees. Mr. Colone agrees that he has been fairly and appropriately represented by his union. Mr. Colone agrees not to seek appeal through the grievance/arbitration procedure provided in the applicable collective bargaining agreement of any disciplinary action taken by the Company against him during the effective period of this Last Chance Agreement. Should Mr. Colone nevertheless pursue a timely and properly processed grievance for any discharge pursuant to this Agreement, the only issue which may be presented to and considered by an arbitrator is whether or not Mr. Colone violated any one of the conditions set forth in this Agreement. Mr. Colone further acknowledges that the only consideration for his signing of this Agreement are the retention of his job and other terms included in this Agreement; that no other promise or agreement of any kind has caused him to sign it; that this Agreement has not been obtained by any duress; and that he fully understands the meaning and intent of this document. More specifically, he understands that in return for his continued employment, he agrees to work under the terms the Agreement contains.
>
> Additionally, the Union and the Company specifically agree that each reserves and maintains any and all rights that they have under the CBA, and any past practices to enforce or challenge applicable work rules and similar policies in the future.

The LCA had been previously presented to unit employees by the Respondent without objection by the Union. In this instance, Colone simply disagreed with the allegations in the LCA and refused to sign it. As a result, he was discharged on June 8, 2018.

[31] Lord's conclusion that the grievance contained "false information" was yet another slanted version of an event. She premised that conclusion on the denials or lack of knowledge on the part of Burton and others in the warehouse that they witnessed Watson curse at Butler. However, she made no reference to Butler's version of the incident, which is what led Colone to file the grievance. (Tr. 65, 105–108, 299–305; GC Exh. 10; R. Exh. 38.)

[32] Lord testified that Colone's made false statements in relation to the Granlee grievances, but when pressed about it conceded that she could not say whether or not Colone made up the statements. (Tr. 65.)

LEGAL ANALYSIS

I. THE OCTOBER 24, 2016 MEETING

An employer violates Section 8(a)(1) of the Act when the employer restrains or coerces an employee in the exercise of his or her statutory right to engage in concerted activity. Statements that would lead a reasonable employee to fear an adverse employment action as a result of union activity are considered threatening. See *Overnite Transp. Co.*, 332 NLRB 1331, 1335 (2000) (remarks that would reasonably lead an employee to fear adverse employment prospects for engaging in union activity were prohibited by the Act). Statements that do not specify a particular consequence for engaging in concerted activity are still coercive when they would lead an employee to anticipate some adverse consequence. E.g., Id. (an employer acted coercively when a supervisor told an employee that his future with the company was "real iffy" because of his participation in a picket line); *Amptech, Inc.*, 342 NLRB 1131, 1135 (2004) (company acted coercively by indicating that a union organizing drive was a personal attack and informing employee that it would keep its "options open"); *Union National Bank*, 276 NLRB 84, 88 (1985) (employer acted coercively by telling employee "watch yourself.").

Here, there is no question that Colone was engaged in protected concerted activity. Colone had been called to a meeting with Wisenbaker and Mosley for a discussion about the grievances he had filed on behalf of other employees, and the statement made by Mosley arose in the context of that discussion. The Respondent does not dispute that Colone's activity—filing grievances—was concerted, and thereby protected by the Act.

Mosley's statement—that Colone wasn't "gonna make it"—is very similar to the sorts of statements made in *Overnite Transp. Co.*, 332 NLRB at 1335 and *Amptech, Inc.*, 342 NLRB at 1135, in that it implied a future adverse consequence, even if it did not explicitly state what that consequence would be.

The Respondent contends that the statement was, nevertheless, not a threat because Mosley, Wisenbaker, and Griggs all indicated that they did not find it threatening,[33] and because Mosley did not intend it as a threat. But the standard for what is coercive is objective, not subjective. See *Crown Stationers*, 272 NLRB 164, 164 (1984) (the test for interference or coercion is whether the conduct may reasonably be said to tend to interfere with the free exercise of employee rights). Therefore, even if the other three people present did not intend or perceive the words as a threat, if a reasonable employee in Colone's position would tend to do so, the words are be prohibited.

The Respondent also argues, without any support, that telling an employee "you ain't gonna make it" is not objectively threatening. I disagree. Indeed, the statement in this case was a more specific and tangible threat than the one in *Amptech, Inc.*. The threat that Colone wouldn't "make it" reasonably suggested the possibility of discharge, a specific adverse employment consequence. By contrast, the statement found to be a threat in *Amptech Inc.*—that the employer would "keep its options open"—was much more open-ended.

Finally, the Respondent argues that the fact that Colone was not discharged for more than 18 months after this statement was purportedly made is further evidence that Mosley did not make a threat. A threat, however, does not need to be carried out in order to be threatening and to chill union activity. See *Crown Stationers*, 272 NLRB at 164 (The Board has . . . consistently held that the motive or *effect* of the coercion is immaterial to the finding of a violation.") (emphasis supplied).

Under the circumstances, Mosley's statement to Colone on October 24, 2016, that he "ain't gonna make it" unlawfully threatened Colone in violation of Section 8(a)(1) of the Act.

II. THE JULY 12, 2017 SAFETY MEETING

The General Counsel argues that Colone was unlawfully disciplined as a result of the comments he made during the safety meeting on July 12, 2017. The Respondent argues that the discipline was justified because Colone's comments were not protected and, if they were, his behavior during and after the meeting was offensive enough to lose the Act's protection.

A. Whether the Activity was Concerted

An employee may be engaged in concerted activity when he/she speaks in the presence of co-workers to address work-related concerns. *Whittaker Corp.*, 289 NLRB 933, 933 (1988) (quoting *Root Carlin, Inc.*, 92 NLRB 1313, 1314 (1951) ("the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization."). The "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity . . .[s]uch individual action is concerted as long as it is engaged in with the object of initiating or inducing ...group action..." Id. (internal quotations omitted).

Here, Colone, an elected union representative, made protected complaints relating to mandatory overtime hours, heat and safety (other terms of employment), all mandatory subjects of bargaining under the Act. By objecting to his employer's proposed changes to these working conditions in the presence of other employees, Colone engaged in concerted activity. *Enterprise Products*, 264 NLRB 946 (1982) (an employee was engaged in concerted activity by objecting, during a group meeting, to employer's proposal that employees increase their productivity in exchange for event tickets instead of higher wages); *Whittaker Corp.*, 289 NLRB at 934 (finding concerted activity when an employee raised his hand and complained about his employer's refusal to increase wages, even where no other employees commented at the meeting).

The Respondent contends that Colone's activity was not protected because no employees asked him to raise questions on their behalf. The argument overlooks the fact that the overtime/heat/safety issues were raised by coworkers before Colone joined the discussion. In any event, that is not the test; the test is whether, in the presence of fellow employees, Colone protested a change in an employment term affecting those employees. *Whittaker Corp*, NLRB at 934, 940–941 (employee's speech was

[33] As discussed above, Griggs understood the comment to relate to Colone's job security, but believed at the time it was unlikely the threat would be carried out given his good work performance and position as a union representative.

concerted where made in the presence of other employees and it related to a change in an employment term even where "no employees . . . indicated group action or approval of [employee's] statements" and the speaking employee "did not seek support from other employees before or after the meeting.").[34]

The Respondent also argues, relying on *Media General Operations, Inc.*, 346 NLRB 369 (2006), that because Colone's questions were about the company's liability, they did not relate to a term and condition of employment, and thus were not made for the purpose of mutual aid or protection. However, *Media General Operations, Inc.* is inapplicable; that case dealt with a situation where an employee raised objections when an employer sought to reprimand him for a workplace mistake—an entirely personal issue that was not of concern to other employees. Here, Colone did express concerns about the way the workplace changes would affect the safety of his fellow employees. Moreover, his reference to the Respondent's potential liability exposure was obviously not over concern for its legal and financial interests but a tactical approach in advocating employees' concerns relating to overtime, heat and safety.

Finally, Respondent contends that Colone's persistence in demanding a copy of the work-set API standard after the meeting was not in the nature of concerted activity. That argument also fails since the standard was requested during the meeting and Dean agreed to provide it before the discussion became contentious. The fact that Colone made the request as he was leaving the room and most others had left did not remove it from the res gestae of the meeting.

B. Whether Colone Forfeited the Protection of the Act

Employees involved in what would normally be concerted activity may lose the protection of the Act if they engage in sufficiently opprobrious conduct. In *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), the Board outlined the applicable factors in determining whether an employee's outburst is sufficiently opprobrious to lose the protection of the Act: (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.

1. Place of discussion

Spontaneous employee comments made during group meetings are more likely to be protected. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007) (employee's comment that a supervisor was a devil and God would punish him and the employer for making employees work 7 days a week was protected when it arose as a "spontaneous remark" during a meeting in protest on behalf of employees on a matter of concern to many employees). Colone's comments were not more impertinent than calling a supervisor a devil, speech found not to lose the Act's protection in the context of group meetings. Id.

The Respondent argues that Colone's comments were not made during a group meeting because it was constructively terminated by his disruptive conduct. Yet the cases cited by the Respondent are inapposite or distinguishable. *Atlantic Steel Co.*, 245 NLRB at 816 (employee lost the Act's protection where he made remarks during production time, as opposed to at a meeting); *Public Service Co. of New Mexico*, 364 NLRB No. 86 (2016) (meeting terminated where employee repeatedly interrupted linemen when they attempted to ask questions, and, after being asked to leave, refused and instructed that the meeting stop and that employees leave); *Carrier Corp.*, 331 NLRB 126 (2000) (employee lost Act's protection by insisting on discussing a subject unrelated to the meeting and refusing to acquiesce to repeated directions that his concerns could be discussed later at a more appropriate time). Here, Colone's conduct is not of the kind at issue in those cases. He did not insist that the safety meeting end, nor did he interrupt it by speaking on unrelated issues; the concerns he voiced were directly related to the subject of the meeting, which was employee safety. Moreover, the meeting accomplished its primary purposes—Dean presented safety information and the customary question and answer session followed. Questions arose about overtime work hours and Dean and employees became frustrated over Dean's statement that overtime requirements would increase. The meeting ended when it became clear that the meeting had run its course, as Dean was unable to placate employees' concerns over overtime working in hot conditions and its impact on their safety.

2. Subject matter of discussion

Speech that relates to terms and conditions of employment is more likely to be protected. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB at 670 (2007) (second factor weighed for employee where the employee's outburst occurred during a discussion of employee complaints about terms and conditions of employment); *Mexican Radio Corp.*, 366 NLRB No. 65, slip op. at 1 (2018) ("email was part of an ongoing dialogue between the workers and employer and was a reaction to the latter's failure to correct the problems perceived by the employees"). Colone's speech concerned issues of safety and working hours, both terms and conditions of employment.

The Respondent argues that this factor weighs against protection because Colone's comments were not made during a joint labor-management consultation, a grievance meeting or a bargaining meeting, and ought to have been reserved for an occasion when they might have been more fruitful, such as when an employer's representative with more authority was present. However, there is no legal precedent mandating that employee speech occur within such specific parameters to merit the Act's protection. The Respondent's strongest argument in support of its proposed concept is *Carrier Corp.*, 331 NLRB 126 (2000) (employee lost Act's protection by insisting on discussing a subject unrelated to the meeting and refusing to acquiesce to repeated directions that his concerns could be discussed later at a more appropriate time). The speech in that case, however, was deemed disruptive because it was entirely off-topic, not merely because—as the Respondent would have it—it was voiced in a forum that was less-than-ideal for resolving employee's

[34] Under the same reasoning, the question of whether or not Colone was acting in his capacity as a union steward is not determinative of whether the activity was concerted, despite the Respondent's suggestion that the activity was not concerted because Colone was only acting in an individual capacity.

concerns.[35]

The remarks Colone made were part of an ongoing dialogue between employees and management over a term of employment, and so this factor cuts against the Respondent. See *Mexican Radio Corp.*, supra at 21 (employees were protected when they were disciplined for speech that occurred via email, when such speech was part of an ongoing dialogue between the workers and management about terms of employment).

3. Nature of the employee's outburst

Loud and boisterous behavior, including cutting off a supervisor, and delivering words in an "animated and challenging tone," is still not opprobrious enough to lose the Act's protection. *Air Contact Transp. Inc.*, 340 NLRB 688 (2003) (holding that where an employee cut off a supervisor, spoke heatedly, and turned to other employees and said that the supervisor's response was "a bunch of baloney" the employee did not forfeit the Act's protection). Even language that is suggestive of violence and contains profanity may be protected. *Kiewit Power*, 355 NLRB 708, 710 (telling a supervisor that things could "get ugly" and that he should "bring his boxing gloves" did not cause an employee to lose the Act's protection); *Leasco, Inc.*, 289 NLRB 549, 549 fn. 1 (1988) (employee's statement, "if you're taking my truck, I'm kicking your ass right now," did not cause him to lose the Act's protection because it was a "colloquialism that standing alone does not convey a threat of actual physical harm."); but see *Atlantic Steel Co.*, 245 NLRB 814 (employee turned to another employee and either called the foreman a "lying son of a bitch" or stated that the foreman had told a "m—f—lie" or was a "m—f—liar" on the production floor, and lost the Act's protection).

Here, Colone spoke persistently and argumentatively, and made a brusque, impolite statement to an employee who was leaving the meeting that he should "just go ahead and leave" because he was not needed; he also, upon Dean refusing to provide him with the paperwork related to the new overtime policy, told Dean that he was not doing his job. Yet Colone's heated speech is of the sort that is protected under the Act. See *Consumers Power Co.*, 282 NLRB 130, 132 (1986) ("The protections Section 7 affords would be meaningless were we 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.").

The Respondent argues, based on *Atlantic Steel Co.*,[36] that Colone's outburst was offensive enough for this factor to cut against him. *Atlantic Steel* is distinguishable for two reasons. First, Colone did not directly insult a supervisor during the meeting (nor use any profanity). Second, and more importantly, *Atlantic Steel* largely turned on the fact that the employee's outburst was unwarranted under the specific circumstances at issue in that case. *Atlantic Steel Co.*, 245 NLRB at 814 (holding that the employee "reacted in an obscene fashion without provocation" and indicating that a spontaneous outburst in other circumstances—such as a formal grievance proceeding—might not have lost protection).

4. Whether the employee's outburst was provoked by an unfair labor practice

Many outbursts that are protected are not motivated by unfair labor practices. E.g. *Leasco, Inc.*, 289 NLRB at 549 fn. 1. Not surprisingly, Colone made the statements at issue during grievance and disciplinary meetings, but they were not shown to have been spurred by the commission of unfair labor practices.

Given that the first three factors weigh in favor of Colone, his conduct during the July 12, 2017 meeting did not forfeit the protection of the Act.

The Respondent also argues that because it was not shown to have anti-union animus, its July 20 discipline of Colone was not unlawful. Yet a showing of antiunion animus is not always necessary to make out a violation of the Act. E.g., *Meyers Industries*, 281 NLRB 882 (no mention of anti-union animus in its analysis). The factors the Respondent lists for consideration in determining if union animus was present (the timing of the employer's adverse action in relationship to the employee's protected activity, the presence of other unfair labor practices, statements and actions showing the employer's general and specific animus, the disparate treatment of the discriminatee, departure from past practice, and evidence that an employer's proffered explanation for the adverse action is a pretext) are relevant to analyzing circumstantial evidence under a *Wright Line* standard in a mixed-motive case where the Respondent claims that it would have disciplined in the absence of union activity for a legitimate business reason. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). E.g., *PAE Technologies*, 367 NLRB No. 105, fn. 11 (2019) (explaining the purpose of a *Wright-Line* analysis). Here, there is no need to consider circumstantial evidence given that the disciplinary letter clearly refers to Colone's protected behavior during the meeting.

Furthermore, the Respondent's alleged justifications for disciplining Colone on July 20 are inauthentic. The Respondent bases its discipline of Colone on "behavior which violated the Respondent's policies" and for providing "fabricated or false information" during a follow-up interview on July 18, 2017, to investigate the incident. As discussed above, I do not credit the assertion that Colone made false statements during his interview.

[35] The Respondent additionally cites *Postal Service*, 268 NLRB 275 (1983), for the proposition that Colone's conduct might only have been justified in a grievance meeting: ("[I]n the administration and resolution of grievances under the collective-bargaining agreement, because of the nature of these endeavors, tempers of all parties flare and comments and accusations are made which would not be acceptable on the plant floor."). However, while *Postal Service* (in the process of drawing a comparison to a similar case where an employee was protected because his comments were made in the context of a grievance resolution) does say that behavior that would be unacceptable on the plant floor might be acceptable during the resolution of a grievance, it does not state this is the *only* context removed from the "plant floor" where a greater degree of aggressive speech might be permissible.

[36] The Respondent also cites *Public Service Co. of New Mexico*, 364 NLRB No. 86, and *Carrier Corp.*, 331 NLRB 126, without fully explaining why it believes them relevant to this factor of the analysis. As discussed at greater length above, those cases are not especially relevant to this factor, nor applicable to this case, as they deal with situations where an employee actually cut a meeting short and where an employee disrupted a meeting by engaging in a wholly off-topic outburst, respectively.

The argument that Colone was disciplined for behavior during the safety meeting which violated the Respondent's policies is circular. The conduct that is alleged to have violated its policies during the meeting *was* the protected concerted activity discussed above. The Respondent also contends that Colone spoke aggressively and angrily during the follow-up interview with Lord and Wisenbaker on July 18. However, while referencing his conduct during the safety meeting and the allegation that he provided false information during his interview on July 18, the disciplinary letter emphatically does *not* say anything about his conduct towards Lord and Wisenbaker during that interview. As such, I did not credit that this was a reason for his discipline. Even if it was, the fact that his protected activity was a significant motivating factor in his discipline still makes that discipline unlawful. *Consolidated Bus Transit, Inc.* 350 NLRB 1064, 1065 (2007) (all the General Counsel must show to make out a case under Section 8(a)(1) is that union animus—such as animus towards a protected concerted activity—was a substantial or motivating factor in the adverse employment action); *Trailways, Inc.*, 237 NLRB 654, 662 (1978) ("[T]he General Counsel must establish that the Respondent acted at least in part with a proscribed motive.").

III. THE RESPONDENT'S DISCHARGE

The complaint alleges that the Respondent discharged Colone because he was engaged in protected concerted activity. The Respondent maintains that Colone was lawfully discharged after having been given a Last Chance Agreement that followed two prior written warnings for legitimate performance issues, and that the basis of the Last Chance Agreement was not that he was filing grievances, but that he was filing *false* grievances.

Colone received two written warnings for performance prior to the Last Chance Agreement—one on August 14, 2017, and another on October 20, 2017. Those incidents were not alleged to have been factors in the Respondent's decision to present Colone with the LCA, nor is claimed that they were driven by antiunion animus. Nevertheless, the LCA referenced them by implication and, as such, they served as predicates for the adverse action.[37] But the Last Chance Agreement itself was not issued because of these prior incidents; it does not mention them specifically, and the inquiry is whether the incidents it does mention are legitimate grounds for discharge, or merely a pretext for discriminatory action. Pursuant to the terms of the Respondent's policy on Last Chance Agreements, they must be issued for just cause based on an employee's "performance problem(s)."[38]

It is true that an employee loses the Act's protection where the employee engages in bad-faith conduct or deliberate and malicious falsehoods. See, e.g., *Ogihara America Corp.*, 347 NLRB 110, 111–112 (2006) (employee lost protection of Act when he inserted a different co-worker's name on the return address label of an anonymous letter critical of supervisor because he feared employer repercussions); *HCA/Portsmouth Regional Hospital*, 316 NLRB 919, 930 (1995) (no protection where employee tried to raise support for a supervisor's removal by recklessly spreading false rumors about a supervisor). On the other hand, when an employee files a grievance which is merely overzealous or contains mistakes, that act is protected. *Roadmaster Corp.*, 288 NLRB 1195, 1195–1196 (1988) (discharge of an employee who improperly signed other individuals' names to grievance forms was unwarranted where the employee had no intent to deceive, where the grievance forms, as opposed to other company paperwork, "merely initiated a procedure through which personnel decisions would be determined" and was driven by a motive—a concern about contractual time limits after being unable to reach the employee by telephone—that was reasonable under the extenuating circumstances of the case).

There was no credible evidence that any of the errors in the grievances filed by Colone were intentional or that he had a malicious intent to deceive the Respondent. In his March 22 grievance, he incorrectly identified Zamora and Hobbs as employees who had been multitasking; the following day, he learned that Taylor, the shift foreman had in fact been the one to step in and perform extra duties. Colone withdrew the grievance and apologized for the incorrect information. His error was one as to the identity of the workers involved; the substantive safety concerns he raised about the dangers inherent in multitasking, however, remained the same in both the original and revised grievances.

With regards to Colone's November 12, 2017 grievance, the Respondent was unable to corroborate his assertion that he was accused of sabotaging the Respondent's operation; however, the mere absence of corroborating evidence does not mean that Colone maliciously lied, only that the Respondent determined that his grievance was without merit. The same is true of Colone's February 15, 2018 grievance; although the Respondent's investigation did not corroborate his allegations, nothing shows that Colone, in filing the grievance, did anything other than rely on statements made to him by another employee, Butler. Finally, in support of three grievances he filed on March 23, 2018, the Respondent provided no evidence, however, to refute Colone's written allegations that he received the information from the grievance and/or employees in a particular work area. Construed in a light most favorably to the Respondent, Colone's alleged misstatements do not reveal the bad faith needed to lose the Act's protection.

In short, the record supports the conclusion that the Respondent scrutinized Colone's grievance for discrepancies between his version of events and those of other witnesses. The Respondent found such discrepancies in four grievances filed over the course

[37] "Prior to [the March 27, 2018] performance transgression, Mr. Colone had progressed through the disciplinary process [counseling, verbal, written, 2nd written] due to violations of Company Policy/Plant Rules for unacceptable behavior and/or job performance transgressions."

[38] The Respondent's policies indicate that discipline does not *need* to be progressive. Thus, the Respondent was not required to discipline Colone with written warnings before implementing the LCA. However, the policy also suggests that the Respondent generally tries to progress up the disciplinary scale in escalating order of severity: "When an employee fails to perform at the expected performance standard by violating one or more Company policy, rule, or standard, discipline may be warranted. Any infraction will result in discipline and employees will advance within the progression regardless of the nature of the violation (in other words, each type of violation does not result in a separate progression). The appropriate discipline to be taken will depend upon the seriousness of the issue."

of about a year.[39] These inconsistencies provide the basis for his Last Chance Agreement, and the Respondent claims they justify Colone's discharge. But even assuming Colone was indeed mistaken in each of these instances, these four or five statements that contain discrepancies with the accounts of other witnesses do not prove that Colone had any wrongful motivation or intention to deceive the Respondent. Cf. *HCA/Portmouth Regional Hospital*, 316 NLRB at 930 (employee's discipline justified where the employee submitted information without verifying it *and* was motivated by personal concerns, rather than a desire to improve employees' working conditions, *and* the information was damaging and defamatory). The more reasonable conclusion is that these incidents were seized upon by the Respondent as a pretext to discharge Colone for being a highly active and zealous union steward. The mistakes in his grievances do not serve to make the act of filing those grievances anything other than concerted activity which is protected by the Act.

Although the submission of inaccurate grievances may have been the main transgression described in the LCA, it was not the only one. The LCA also accuses Colone of making "false accusations using inflammatory and insulting language," in connection with the grievances that he filed. It cites a couple of instances by referring to the warning letters Colone received in July and April of 2017; the first of those letters, as discussed above, upbraided Colone for his speech during an employee safety meeting. The April warning letter criticizes, in part, statements by Colone made in connection with his pursuit of a grievance, where he accused a supervisor of having amnesia and asserting that "people in the position of leadership have no integrity."

Section 7 of the Act entitles employees to file and process grievances, and disciplining or discharging of employees for doing so violates Section 8(a)(1). *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967), *approved in NLRB v. City Disposal Systems*, 465 U.S. 822, 831–32 (1984). As discussed above, an employee may lose the Act's protection if the employee's conduct is sufficiently opprobrious. However, in the context of grievances, the standard is a high bar, and inflammatory, rude, or even profane language does not meet that bar—rather, such language is part of the res gestae of the grievance discussion. *Thor Power Tool Co.*, 148 NLRB 1379, 1380–1381 (1964), enfd. 351 F.2d 584 (7th Cir. 1965) (calling a superintendent a "horse's ass" following a grievance discussion was not a basis for discharge, but rather "part and parcel" of the employee's participation in protected grievance activity); *Clara Barton Terrace Convalescent Center*, 225 NLRB at 1029 (the "abrupt and officious" tone in which a grievance was worded did not cause an employee to lose the Act's protection); *Desert Cab, Inc.*, 367 NLRB No. 87, slip op. at 14–15 (2019) (when an employee is discharged for conduct that is part of the res gestae of protected activities, the question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service). A steward's processing of grievances is protected unless "his excess is extraordinary, obnoxious, wholly unjustified, and departs from the res gestae of the grievance procedure." *Union Fork and Hoe Co.*, 241 NLRB 907, 908 (1979) (arbitrator, who had ruled a union steward was discharged for just cause, failed to consider the great extent to which a union steward is protected during the grievance process).

Besides those already mentioned, the Respondent offers no concrete examples of exactly what Colone said while processing grievances that might have gone so far as to lose the Act's protection. The examples that *are* referenced in the Last Chance agreement are not sufficiently opprobrious to do so. Colone's comments during the safety meeting were protected for the reasons discussed above. The language described in the April 3 disciplinary letter is likewise protected. See *Phoenix Transit System*, 337 NLRB 510, 510 (2002) ("the views of workers and the union need not be expressed with any excessive regard for the niceties of courtesy, or in the politest of terms. It is recognized that Federal law gives license in the collective-bargaining arena to use intemperate, abusive, or insulting language without fear of restraint or penalty . . ."). Colone's statement did not contain language as extreme as that found protected in *Thor Power Tool Co.*; he did not use vulgar language to insult a supervisor.[40] He did not act unlawfully. *Fork and Hoe Co.*, 241 NLRB at 908 (in some cases an employee may not be disciplined even for acting unlawfully in "a moment of animal exuberance" if not driven by improper motives). His tenacity and stubbornness, such as it was, did not even rise to the level of threatening a supervisor with any adverse consequence. *Clara Barton*, 225 NLRB at 1029–1030 (employee was protected after telling supervisor "this is a warning if it happens again you will be given a reprimand."). Thus, Colone was discharged for conduct that was part of the res gestae of concerted activity.

The Last Chance Agreement does mention one other performance-related incident on November 7, 2017. However, even assuming (given the lack of evidence on the issue) that this incident was indeed a legitimate performance-related incident since no discipline was issued, the Respondent does not argue that this single event, which occurred almost 7 months before Colone's discharge, would have justified the issuance of a LCA in the absence of his protected activity; in fact, Wisenbaker testified to precisely the contrary. See *In re Alamo Rent-a-Car*, 236 NLRB 1155, 1156 (2001) ("[T]he Board must determine based on all of the evidence whether the employer has established that it '*would* have fired' the employee, not merely that it *could* have done so.") (internal quotation omitted).

Given that the performance-related issue mentioned would not have provided an independent basis for discharge and given that the Respondent's proffered motivation for discharging Colone—

[39] The Respondent's Last Chance Agreement also references Colone's allegedly false statements during his July 2017 interview with Lord and Wisenbaker. As discussed above, I do not find credible any assertion that Colone made false statements during this interview.

[40] The Respondent argues that it is not possible to evaluate the offensiveness of the language in Colone's statement because the General Counsel never entered it into evidence. However, although the statement was not entered into evidence, the warning letter was, and the disrespectful comments described therein do not rise to the level required for an employee to lose the protection of the Act.

provision of false statements—is illegitimate, it is not necessary, as the Respondent claims, to perform a *Wright Line* analysis. A *Wright Line* analysis applies in mixed-motive cases, where an employer discharges an employee in part because of concerted protected activity but argues that it would have discharged the employee regardless of that activity, for a legitimate business reason. *Wright Line,* supra); *PAE Technologies,* 367 NLRB No. 105 fn. 11 (2019).[41] *Wright Line* requires that the General Counsel demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in an employer's adverse action by showing: 1) that the employee's activity was protected, 2) that the employer knew about the protected activity, and 3) the employer's animus. *See Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007) (referencing *Wright Line*). The Respondent argues that it lacked antiunion animus and lists a range of factors it believes relevant to this determination.[42]

However, even assuming that *Wright Line* applied, the Respondent's defense would still fail under such an analysis. There is no question that Colone engaged in protected activity, for the reasons discussed above, nor that the Respondent knew about such activity. The considerations the Respondent lists for determining antiunion animus (the third *Wright Line* factor) are only used to determine antiunion animus if no direct evidence of such animus exists and the only evidence available is circumstantial. *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004) (unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity). They are irrelevant here, because there is such direct evidence. In its Last Chance Agreement, the Respondent directly references Colone's "using inflammatory and insulting language," as well as the warning letter of April 2017 and the written discipline of July 2017 urging him to conduct himself in a "civil and professional manner." This means that the Respondent expressly issued the Last Chance Agreement to Colone because of protected activity that was part of the res gestae of his role as a union steward. E.g., *Thor Power Tool Co.*, 148 NLRB at 1380-81 (1964) (offensive language part of the res gestae of the grievance discussion). If further evidence of the Respondent's hostility towards Colone's protected activity were needed, Mosley's threat that Colone would not "make it," which was prompted by Colone filing grievances, demonstrates such hostility.

Finally, the Respondent argues that it terminated Colone because he refused to sign the Last Chance Agreement, not because of his concerted activity per se. This argument fails, because when an employee is discharged for refusing to sign off on a disciplinary action that would not have been taken but for the employee's protected activity, the discharge is still unlawful. See, e.g., *Air Contact Transport, Inc.*, 340 NLRB 688 (2003) (rejecting employer's reliance on employee's refusal to sign unlawful reprimand as independent basis for discharge).

In essence, this dispute does not pit enforcement of Colone's Section 7 rights as a union steward against the Respondent's management rights under the CBA with respect to employee performance. Colone's conduct as a union steward tenaciously advocating on behalf of unit employees' terms and conditions of employment did not fall within the ambit of discipline. Management certainly had a right to complain about his grievance-related behavior to the Union and Lord certainly did that. However, the Respondent was not lawfully entitled to discipline him because he was annoying and filed grievances based upon what unit employees told him. Under the circumstances, the Respondent' violated Section 8(a)(3) and (1) of the Act by discharging Colone on June 8, 2018, because of his protected and concerted activities as a union steward.

CONCLUSIONS OF LAW

1. Lion Elastomers LLC is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 228 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive labor representative of employees of the following bargaining unit:

> All hourly employees employed as operating employees in job classifications set forth in Article VI, but excluding all other employees such as shipping and receiving clerks, engineering stockroom clerk's, machine shop and tool room clerks, all office clerical and secretarial employees, plant protection employees, laboratory employees, all professional and technical employees, research and development unit employees, and all supervisory employees with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees.

4. The Respondent, by James Mosley, threatened employee Joseph Colone's job security in violation of Section 8(a)(1) of the Act on October 24, 2016 by telling Colone that he "ain't gonna make it" because he refused to settle or withdraw grievances.

5. The Respondent discharged Colone on June 8, 2018, in violation of Section 8(a)(3) and (1) because he filed numerous grievances.

6. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent discriminatorily discharged Joseph Colone, the Respondent shall be ordered to offer Colone

[41] A *Burnup and Sims* analysis is likewise not appropriate in this situation, as that case deals with a disputed issue of fact—i.e. whether or not the employee actually engaged in the conduct for which he was disciplined. 379 U.S. 21, 23 (1964). Here, there is no question that Colone filed the grievances at issue. The only dispute is whether to characterize his behavior as protected or as having lost the protection of the Act.

[42] These factors are: (1) the timing of the employer's adverse action in relationship to the employee's protected activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus, (4) the disparate treatment of the discriminatee, (5) departure from past practice, and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 (2018), citing *National Dance Institute—New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016).

reinstatement to his former position or, if that position no longer exists, in a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired in his place. Colone shall be made whole for any loss of earnings he may have suffered due to the discrimination against him. 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 also be required to expunge from its files any reference to the unlawful termination of Colone and to notify him in writing that this has been done. In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall be ordered to compensate Colone for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Colone 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[43]

ORDER

The Respondent, Lion Elastomers LLC, Port Neches, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively telling any employees that their employment may be in jeopardy if they file grievances alleging violations of our collective bargaining agreement with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 228 (the Union).

(b) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity on behalf of the Union or any other union.

(c) 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 Joseph Colone 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 Joseph Colone 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) Compensate Joseph Colone for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

(d) 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 the employee in 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 facility in Port Neches, Texas, copies of the attached notice marked "Appendix."[44] Copies of the notice, on forms provided by the Regional Director for Region 16, 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 October 24, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 16 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. April 25, 2019

APPENDIX

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

[43] 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.

[44] 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."

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 the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 228 or any other union.

WE WILL NOT tell you that your employment may be in jeopardy if you file grievances alleging violations of our collective bargaining agreement with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 228.

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 Joseph Colone 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 Joseph Colone whole for any loss of earnings and other benefits resulting from his unlawful termination, 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 Joseph Colone for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

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

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Joseph Colone, 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.

LION ELASTOMERS LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-190681 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.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LION ELASTOMERS, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	Case No. _____ May 29, 2020 369 NLRB No. 88

CERTIFICATE OF FILING

Pursuant to Fifth Circuit Rule 15.3.1, the undersigned counsel of record certifies that the National Labor Relations Board has filed the order for which Petitioner seeks review.

Dated: June 17, 2020.

Respectfully submitted,
/s/Jaklyn Wrigley

Steven R. Cupp, Esq.
Jaklyn Wrigley, Esq.
FISHER & PHILLIPS LLP
2505 14th Street, Suite 300
Gulfport, Mississippi 39501
(228) 822-1440 - Telephone
(228) 822-1441 - Facsimile
scupp@fisherphillips.com
jwrigley@fisherphillips.com
Counsel for Petitioner Lion Elastomers

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I also caused the forgoing Petition for Review to be served by Federal Express – Overnight Delivery upon the following:

Bryan Dooley
David Foley
National Labor Relations Board, Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6107
Bryan.Dooley@nlrb.gov
David.Foley@nlrb.gov

Sasha Shapiro
Bruce Fickman
United Steel Workers International Union
60 Blvd. of the Allies
Five Gateway Ctr, Room 807
Pittsburgh, PA 15222-1214
sshapiro@usw.org
bfickman@usw.org

Rick Erpelding, Staff Rep
United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial and Service
Workers International Union, Local 228
1300 Rollingbrook Drive, Suite 504
Baytown, TX 77521
rerpelding@usw.org

/s/Jaklyn Wrigley
JAKLYN WRIGLEY