

**Nos. 19-1150 & 19-1167**

---

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**CADILLAC OF NAPERVILLE, INC.,**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**JULIE BROCK BROIDO**

*Supervisory Attorney*

**JARED D. CANTOR**

*Senior Attorney*

*National Labor Relations Board*

**1015 Half Street, SE**

**Washington, DC 20570**

**(202) 273-2996**

**(202) 273-0016**

**PETER B. ROBB**

*General Counsel*

**ALICE B. STOCK**

*Deputy General Counsel*

**RUTH E. BURDICK**

*Acting Deputy Associate General Counsel*

**DAVID HABENSTREIT**

*Assistant General Counsel*

**National Labor Relations Board**

---

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certifies the following:

### **A. Parties and Amici**

Cadillac of Naperville, Inc. (“Naperville”), was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO (“the Union”), was the charging party before the Board. There were no intervenors or amici before the Board, and there are none before the Court.

### **B. Ruling Under Review**

The ruling under review is a Decision and Order of the Board in *Cadillac of Naperville, Inc.*, 368 NLRB No. 3 (June 12, 2019).

### **C. Related Cases**

This case has not previously been before this or any other court. Counsel is aware of a related case where, as here, a party asserts, contrary to the Board’s Casehandling Manual, that it is entitled to retain confidential witness affidavits after completing cross-examination in a Board hearing. *See Napleton 1050, Inc. v. NLRB*, D.C. Cir. Nos. 19-1025, 19-1064 (argued Dec. 2, 2019).

## **TABLE OF CONTENTS**

<b>Headings</b>	<b>Page(s)</b>
Statement of subject matter and appellate jurisdiction .....	1
Statement of the issues .....	2
Relevant statutory and regulatory provisions .....	3
Statement of the case.....	3
I. Procedural history .....	3
II. The Board’s findings of fact.....	4
A. Background; the parties’ negotiations for a successor collective- bargaining agreement .....	4
B. Laskaris says things would not be the same if mechanics went on strike; they strike and Naperville hires replacements .....	5
C. The strike ends with the parties’ agreement to return all former strikers to work; Laskaris blames the strike on Bisbikis, says he is not wanted as an employee; Laskaris also tells him to “get the fuck out,” prompting Bisbikis to call Laskaris a “stupid jack off”; Naperville discharges Bisbikis and refuses to recall five former strikers .....	7
D. Recalled mechanics return to work; Laskaris tells Towe to look for another job because he would not be at the dealership for very long; Laskaris tells the recalled mechanics they will be laid off if the dealership runs out of work due to union leafletting, says there would be stricter enforcement of company rules, and warns that filing grievances is pointless; Laskaris adds that he would eat their kidneys and spit them out if they fucked with him .....	10

## **TABLE OF CONTENTS**

<b>Headings</b>	<b>Page(s)</b>
E.    Laskaris offers to reinstate Higgins but expresses doubt about the longevity of his employment; Naperville belatedly recalls the remaining strikers.....	12
F.    After the strike ends, Naperville announces new attendance policies, rescinds established employee benefits, and restricts union access, without notifying or bargaining with the Union .....	12
III.  The Board’s conclusions and Order.....	13
Summary of argument.....	15
Standard of review .....	18
Argument.....	19
I.    The Board is entitled to summary enforcement of the uncontested portions of its Order remedying Naperville’s violations of Section 8(a)(5), (3), and (1) of the Act.....	19
II.   Substantial evidence supports the Board’s findings that Naperville violated Section 8(a)(1) of the Act by making numerous threats and coercive statements .....	21
A.   An employer violates Section 8(a)(1) of the Act by making statements that reasonably tend to interfere with, restrain, or coerce employees’ exercise of Section 7 rights.....	21
B.   President Laskaris violated Section 8(a)(1) of the Act by coercively threatening employees on five occasions .....	22
1.  President Laskaris unlawfully threatened that things would not be the same if employees went on strike .....	23

## **TABLE OF CONTENTS**

<b>Headings</b>	<b>Page(s)</b>
2. President Laskaris unlawfully threatened to discharge Towe .....	26
3. President Laskaris unlawfully threatened to lay off recalled employees.....	28
4. President Laskaris unlawfully threatened stricter rule enforcement.....	30
5. President Laskaris violated Section 8(a)(1) by expressing doubt about the longevity of Higgins' employment .....	32
C. President Laskaris violated Section 8(a)(1) by suggesting that filing grievances was futile.....	34
D. President Laskaris violated Section 8(a)(1) by telling employees he would eat their kidneys.....	36
III. Substantial evidence supports the Board's finding that Naperville violated Section 8(a)(3) and (1) of the Act by discharging Bisbikis.....	38
A. Naperville discharged Bisbikis for conduct occurring during protected union activity.....	39
B. Bisbikis did not forfeit the protection of the Act.....	40
C. Naperville's challenges to the Board's analysis are meritless.....	44
IV. Substantial evidence supports the Board's finding that Naperville violated Section 8(a)(5) and (1) of the Act by unilaterally prohibiting union access to employees.....	48
A. An employer may not change employees' terms and conditions of employment without notifying and bargaining with the union.....	48

## **TABLE OF CONTENTS**

<b>Headings</b>	<b>Page(s)</b>
B. Naperville unlawfully prohibited union access to employees .....	49
V. The administrative law judge, affirmed by the Board, properly exercised his discretion in making certain evidentiary rulings .....	51
A. To successfully challenge an evidentiary ruling, a party must show an abuse of discretion that was prejudicial .....	51
B. Naperville failed to show it was prejudiced by the ruling on witness affidavits; in any event, the judge did not abuse his discretion by denying Naperville's request to retain them .....	51
C. Naperville fails to show that the judge abused his discretion by admitting the October 6 recording into evidence .....	54
Conclusion .....	58

## TABLE OF AUTHORITIES

Cases	Page(s)
* <i>800 River Rd. Operating Co., LLC v. NLRB</i> , 846 F.3d 378 (D.C. Cir. 2017).....	51
<i>Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB</i> , 253 F.3d 19 (D.C. Cir. 2001).....	46, 47
* <i>Atl. Steel Co.</i> , 245 NLRB 814 (1979).....	16, 17, 39, 40, 41, 42, 44, 45, 46, 47
<i>Avecor, Inc. v. NLRB</i> , 931 F.2d 924 (D.C. Cir. 1991).....	21
<i>Browning-Ferris Indus. of Cal., Inc. v. NLRB</i> , 911 F.3d 1195 (D.C. Cir. 2018).....	47
<i>Bruce Packing Co. v. NLRB</i> , 795 F.3d 18 (D.C. Cir. 2015).....	18, 27
<i>Caterpillar Tractor Co.</i> , 276 NLRB 1323 (1985).....	46
<i>CC1 Ltd. P'ship v. NLRB</i> , 898 F.3d 26 (D.C. Cir. 2018).....	20
<i>Colonial Parking</i> , 363 NLRB No. 90, 2016 WL 67743 (Jan. 5, 2016) .....	24
* <i>Concepts &amp; Designs, Inc.</i> , 318 NLRB 948 (1995), <i>enforced</i> , 101 F.3d 1243 (8th Cir. 1996).....	23, 27-28, 33
<i>Corr. Corp. of Am.</i> , 347 NLRB 632 (2006).....	43, 45

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Daily News of L.A. v. NLRB</i> , 73 F.3d 406 (D.C. Cir. 1996).....	48
<i>Desert Springs Hosp. Med. Ctr.</i> , 363 NLRB No. 185, 2016 WL 2753320 (May 10, 2016) .....	45
* <i>E. Belden Corp.</i> , 239 NLRB 776 (1978), <i>enforced mem.</i> , 634 F.2d 635 (9th Cir. 1980) .....	55
* <i>Ernst Home Ctrs., Inc.</i> , 308 NLRB 848 (1992) .....	48, 49
<i>F.W. Woolworth Co.</i> , 310 NLRB 1197 (1993) .....	25
<i>Felix Indus., Inc.</i> , 339 NLRB 195 (2003), <i>enforced mem.</i> , 2004 WL 1498151 (D.C. Cir. 2004) .....	42
<i>Felix Indus., Inc. v. NLRB</i> , 251 F.3d 1051 (D.C. Cir. 2001) .....	46
<i>Foodtown Supermarkets, Inc.</i> , 268 NLRB 630 (1984) .....	46
* <i>Gen. Elec. Co. v. NLRB</i> , 117 F.3d 627 (D.C. Cir. 1997) .....	22, 29
<i>Gen. Motors LLC</i> , 368 NLRB No. 68, 2019 WL 4240696 (Sept. 5, 2019) .....	47

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## **TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>HealthBridge Mgmt., LLC</i> , 362 NLRB 310 (2015), <i>enforced mem.</i> , 672 F. App'x 1 (D.C. Cir. 2006) .....	41, 42
<i>Inova Health Sys.</i> , 360 NLRB 1223 (2014), <i>enforced</i> , 795 F.3d 68 (D.C. Cir. 2015).....	41
* <i>Kiewit Power Constructors Co.</i> , 355 NLRB 708 (2010), <i>enforced</i> , 652 F.3d 22 (D.C. Cir. 2011).....	42-43, 44-45
* <i>Kiewit Power Constructors Co. v. NLRB</i> , 652 F.3d 22 (D.C. Cir. 2011).....	18, 40, 41, 43, 45
<i>King Soopers, Inc.</i> , 364 NLRB No. 93, 2016 WL 4474606 (Aug. 24, 2016), <i>enforced in relevant part</i> , 859 F.3d 23 (D.C. Cir. 2017).....	43
<i>Laredo Packing Co.</i> , 254 NLRB 1 (1981) .....	34
<i>Litton Fin. Printing Div. v. NLRB</i> , 501 U.S. 190 (1991).....	49
<i>Long-Airdox Co.</i> , 277 NLRB 1157 (1985) .....	31
<i>Mass. Coastal Seafoods, Inc.</i> , 293 NLRB 496 (1989) .....	29

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## **TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>M.D. Miller Trucking &amp; Topsoil, Inc.</i> , 361 NLRB 1225 (2014), <i>enforced mem.</i> , 728 F. App'x 2 (D.C. Cir. 2018) .....	35
<i>Mid-Mountain Foods, Inc.</i> , 332 NLRB 229 (2000), <i>enforced</i> , 269 F.3d 1075 (D.C. Cir. 2001) .....	31
<i>Miller Indus. Towing Equip., Inc.</i> , 342 NLRB 1074 (2004) .....	31
<i>Napleton 1050, Inc. v. NLRB</i> , Nos. 19-1025, 19-1064 (D.C. Cir.) .....	53
<i>Network Dynamics Cabling, Inc.</i> , 351 NLRB 1423 (2007) .....	43-44
<i>NLRB v. Gen. Fabrications Corp.</i> , 222 F.3d 218 (6th Cir. 2000) .....	20
* <i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969) .....	22, 23, 24, 25, 29, 33
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962) .....	49
* <i>NLRB v. Local 90, Operative Plasterers &amp; Cement Masons' Int'l Ass'n</i> , 606 F.2d 1892 (7th Cir. 1979) .....	56
<i>NLRB v. S. Bay Daily Breeze</i> , 415 F.2d 360 (9th Cir. 1969) .....	56
<i>NY Rehab. Care Mgmt., LLC v. NLRB</i> , 506 F.3d 1070 (D.C. Cir. 2007) .....	52

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## **TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
* <i>Orange Cty. Publ’ns</i> , 334 NLRB 350 (2001), <i>enforced</i> , 27 F. App’x 64 (2d Cir. 2001) .....	56
<i>Ozburn-Hessey Logistics, LLC</i> , 357 NLRB 1456 (2011), <i>enforced</i> , 605 F. App’x 1 (D.C. Cir. 2015) .....	24-25
<i>Ozburn-Hessey Logistics, LLC v. NLRB</i> , 833 F.3d 210 (D.C. Cir. 2016).....	18, 19, 28, 38, 50
<i>Phoenix Glove Co.</i> , 268 NLRB 680 (1984) .....	25
<i>Pipe Realty Co.</i> , 313 NLRB 1289 (1994) .....	46
<i>Pirlott v. NLRB</i> , 522 F.3d 423 (D.C. Cir. 2008).....	19
* <i>Progressive Elec., Inc. v. NLRB</i> , 453 F.3d 538 (D.C. Cir. 2006).....	21, 22, 23, 25, 27
<i>Prudential Ins. Co.</i> , 317 NLRB 357 (1995) .....	35
<i>Reno Hilton Resorts v. NLRB</i> , 196 F.3d 1275 (D.C. Cir. 1999).....	51
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945).....	50
<i>Savers</i> , 337 NLRB 1039 (2002) .....	29

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## **TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Staffing Network Holdings, LLC</i> , 362 NLRB 67 (2015), <i>enforced</i> , 815 F.3d 296 (7th Cir. 2016) .....	43
<i>Stanford Hotel</i> , 344 NLRB 558 (2005) .....	39
* <i>Stephens Media, LLC v. NLRB</i> , 677 F.3d 1241 (D.C. Cir. 2012) .....	38, 40, 41, 55
* <i>Tasty Baking Co. v. NLRB</i> , 254 F.3d 114 (D.C. Cir. 2001) .....	21, 22, 23, 51
<i>Torrington Extend-A-Care Emps. Ass’n v. NLRB</i> , 17 F.3d 580 (2d Cir. 1994) .....	20
<i>Triple Play Sports Bar &amp; Grille</i> , 361 NLRB 308 (2014), <i>enforced</i> , 629 F. App’x 33 (2d Cir. 2015) .....	40
<i>Tube Craft, Inc.</i> , 287 NLRB 491 (1987) .....	28
<i>U.S. Marine Corp. v. NLRB</i> , 944 F.2d 1305 (7th Cir. 1991) .....	20
<i>United Aircraft Corp.</i> , 192 NLRB 382 (1971) .....	23-24
<i>United States Postal Serv.</i> , 360 NLRB 677 (2014) .....	43
<i>United States Testing Co. v. NLRB</i> , 160 F.3d 14 (D.C. Cir. 1998) .....	19

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## **TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>United States v. Stephenson</i> , 121 F. Supp. 274 (D.D.C. 1954).....	57
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	18
<i>Valmet, Inc.</i> , 367 NLRB No. 84, 2019 WL 446384 (Feb. 4, 2019).....	24
<i>Wal-Mart Stores, Inc.</i> , 339 NLRB 64 (2003).....	52, 53
<i>Wal-Mart Stores, Inc.</i> , 364 NLRB No. 118, 2016 WL 4582497 (Aug. 27, 2016).....	36, 37
<i>Wayneview Care Ctr. v. NLRB</i> , 664 F.3d 341 (D.C. Cir. 2011).....	18
<i>Weiss v. United States</i> , 308 U.S. 321 (1939).....	57
* <i>Wellstream Corp.</i> , 313 NLRB 698 (1994).....	56
<i>Wilkes-Barre Hosp. Co., LLC v. NLRB</i> , 857 F.3d 364 (D.C. Cir. 2017).....	48, 49

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## **TABLE OF AUTHORITIES**

<b>Statutes</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151, et seq.)	
Section 7 (29 U.S.C. § 157) .....	14, 21, 34, 36, 37, 38, 40
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 4, 13-17, 19-22, 30-32, 34-36, 38, 39, 44, 48-50, 54
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	3, 4, 14, 15, 16, 19, 20, 38, 39, 44
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 4, 14, 15, 17, 19, 20, 48-50
Section 8(c) (29 U.S.C. § 158(c)) .....	21, 22
Section 8(d) (29 U.S.C. § 158(d)).....	48
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(b) (29 U.S.C. § 160(b)).....	55
Section 10(e) (29 U.S.C. § 160(e)) .....	2, 18, 19, 28, 50
Section 10(f) (29 U.S.C. § 160(f)) .....	2
720 Ill. Comp. Stat. Ann. 5/14-1(d) .....	55
 <b>Regulations</b>	 <b>Page(s)</b>
29 C.F.R. § 102.118(e)(1).....	52
 <b>Miscellaneous</b>	 <b>Page(s)</b>
NLRB Casehandling Manual (Part 1) § 10394.9 (2020).....	52, 53, 54

## GLOSSARY

A.	The appendix
Br.	Naperville's opening brief
Naperville	Cadillac of Naperville, Inc.
The Act	National Labor Relations Act, 29 U.S.C. § 151, et seq.
The Board	National Labor Relations Board
The Order	<i>Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville</i> , 367 NLRB No. 6 (Sept. 28, 2018)
The Union	Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**Nos. 19-1150 & 19-1167**

---

**CADILLAC OF NAPERVILLE, INC.,**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

**ON PETITION FOR REVIEW AND  
CROSS-APPLICATION FOR ENFORCEMENT OF  
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Cadillac of Naperville, Inc.  
for review, and the cross-application of the National Labor Relations Board for

enforcement, of a Board Decision and Order issued against Naperville on June 12, 2019, and reported at 368 NLRB No. 3. (A. 49-73.)<sup>1</sup>

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended. 29 U.S.C. § 151, 160(a). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. 29 U.S.C. § 160(e) and (f). The Board's Order is final, and the petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

### **STATEMENT OF THE ISSUES**

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order remedying the Board's findings that Naperville violated the Act by failing to immediately reinstate five striking employees after their unconditional offer to return to work; and by enacting new attendance policies and discontinuing employees' benefits unilaterally and in response to their union activity.

---

<sup>1</sup> "A." references are to the appendix "Br." to Naperville's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's findings that Naperville violated Section 8(a)(1) of the Act by making numerous threats and coercive statements to employees because of their union activities.

3. Whether substantial evidence supports the Board's finding that Naperville violated Section 8(a)(3) and (1) of the Act by discharging John Bisbikis because of his union activity.

4. Whether substantial evidence supports the Board's finding that Naperville violated Section 8(a)(5) and (1) of the Act by unilaterally prohibiting union representatives' access to employees.

5. Whether the administrative law judge, affirmed by the Board, properly exercised his discretion in making certain evidentiary rulings.

## **RELEVANT STATUTORY AND REGULATORY PROVISIONS**

Relevant sections of the Act, the Board's regulations, and Illinois' eavesdropping statute, are reproduced in the Addendum.

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

After investigating a charge and amended charge filed by Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union"), the Board's General Counsel issued a

complaint, subsequently amended, alleging that Naperville committed multiple violations of Section 8(a)(5), (3), and (1) of the Act. (A. 55; A. 277-86, 293-96.)

Following a hearing, an administrative law judge found, in relevant part, that Naperville violated Section 8(a)(1) by making numerous threats and coercive statements to employees because of their union activities. (A. 64-67, 70.) The judge also found that Naperville violated Section 8(a)(3) and (1) by discharging John Bisbikis because of his union activity, and by enacting new attendance policies and discontinuing workplace benefits in response to employees' union activities. (A. 67-70.) In addition, he found that Naperville violated Section 8(a)(5) and (1) by unilaterally enacting new attendance policies, discontinuing workplace benefits, and prohibiting union representatives' access to employees, and by failing to immediately reinstate five former strikers after their unconditional offer to return to work. (A. 69-70.) On review, the Board affirmed the judge's rulings, findings, and conclusions to the extent consistent with its Decision, amended the remedy, and adopted the recommended Order with modifications. (A. 49-54.)

## **II. THE BOARD'S FINDINGS OF FACT**

### **A. Background; the Parties' Negotiations for a Successor Collective-Bargaining Agreement**

Naperville operates a dealership in Naperville, Illinois, where it sells and services new and pre-owned automobiles. (A. 49, 55; A. 277 ¶ II(a), 287 ¶ II(a).)

Frank Laskaris owns Naperville and serves as its president. (A. 55; A. 194-95, 226.) Naperville recognizes the Union as the bargaining representative of its 12 mechanics and is an employer-member of the New Car Dealer Committee, a multi-employer bargaining committee composed of 129 Chicago-area dealerships. Employer-members assign their bargaining rights to the Committee, which negotiates and administers master collective-bargaining agreements with the Union as the representative of nearly 2,000 employees. (A. 49, 55; A. 75-77, 195-96, 225.) John Bisbikis worked at Naperville for 15 years as a journeyman mechanic; for more than 10 years, he also served as a union steward. (A. 55; A. 140-41.)

With the then-current bargaining agreement set to expire on July 31, 2017, the Union and the Committee began negotiations for a successor contract in early May. (A. 49, 56; A. 77-78, 239.) The Union's bargaining team included its representatives (Sam Cicinelli and Kenneth Thomas), as well as Bisbikis. (A. 49, 56; A. 76, 141-42, 179.)

**B. Laskaris Says Things Would Not Be the Same if Mechanics Went on Strike; They Strike and Naperville Hires Replacements**

On June 29, Bisbikis approached President Laskaris in his office to discuss shop-related issues, including a new requirement that employees pay some of the cost of their uniform shirt. After rejecting Bisbikis' appeal regarding the shirts, Laskaris steered the conversation to the ongoing labor negotiations, stating that if

the mechanics decided to strike, “things wouldn’t be the same.” (A. 51, 56; A. 142-43, 162, 197-99.)

On August 1, after the parties failed to reach a successor contract, Naperville’s mechanics began striking. (A. 49, 56; A. 78-79, 142.) On August 4, Naperville told the strikers it was preparing to hire replacement mechanics and that it would notify them if they were replaced. It also required strikers to remove their tools and toolboxes, which are large pieces of equipment that had to be transported by trailer because the boxes weighed several thousand pounds when full. (A. 56; A. 82-83, 100, 115-16, 145, 250.)

Five days later, Naperville sent form letters to six of the strikers, including Bisbikis, notifying them that they had been permanently replaced and stating that they would be put on a preferential hiring list if they unconditionally offered to return to work. (A. 49-50, 56, 57 n.9; A. 87, 252-57, 268-73.) In response, the strikers repositioned themselves across from the dealership’s main entrance, blew horns, used a loudspeaker, sought to engage customers, and yelled at non-striking employees. (A. 50, 57; A. 201, 204, 208, 213-14, 228-29.)

**C. The Strike Ends with the Parties' Agreement To Return All Former Strikers to Work; Laskaris Blames the Strike on Bisbikis, Says He Is Not Wanted as an Employee; Laskaris also Tells Him To "Get the Fuck Out," Prompting Bisbikis To Call Laskaris a "Stupid Jack off"; Naperville Discharges Bisbikis and Refuses To Recall Five Former Strikers**

On September 15, the New Car Dealer Committee entered into a strike settlement agreement with the Union on behalf of dealerships, including Naperville, that had not signed separate interim agreements during the strike. The agreement, which established return-to-work procedures for strikers at all dealerships, provided that replacements would be credited with seniority but placed on "layoff status" until higher-seniority former strikers were recalled. (A. 50, 57; A. 79-81, 247-49.) The parties also entered into a successor collective-bargaining agreement that addressed seniority, layoffs, and recalls. (A. 57; A. 242, 244.) On September 17, the Union's membership ratified both agreements. (A. 50, 57; A. 84, 242.)

The next morning, the former strikers gathered across the street from the dealership to return to work. Cicinelli, Thomas, and Bisbikis proceeded to President Laskaris' office to meet with him and Vice President John Francek about the return-to-work process. (A. 50, 55, 57-58; A. 88-89, 149-50, 179-80, 226-27, 230.) Almost immediately, Laskaris said he did not want Bisbikis in the meeting. Cicinelli explained Bisbikis was a necessary participant because he was the shop steward and needed to know what was happening. Laskaris replied that he did not

care. He insisted Bisbikis was the ringleader and at fault for the strike, adding that he did not want Bisbikis as an employee. After conferring with Cicinelli, Bisbikis left the office and rejoined the former strikers outside. (A. 58; A. 90, 150, 205, 231.)

During the meeting, Cicinelli noted that the strike settlement agreement required Naperville to reinstate all former strikers, including those whom Naperville had permanently replaced. (A. 58; A. 90-91, 181, 205-07, 232.) Laskaris demurred, claiming he had not seen the agreement and had received conflicting legal advice. (A. 58 & n.15; A. 209-10.) He proposed instead to pay each striker \$1,000-\$2,000 in exchange for not returning. Cicinelli and Thomas walked across the street to relay Laskaris' offer to the former strikers, who rejected it. (A. 58; A. 91-93, 181-82, 233-34.)

When Cicinelli, Thomas, and Bisbikis returned to Laskaris' office, Laskaris again asked why Bisbikis was present. Cicinelli repeated that he was there to speak on the employees' behalf. (A. 58; A. 93-95, 152-53, 182, 186-87, 210-12, 234.) Bisbikis criticized Laskaris for his treatment of the strikers, explaining that they were personally offended by the permanent-replacement letters, and asked Laskaris if he had issued them because the mechanics did not get along with Francek. (A. 58; A. 93-96, 152, 213-15, 234.) Laskaris did not want to hear anything Bisbikis had to say. Instead, he asked Bisbikis why he wanted to return

to Naperville. Bisbikis replied that he had worked there for 15 years and considered it his home. Laskaris reiterated that he did not want any of the former strikers to return to work, especially those whom Naperville had replaced. When a disagreement arose about the number of replacements, Francek left to retrieve documentation. (A. 58; A. 153, 156, 182, 215, 236.)

Before Francek returned, Bisbikis brought up his June 29 meeting with Laskaris in which they discussed employees' workplace concerns. When Laskaris denied that the discussion occurred, Bisbikis accused him of lying. (A. 58; A. 96-97, 155-56.) Laskaris then cursed at Bisbikis, telling him to "get the fuck out before I get you the fuck out." (A. 50, 58; A. 97.) Bisbikis started to depart but called Laskaris a "stupid jack off" in Greek while standing by the office door. (A. 50, 58 & n.17; A. 156-57, 167, 187-88, 216, 258.) When Laskaris asked what he said, Bisbikis denied saying anything. Laskaris announced that he now planned to discharge Bisbikis for insubordination. (A. 50, 58 & n.17; A. 97-98, 157, 183, 216.) Later that morning, Naperville issued Bisbikis a "notice of termination for insubordination [sic] conduct and inappropriate language." The notice referenced Bisbikis' statement in Laskaris' office, claiming it was "a direct violation of [Naperville's] Standards of Conduct" and "a terminable action." (A. 50, 59; A. 258.) Prior to this incident, Bisbikis had never been disciplined. (A. 55; A. 159-60.)

In the meantime, the other union representatives resumed their discussions with Laskaris about the process for returning to work former strikers who had not received replacement letters, and the return of their toolboxes from a storage facility. (A. 58-59; A. 99-102, 188, 219-20.) Later that day, Naperville issued recall notices to 7 of the 12 former strikers, instructing them to arrive at work with their tools and toolboxes the next day, September 19. (A. 50, 59; A. 262.)

**D. Recalled Mechanics Return to Work; Laskaris Tells Towe To Look for Another Job Because He Would Not Be at the Dealership for Very Long; Laskaris Tells the Recalled Mechanics They Will Be Laid off if the Dealership Runs Out of Work Due to Union Leafletting, Says There Would Be Stricter Enforcement of Company Rules, and Warns that Filing Grievances Is Pointless; Laskaris Adds that He Would Eat Their Kidneys and Spit Them Out if They Fucked with Him**

On the morning of September 19, Cicinelli, Thomas, and the seven recalled mechanics gathered across the street from Naperville and proceeded as a group to the dealership's service area where Laskaris met them. After a back-and-forth between Cicinelli and Laskaris over employees' inability to retrieve their toolboxes from the still-closed storage facility, the latter agreed to let the mechanics bring them back that evening. (A. 59-60; A. 102-04, 117-18, 174-75, 220-23, 237-38.)

On September 20, the seven recalled mechanics returned to work. (A. 60; A. 118, 177, 218.) That morning, Laskaris pulled aside mechanic Patrick Towe and, after commenting on his picket-line conduct, stated he did not want any of the

recalled strikers at the dealership, telling Towe to look for another job because he would not be at Naperville for very long. (A. 60; A. 119-21, 224.)

At a September 25 meeting attended by the recalled mechanics, Laskaris expressed his frustration with the Union's post-strike leafletting outside the dealership. Laskaris told them it was taking money out of their pockets and warned that if the dealership ran out of work Naperville would lay them off. (A. 51, 61; A. 175-76.)

At an October 6 meeting with the recalled mechanics, Laskaris rehashed the contentious events of the preceding months and discussed his labor relations approach going forward. He advised them that they could take notes and tell the Union exactly what he said, which Towe did by surreptitiously recording his remarks. (A. 51, 62-64; A. 124-28, 178.) Laskaris then proceeded to tell employees that there would be stricter enforcement of company rules, stating that if he chose to enforce the rules as written, things would be much harder for them. Laskaris also repeatedly emphasized that he did not "give a shit about [employees filing] grievances. Grieve all you want. It doesn't matter. They can't do shit." (A. 51, 63.) He also declared he could be "the nicest guy in the world" and would even "give you a kidney," but that if "you fuck with me and my people, I'm going to eat your kidney out of your body and spit it at you." He proclaimed "[t]hat's how nasty I can be" and "they can't stop me from being a prick." (A. 51, 64.)

**E. Laskaris Offers To Reinstate Higgins but Expresses Doubt About the Longevity of His Employment; Naperville Belatedly Recalls the Remaining Strikers**

On October 27, Laskaris telephoned Brian Higgins, a mechanic whom Naperville had failed to recall on September 18, to say that he was being recalled and to ask if he was still interested in returning. (A. 64; A. 169-70, 172.)

Although Higgins responded affirmatively, Laskaris replied that he did not want him or any of the other permanently replaced employees to return, and added that if Higgins did come back it would not be long before he was gone. (A. 64; A. 173.) On November 17, Naperville belatedly recalled him and the remaining former strikers, months after they had unconditionally offered to return to work. (A. 64; A. 268-73.)

**F. After the Strike Ends, Naperville Announces New Attendance Policies, Rescinds Established Employee Benefits, and Restricts Union Access, Without Notifying or Bargaining with the Union**

Prior to the strike, Naperville had no formal attendance policy. Instead, it left attendance-related issues to the service manager's discretion. (A. 61; A. 122-23, 160-61.) In its September 18 recall notice, Naperville set forth for the first time a written attendance policy that included disciplinary measures. (A. 59; A. 262.) It announced the September 18 policy without notifying or bargaining with the Union. (A. 61; A. 110-11.) Several weeks later, Naperville issued a more

detailed version of the attendance policy, also without union notice or bargaining. (A. 61-62; A. 266.)

In the years preceding the strike, Naperville had provided unit employees with free gloves, which are required for their jobs, and free bottled water. After the strike ended, Naperville discontinued both benefits and posted signage requiring them to pay \$11.50 per box for gloves and \$7.50 per bottle for water. (A. 61; A. 129-32, 145-47, 173, 297.) Naperville rescinded the benefits without notifying or bargaining with the Union. (A. 70; A. 112-14.)

Prior to the strike, Naperville had granted the Union unrestricted access to unit employees at work, consistent with the parties' collective-bargaining agreements. (A. 60-61; A. 106-10, 184-85, 189-92, 241, 246.) Afterward, Naperville notified the Union that Cicinelli and Thomas were not allowed onsite and that the Union needed to submit requests if they wanted to access the dealership and talk with employees at work. Naperville made these changes without bargaining with the Union. (A. 60-61; A. 107, 265.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

Based on the foregoing facts, the Board (Chairman Ring and Member McFerran; Member Emanuel dissenting in part) found that Naperville violated Section 8(a)(1) by making numerous threats and coercive statements to employees because of their union activities. (A. 49 & n.2, 51-52.) In addition, the Board

unanimously found that Naperville violated Section 8(a)(3) and (1) by discharging Bisbikis because of his union activity, and by enacting new attendance policies and discontinuing workplace benefits in response to employees' union activities. (A. 49-50, 52.) The unanimous Board also found that Naperville violated Section 8(a)(5) and (1) by unilaterally enacting the new attendance policies, discontinuing the benefits, and prohibiting union representatives' access to employees. (A. 49 & n.2, 52.) Finally, in the absence of exceptions, the Board adopted the judge's finding that Naperville violated Section 8(a)(5) and (1) by failing to immediately reinstate five former strikers. (A. 49 n.2, 52-53.)

The Board's Order requires Naperville to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. (A. 52-53.) Affirmatively, the Order requires Naperville to offer Bisbikis full reinstatement to his former job or, if it no longer exists, to a substantially equivalent position, and to remove from its files any reference to his unlawful discharge, notifying him in writing of the expungement and that the discharge will not be used against him in any way. In addition, the Order requires Naperville to make Bisbikis and the belatedly reinstated former strikers whole for any loss of earnings and other benefits suffered as a result of its unlawful actions against them. (A. 52.)

The Order further requires Naperville to notify all employees that it has rescinded its unlawful changes to its policies regarding attendance and charging for gloves and drinking water. Naperville must also notify and, on request, bargain with the Union before implementing any changes to those policies or other terms and conditions of employment. Finally, Naperville must post a remedial notice.

(A. 52.)

### **SUMMARY OF ARGUMENT**

1. Before the Board and in its opening brief, Naperville failed to challenge the finding that it violated Section 8(a)(5) and (1) of the Act by failing to immediately reinstate five former strikers after they unconditionally offered to return to work. In its opening brief, Naperville also does not challenge the Board's findings that it violated Section 8(a)(5) and (1) by unilaterally enacting new attendance policies and discontinuing workplace benefits, and additionally violated Section 8(a)(3) and (1) by taking those actions because of employees' union activity. Accordingly, the Court should summarily enforce the portions of the Order remedying those violations.

2. Substantial—and undisputed or irrefutable—evidence supports the Board's finding that President Laskaris made numerous threats and coercive statements to employees in violation of Section 8(a)(1). Specifically, he unlawfully threatened to change employees' terms and conditions of employment

if they went on strike; to discharge Towe; to lay off all recalled former strikers; to enforce company rules more strictly; and to cut short Higgins' employment. He also unlawfully told employees that filing grievances was futile and that he would eat their kidneys if they fucked with him. Naperville's half-hearted challenges lack legal support and provide no basis for disturbing the Board's findings.

3. Substantial—and undisputed—evidence supports the Board's finding that Naperville violated Section 8(a)(3) and (1) by discharging Bisbikis because of his union activity. There is no dispute that he was engaged in union activity—discussing outstanding post-strike issues with management—when he called Laskaris a “stupid jack off” in Greek. Moreover, the evidence amply supports the Board's conclusion that under *Atlantic Steel Co.*, 245 NLRB 814 (1979), the name-calling did not cost him the Act's protection. As the Board found, he uttered the phrase only once in Laskaris' private office as he retreated from the room, and the utterance was unaccompanied by any threats or menacing behavior. Moreover, Laskaris provoked the name-calling by telling Bisbikis to “get the fuck out or I will get you the fuck out.”

Naperville does not challenge most of these findings. Instead, it misreads precedent by attempting to distinguish cases the Board reasonably relied on, and by relying on cases involving employees who engaged in decidedly more opprobrious conduct. Nor does it gain any ground by noting that the Board subsequently

invited briefing in another case addressing the *Atlantic Steel* analysis. That invitation does not alter extant Board law.

4. Substantial—and undisputed—evidence supports the Board’s finding that Naperville violated Section 8(a)(5) and (1) by unilaterally restricting union access to unit employees at work. It is uncontested that the parties had an established past practice of granting the Union unrestricted access, which is rooted in the collective-bargaining agreement. Naperville’s claim that it “simply barred” two representatives and created a new access procedure all but admits the violation.

5. Naperville incorrectly asserts that the Board erred in finding that the administrative law judge did not abuse his discretion by preventing its counsel from retaining witness affidavits after finishing cross-examination, and by admitting a surreptitious recording of the October 6 meeting where Laskaris made unlawful statements. Naperville does not even attempt to make the required showing that it was prejudiced by the affidavit-retention ruling. In any event, it had no “right” to retain affidavits; rather, the matter is wholly within the Board’s discretion. Further, it is settled that surreptitious recordings of employer meetings are admissible in Board proceedings even if obtained in violation of state law (a showing that Naperville fails to make). Thus, the Board properly affirmed the

judge's eminently reasonable rulings on both issues, neither of which constituted an abuse of discretion.

### STANDARD OF REVIEW

This Court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Court "accord[s] a very high degree of deference to administrative adjudications by the [Board] and reverse[s] its findings only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (internal quotation marks omitted). Thus, the Board's findings of fact are "conclusive" when supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477. The question on review, moreover, is not "whether record evidence could support the [employer's] view of the issue, but whether it supports the [Board's] ultimate decision." *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015).

The Court also applies the substantial evidence test to the Board's "application of law to the facts, and accords due deference to the reasonable

inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*.” *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Accordingly, “a decision of the NLRB will be overturned only if the Board’s factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case.” *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008) (internal quotation marks omitted).

## **ARGUMENT**

### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER REMEDYING NAPERVILLE’S VIOLATIONS OF SECTION 8(a)(5), (3), AND (1) OF THE ACT**

Relying on ample record evidence, the administrative law judge found that Naperville violated Section 8(a)(5) and (1) of the Act by failing to immediately reinstate five former strikers after they unconditionally offered to return to work. (A. 70; A. 247-49, 252-57, 268-73.) Naperville, however, did not file exceptions to that finding, and so the Board adopted it. (A. 49 n.2; A. 45-48.) Accordingly, the Court is jurisdictionally barred from addressing any challenge to the finding. *See* 29 U.S.C. § 160(e) (“[n]o objection that has not been urged before the Board . . . shall be considered by the court,” absent extraordinary circumstances); *accord Ozburn-Hessey*, 833 F.3d at 224 n.4. Indeed, Naperville has foregone any such challenge in its opening brief. (Br. 6-60.)

In addition, the Board found, based on uncontroverted evidence, that Naperville further violated Section 8(a)(5) and (1) by enacting new attendance policies and discontinuing workplace benefits without notifying and bargaining with the Union. Separately, the Board found that Naperville violated Section 8(a)(3) and (1) by taking those actions in response to employees' union activity. (A. 49 & n.2, 69-70; A. 110-14, 122-23, 129-132, 145-47, 160-61, 173, 297, 262, 266.) In its opening brief, Naperville expressly waives any challenge to these findings. (Br. 6 n.1.)

Accordingly, the Board is entitled to summary enforcement of the portions of its Order remedying the uncontested violations described above. *See CCI Ltd. P'ship v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (granting summary enforcement where party failed to challenge finding in opening brief; doing so in its reply brief was too late). The multiple uncontested violations, however, do not disappear from the case. They remain, lending their aroma to the context in which Naperville's numerous remaining unfair labor practices are considered. *See, e.g., NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000); *Torrington Extend-A-Care Emps. Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991).

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT NAPERVILLE VIOLATED SECTION 8(a)(1) OF THE ACT BY MAKING NUMEROUS THREATS AND COERCIVE STATEMENTS**

### **A. An Employer Violates Section 8(a)(1) of the Act by Making Statements that Reasonably Tend To Interfere with, Restrain, or Coerce Employees’ Exercise of Section 7 Rights**

Among the rights guaranteed by Section 7 of the Act is the right of employees “to form, join, or assist labor organizations,” and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). The test for a Section 8(a)(1) violation is whether, “considering the totality of the circumstances,” an employer’s statement or conduct “has a reasonable tendency to coerce or interfere with” the free exercise of an employee’s Section 7 rights.

*Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (quoting *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001)). Proof of actual coercion is unnecessary. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991).

Balanced against an employee’s right to be free from interference, restraint and coercion, is an employer’s free-speech right, codified in Section 8(c) of the Act, 29 U.S.C. § 158(c). As the Supreme Court explained, “an employer is free to

communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (quoting Section 8(c)). Thus, while an employer “may even make a prediction as to the precise effects he believes unionization will have on his company,” that “prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control.” *Id.*

As shown below, substantial—and almost entirely undisputed—evidence supports the Board’s findings that Naperville committed seven separate violations of Section 8(a)(1) when President Laskaris made various threats and other coercive statements to employees before and after they exercised their statutory right to strike.

**B. President Laskaris Violated Section 8(a)(1) of the Act by Coercively Threatening Employees on Five Occasions**

An employer violates Section 8(a)(1) by coercively threatening employees with job losses, layoffs, stricter enforcement of company rules, and other unspecified reprisals. *See, e.g., Progressive Elec.*, 453 F.3d at 544 (job loss); *Tasty Baking*, 254 F.3d at 124-25 (stricter enforcement, unspecified reprisals); *Gen. Elec. Co. v. NLRB*, 117 F.3d 627, 635 (D.C. Cir. 1997) (layoffs). The Board assesses the employer’s statements based on whether employees would “reasonably perceive”

them as threats. *Progressive Elec.*, 453 F.3d at 544. A coercive threat may, therefore, be implicit or explicit. *Tasty Baking*, 254 F.3d at 124-25; *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995), *enforced*, 101 F.3d 1243 (8th Cir. 1996). In applying this standard, the Board considers “the economic dependence of employees on their employer, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *Gissel*, 395 U.S. at 617.

**1. President Laskaris unlawfully threatened that things would not be the same if employees went on strike**

Substantial—and undisputed (*see* Br. 34-36)—evidence supports the Board’s finding that on June 29, during a meeting with union steward Bisbikis about workplace concerns, Laskaris unlawfully threatened that if employees went on strike, “things wouldn’t be the same,” implicitly suggesting that their terms and conditions of employment would get worse, not better. *See* pp. 5-6. Quoting the judge’s decision, the Board agreed with his finding that Laskaris’ statement was “unlawful as it did not ‘communicate any objective facts or predictions as to the effects of a potential strike,’” and therefore “cannot be viewed as anything but a threat that a strike would produce only negative consequences for the [u]nit.” (A. 51 (quoting A. 65).)

As the Board found, the timing of Laskaris’ threat was “significant,” as he made it just over a month before the strike. (A. 65 (citing *United Aircraft Corp.*,

192 NLRB 382, 383 (1971) (considering statement’s timing)).<sup>2</sup> At this fraught moment, when the law unmistakably requires an employer to choose its words carefully, Laskaris instead issued a thinly veiled threat that things would be worse for employees if they exercised their right to strike. Laskaris’ remark, in short, failed to abide by the strictures of *Gissel*, 395 U.S. at 618.

As the Board aptly noted (A. 51), Laskaris’ threat is similar to those found unlawful in cases such as *Valmet, Inc.*, 367 NLRB No. 84, 2019 WL 446384, at \*1 & n.7 (Feb. 4, 2019) (manager threatened unspecified reprisals by telling employee they could no longer have “one-on-one” conversations if there were a union, and by remarking, “Remember that I hired you”),<sup>3</sup> and *Colonial Parking*, 363 NLRB No. 90, slip op. at 7, 2016 WL 67743 (Jan. 5, 2016) (after recounting prior close and good relationship with pro-union employee, supervisor unlawfully threatened unspecified reprisals by warning that the good rapport was over). Indeed, ample additional precedent supports the Board’s finding. *See, e.g., Ozburn-Hessey*

---

<sup>2</sup> The judge correctly cited *United Aircraft* for timing. Accordingly, Naperville misses the mark in asserting that he “wrongly paralleled” Laskaris’ implicit threat to the “clear [and] unambiguous” threat there. (Br. 35-36.)

<sup>3</sup> Naperville errs in claiming that *Valmet* is “non-analogous” because it purportedly involved a discharge threat. (Br. 36.) Although the judge there recommended finding a threat of discharge, the Board found only a threat of unspecified reprisals. Thus, contrary to Naperville’s suggestion, the Board did not rely on an affidavit claiming that the manager told the employee he had hired him and could fire him. *See Valmet*, 2019 WL 446384, at \*1 & n.7.

*Logistics, LLC*, 357 NLRB 1456, 1490 (2011) (manager’s statement there would be “repercussions” if anyone found out he had asked employee about her pro-union sympathies constituted threat of unspecified reprisals), *enforced*, 605 F. App’x 1 (D.C. Cir. 2015); *F.W. Woolworth Co.*, 310 NLRB 1197, 1200, 1203 (1993) (after union raised employees’ scheduling complaints in bargaining, personnel director warned “[i]f they think that I’m a bitch now, wait.”).

Naperville’s challenges to the Board’s finding are without merit. Although it characterizes Laskaris’ statement as “vague, at best” (Br. 36), it does not suggest that he meant things would improve after a strike. Instead, as the Board inferred from the totality of the circumstances, Laskaris was insinuating things would be *worse* for employees.<sup>4</sup> *See Gissel*, 395 U.S. at 617 (economically dependent employees have a “necessary tendency” to pick up on their employer’s insinuations). As shown, the Board’s inference is reasonable and consistent with precedent, and Naperville has not established that the Court must reject it. *See Progressive Elec.*, 453 F.3d at 545 (court will not reject Board’s reasonable inferences even if other reasonable inferences may be drawn).

---

<sup>4</sup> Laskaris’ statement is thus distinguishable from the supervisor’s remark that employees would be “messing up” if they voted for a union, which the Board found too vague and ambiguous in *Phoenix Glove Co.*, 268 NLRB 680, 680 n.3 (1984), a case cited by Naperville (Br. 36).

Finally, while not necessary to find the violation, the Board emphasized that Laskaris' statement was "not an isolated occurrence" and was followed by multiple violations, "all committed by Laskaris." (A. 51.) That context provides further support for the Board's finding that employees reasonably would perceive Laskaris' remark "as threatening—a foreshadowing of worse to come." (A. 51.) Indeed, as shown (pp. 26-37), Laskaris upped the ante by proceeding to commit a series of even more egregious violations.

## **2. President Laskaris unlawfully threatened to discharge Towe**

Substantial—and undisputed (*see* Br. 48-50)—evidence also supports the Board's finding that Laskaris unlawfully threatened Towe with discharge. As shown (pp. 10-11), on September 20, he questioned Towe, a recalled striker, about ostensible picket line misconduct, saying he hoped Towe would refrain from such conduct.<sup>5</sup> Laskaris then changed the conversation, declaring that he did not want any of the recalled mechanics—including Towe—at the dealership. The exchange

---

<sup>5</sup> Laskaris played a video of Towe carrying a sign and slowly walking on the center striped line of the street in front of the dealership's driveway. A customer taking a test drive drove slowly behind Towe as he walked across the parking lot entrance. The customer accelerated when Towe was nearly out of the way but he pirouetted and walked back toward the vehicle, causing the customer to brake hard. (A. 60; A. 119-21.)

“culminat[ed] with the dire prediction by Laskaris that Towe would not be at [Naperville] very long and [he] should find another job.” (A. 65; A. 120-21.)

As the Board aptly found, the conversation’s “overreaching theme” was not Towe’s picket line “shenanigans on a particular day, but rather, Laskaris’ disapproval of Towe’s overall participation in the strike,” unquestionably protected activity. (A. 65.) Notably, by the time Laskaris threatened Towe, the conversation had moved from his ostensible misbehavior to Laskaris’ explicit displeasure over Towe and other former strikers returning to work. Although Naperville maintains that Laskaris’ remark pertained only to Towe’s alleged misconduct (Br. 49), the Board disagreed and found, as a factual matter, that it referred to Towe’s overall protected activity. The Board’s finding is reasonable and supported by the evidence, and Naperville has not established that it must be rejected. *See Bruce Packing*, 795 F.3d at 22; *Progressive Elec.*, 453 F.3d at 545.

Based on the totality of the circumstances, and consistent with court-approved precedent that a threat need not be expressly stated, the Board therefore reasonably found that “Laskaris’ statement of doubt as to Towe’s continued employment was a threat of discharge in response to protected union activity.” (A. 65 (citing cases).) *See, e.g., Concepts & Designs*, 318 NLRB at 954-55 (company president threatened employee with discharge by remarking it would “sure be nice”

to receive a paycheck each week and he was certain the employee's daughter would like to know there would be money for food and clothes).

Naperville gains no ground by asserting that the Board “failed to apply the proper legal standard” (Br. 50) because Towe’s blocking of a vehicle on the picket line purportedly “caused him to lose the protection of the Act” (Br. 49). Because Naperville failed to raise that claim before the Board (A. 45-48), the Court lacks jurisdiction to consider it. *See* 29 U.S.C. § 160(e); *accord Ozburn-Hessey*, 833 F.3d at 224 n.4. In any event, this case does not involve whether Towe forfeited a right to reinstatement based on alleged misconduct in the course of otherwise protected activity. Accordingly, the loss-of-protection cases cited by Naperville are inapposite.<sup>6</sup>

### **3. President Laskaris unlawfully threatened to lay off recalled employees**

Substantial—and undisputed (*see* Br. 52-53)—evidence supports the Board’s finding that Laskaris unlawfully threatened to lay off all the former strikers whom Naperville had recalled. As shown (p. 11), during a September 25 meeting attended solely by the recalled mechanics, he criticized the ongoing union

---

<sup>6</sup> Contrary to Naperville’s selective quotation, *Tube Craft, Inc.*, 287 NLRB 491 (1987), does not hold that blocking a vehicle “is, per se, misconduct.” (Br. 49.) Rather, it states: “Further, regardless of whether blocking access is, per se, misconduct which forfeits the right of reinstatement, the conduct here amounted to such coercion . . . .” *Id.* at 492-93.

leafletting, asserting that it was taking money out of their pockets, and warning that he would lay all of them off if the dealership ran out of work. Applying *Gissel*, 395 U.S. at 618-19, the Board reasonably concluded that Laskaris' statement was "an unlawful threat of retaliation in response to protected activity," and not "a lawful, fact-based prediction of economic consequences beyond an employer's control." (A. 65.) *Accord Gen. Elec.*, 117 F.3d at 635 (employer's handbills unlawfully threatened layoffs because they failed to address objective circumstances beyond its control).

Significantly, as the Board found, Naperville presented no evidence that the union leafletting had caused such substantial economic harm as to justify a layoff of so many mechanics. (A. 65 (citing cases).) *Compare Mass. Coastal Seafoods, Inc.*, 293 NLRB 496, 496, 510-12 (1989) (statements about mass employee layoff by plant manager and company president were unlawful threats, not lawful predictions, when not based on objective facts), *with Savers*, 337 NLRB 1039, 1039 (2002) (supervisor's prediction of potential mass layoff lawful where company was not profitable and statement was carefully phrased and based on objective fact).

The coerciveness of Laskaris' statement is further exemplified by the fact that he "singled out the recalled strikers, rather than employees in general, as those who would suffer the impact of any economic consequences" allegedly created by

the union leafletting, thereby “targeting employees who engaged in protected activity.” (A. 51.) Naperville’s attempt to explain away Laskaris’ targeting of the former strikers falls short. (Br. 53.) After all, if the leafletting would drive away customers and create such a dire lack of work as to necessitate laying off all mechanics, as Laskaris claimed, that would impact employees outside of the unit. Yet, Laskaris made no mention of those non-unit employees. Instead, he limited his layoff threat to those who had recently engaged in union activity. In these circumstances, the Board reasonably found that Laskaris’ statement tended to coerce the former strikers.

Laskaris could have expressed his views about the dealership’s alleged economic condition without threatening layoffs. As the Board noted, “[i]nstead, he took the opportunity to once again cast union activity as inimical to unit members’ employment security in violation of Section 8(a)(1).” (A. 65.) Accordingly, the Board reasonably found that Laskaris’ statement constituted an unlawful threat to lay off all recalled mechanics.

#### **4. President Laskaris unlawfully threatened stricter rule enforcement**

Substantial, irrefutable evidence supports the Board’s finding that Laskaris unlawfully threatened stricter enforcement of company rules. As the audio recording of the October 6 meeting shows, Laskaris told the recalled strikers that if he chose to enforce the rules as written, then things would be much harder for

them. (A. 65.) Specifically, he told them to read their “little blue book” (which established workplace rules), then warned them that if he “follow[ed] that book” their “life . . . will get harder.” (A. 63, 66.)

Under established Board law an employer violates Section 8(a)(1) by threatening to more strictly enforce rules because of employees’ protected activity. *See, e.g., Miller Indus. Towing Equip., Inc.*, 342 NLRB 1074, 1074, 1079-80, 1084 (2004) (company officials threatened employees with stricter enforcement of plant rules governing meals and breaktimes); *Mid-Mountain Foods, Inc.*, 332 NLRB 229, 237-38 (2000) (operations director threatened that company would draft strict work rules, which would be “followed to the letter”), *enforced*, 269 F.3d 1075 (D.C. Cir. 2001); *Long-Airdox Co.*, 277 NLRB 1157, 1157, 1159, 1164-66 (1985) (superintendent threatened employees with stricter enforcement of plant rules for those not “putting out 100 percent”).

Laskaris’ statement, the Board reasonably concluded, “falls squarely in the *Long-Airdox Co.* line of cases as an unabashed threat of greater enforcement in response to union activity.” (A. 66.) Thus, the “crux of the meeting was that there would be negative consequences for engaging in union activities.” (A. 66.) Moreover, Laskaris’ threat of stricter rule enforcement was “clearly motivated by general animus” toward the mechanics’ union activity. (A. 66.) Accordingly, the

Board reasonably found that Laskaris violated Section 8(a)(1) of the Act by threatening stricter enforcement of company rules in response to that activity.

Unable to refute what Laskaris admittedly said, and not disputing that he said it in response to employees' union activity, Naperville retreats to the curious defense that his words fell short of a threat because he used the conditional tense. Instead of saying he "will" or "is going to" enforce rules more strictly, he "state[d] that if he were to do so, it would be harder on the employees." (Br. 57.) In pressing that grammatical argument, Naperville all but admits that Laskaris' statement constituted a threat under the precedent cited by the Board, none of which it addresses.

**5. President Laskaris violated Section 8(a)(1) by expressing doubt about the longevity of Higgins' employment**

Substantial—and undisputed (*see* Br. 58)—evidence also supports the Board's finding that President Laskaris again violated Section 8(a)(1) by telling Higgins, during an October 27 telephone call ostensibly about his recall, that he did not want him or any of the permanently replaced employees to return to work, and by warning him that if he did return it would not be long before he was gone. Laskaris, in fact, went so far as to "personally guarantee" that outcome. (A. 173.)

As the Board reasoned, Laskaris' statements "were overtly coercive in trying to convince Higgins that returning to [Naperville] would not be in his best interest," despite his right to do so. (A. 67.) Higgins, it must be recalled, was one

of the five strikers whom Naperville had permanently replaced during the strike and then unlawfully refused to reinstate despite their unconditional offer to return to work. (A. 56, 64, 70.) *See* p. 19 (addressing this uncontested violation). Accordingly, under settled law, Laskaris’ “expression of doubt as to Higgins’ longevity” if he returned to work was unlawful. (A. 67 (citing *Concepts & Designs*, 318 NLRB at 954).)

Contrary to Naperville’s claim (Br. 59-60), the Board appropriately cited *Concepts & Designs* in finding the violation because a statement need not explicitly articulate an unlawful outcome to be coercive. *See* pp. 22-23. Both here and in that case, employers sent a thinly veiled message that employees’ employment longevity was at risk because of their protected activities. *See Concepts & Designs*, 318 NLRB at 954.

Seeking to justify Laskaris’ statement under *Gissel*, Naperville also asserts that he had merely “questioned Higgins’ commitment to working” at Naperville and was simply making a “prediction that Higgins would not stay on at [the dealership] long after his reinstatement based on his belief that Higgins and the other technicians were not committed to working” there. (Br. 59-60.) Naperville, however, fabricates these claims from whole cloth. It provides no evidentiary support for its assertions because there is none. Indeed, Laskaris never testified about his conversation with Higgins, let alone about his purported “belief” and

“prediction” that Higgins was not committed to working at Naperville—a prediction at odds with Higgins’s affirmative request for reinstatement. (A. 64 n.36.)

**C. President Laskaris Violated Section 8(a)(1) by Suggesting that Filing Grievances Was Futile**

Substantial, indeed irrefutable, evidence supports the Board’s finding that President Laskaris unlawfully suggested to employees that it would be futile to file grievances. As the audio recording of his October 6 meeting with employees unequivocally shows, “Laskaris made his views regarding the futility of filing grievances and the low merit of past grievances abundantly clear.” (A. 66.) Regarding the former, Laskaris made declarations such as “I don’t give a shit about grievances. Grieve all you want. It doesn’t matter. They can’t do shit,” and “I’m here to tell you I don’t care, I don’t care on what you grieve, I don’t care how much you complain, they’re not going to tell me what to do.” (A. 66.) Regarding the latter, Laskaris admonished employees that they “look stupid” saying their employer does not give them “free water” and they should “[b]e a man, grieve something important, like wages.” (A. 66.)

“It is settled that the filing and prosecution of employee grievances is a fundamental, day-to-day part of collective bargaining and is protected by Section 7.” *Laredo Packing Co.*, 254 NLRB 1, 2 (1981) (internal quotation marks and citation omitted). Where, as here, an employer “conveyed the impression that the

contractual grievance procedure was futile” to employees, the Board finds a violation of Section 8(a)(1). *See, e.g., M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB 1225, 1225, 1230 (2014) (company president told employee “[g]o file a grievance. You’ll get nowhere.”), *enforced mem.*, 728 F. App’x 2 (D.C. Cir. 2018); *Prudential Ins. Co.*, 317 NLRB 357, 357 (1995) (general manager told employee that filing a grievance would “lead to a bad situation” and “it didn’t matter what happened during the grievance procedure”).

As the Board aptly noted, Laskaris told employees “in unequivocal fashion” that “he had no patience for past grievances, nor would he entertain any grievances that did not comport with his idea of a ‘real grievance.’” (A. 66.) Thus, for instance, his unambiguous declarations, “I don’t care on what you grieve . . . *they’re not going to tell me what to do*” and “Grieve all you want. *It doesn’t matter. They can’t do shit.*” (A. 66 (emphasis added).) Given Laskaris’ indisputable statements plainly telling employees that filing grievances was futile, the Board reasonably found, consistent with precedent, that his “comments crossed the line of protected employer speech” and coerced employees in violation of Section 8(a)(1). (A. 66.)

Beyond simply asserting that Laskaris’ I-don’t-care statement was “too vague,” Naperville’s half-hearted defense fails to grapple with any of his actual words—essentially asking the Court to blink away the evidence—and ignores

relevant case law. (Br. 57.) Having failed to undermine the factual or legal basis for the Board’s finding, Naperville presents no reason for the Court to reject it.

**D. President Laskaris Violated Section 8(a)(1) by Telling Employees He Would Eat Their Kidneys**

Substantial—and irrefutable—evidence supports the Board’s finding that Laskaris, again responding to employees’ union activity, unlawfully coerced them by saying he would eat their kidneys. Thus, the audio recording of the October 6 meeting demonstrates that “during a heated speech aimed at returning strikers and other employees” in which he committed several Section 8(a)(1) violations, Laskaris “ratcheted the impact of his coercive remarks with anatomically colorful” decrees by telling them that if they “fuck with me and my people,” he was “going to eat your kidney out of your body and spit it at you,” because “[t]hat’s how nasty I can be,” and “they can’t stop me from being a prick.” (A. 51, 64.)

When an employer expresses hostility in response to employees’ protected activity, the Board can find a violation of the Act regardless of whether the remark constitutes a threat to cause actual bodily harm. *See, e.g., Wal-Mart Stores, Inc.*, 364 NLRB No. 118, 2016 WL 4582497, at \*1 n.6 (Aug. 27, 2016). Citing this precedent, the Board found that given the circumstances—“a 40-minute rant filled with multiple unlawful statements”—Laskaris’ statement “would reasonably tend to coerce employees in the exercise of their Section 7 rights.” (A. 52.) In particular, “it was not unreasonable for the employees to be shocked by Laskaris’

comments,” which were “not made in jest.” (A. 67.) To the contrary, his comments were “an act of verbal intimidation that conveyed to the employees in attendance that union activities were not to be repeated.” (A. 67.) Naperville itself aptly describes Laskaris as “ranting.” (Br. 57.)

The Board appropriately relied on *Wal-Mart* in finding coercion here. In that case, a supervisor stated, during an angry outburst at returning strikers, that if it were up to him, he would “shoot the union.” *Wal-Mart*, 2016 WL 4582497, at \*1. The Board found the employees would be “understandably shocked” by the supervisor’s comments and hostility, which would have reasonably tended to coerce them in the exercise of Section 7 rights, even if they did not interpret the supervisor’s statement as an actual threat of shooting. *Id.* at \*1 n.6. Similarly, Laskaris’ remarks would have reasonably tended to coerce employees regardless of whether his statements were taken literally as an actual threat of cannibalism.

Naperville’s passing challenge to the Board’s finding is wholly unpersuasive. Given what Laskaris indisputably said throughout his tirade, Naperville strains credibility in arguing “he was simply expressing the fact that he would not allow his employees to be harassed at work.” (Br. 57.) Likewise, there is no merit to Naperville’s assertion that the Board took his statements “out of context.” (Br. 57.) As shown, the Board specifically considered the totality of the circumstances in finding that his statements were coercive.

### **III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT NAPERVILLE VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING BISBIKIS**

To protect employees’ Section 7 right “to form, join, or assist labor organizations,” 29 U.S.C. § 157, Section 8(a)(3) of the Act prohibits employers from discriminating “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). Unless an employee loses the protection of the Act by engaging in sufficiently egregious conduct, an employer violates Section 8(a)(3) and (1) by discharging him for engaging in union or protected concerted activity.<sup>7</sup> *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1251-53 (D.C. Cir. 2012).

As shown (pp. 7-9), during the September 18 meeting about the former strikers returning to work and other employment-related matters, Laskaris hurled profanity at Bisbikis, ordering him to “get the fuck out before I get you the fuck out.” Provoked, Bisbikis responded by calling Laskaris a “stupid jack off” in Greek as he left the room. As discussed below, Bisbikis, a union steward, was undisputedly engaged in union activity when he used that Greek epithet, and Naperville discharged him for using that expression. Moreover, under the analysis

---

<sup>7</sup> A violation of Section 8(a)(3) produces a “derivative[]” violation of Section 8(a)(1). *Ozburn-Hessey*, 833 F.3d at 217.

set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), this single incident of name-calling was not so egregious as to cost Bisbikis the Act's protection. Accordingly, the Board reasonably found that Naperville violated Section 8(a)(3) and (1) by discharging Bisbikis.

**A. Naperville Discharged Bisbikis for Conduct Occurring During Protected Union Activity**

The record fully supports—and Naperville does not contest (*see* Br. 37-48)—the Board's finding that Bisbikis was engaged in protected union activity at the time of the name-calling incident. (A. 50 & n.5, 67.) As shown (pp. 7-9), Bisbikis, the long-serving union steward, participated in the September 18 meeting between Naperville's management and union representatives where the parties discussed a return-to-work process for the former strikers, as well as unresolved issues concerning the permanently replaced strikers and unit employees' grievances.

Because there is no dispute that Naperville discharged Bisbikis for conduct that was part of the *res gestae* of his protected union activity, the only remaining question for the Board was whether his conduct during the meeting was sufficiently egregious to cause him to lose the Act's protection. *See Stanford Hotel*, 344 NLRB 558, 558 (2005) ("When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of

the Act.”). *Accord Kiewit Power*, 652 F.3d at 28-29. As shown below, the Board reasonably found that he did not.

### **B. Bisbikis Did Not Forfeit the Protection of the Act**

It is well established that an employee’s right to engage in Section 7 activity “may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to maintain order and respect.” *Kiewit Power*, 652 F.3d at 26. Consequently, an employee engaged in protected concerted or union activity loses the Act’s protection only if his conduct during that activity is “so egregious as to be indefensible.” *Stephens Media*, 677 F.3d at 1253. In determining whether conduct satisfies that standard, the Board weighs the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was provoked in any way by an employer’s unfair labor practice. *Atl. Steel*, 245 NLRB at 816; *accord Stephens Media*, 677 F.3d at 1253 (applying *Atlantic Steel*).

The Board’s “multifactor framework enables [it] to balance employee rights with the employer’s interest in maintaining order at its workplace.” *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311 (2014), *enforced*, 629 F. App’x 33 (2d Cir. 2015). The Court will not disturb the Board’s determination of whether an employee retains the Act’s protection unless it is arbitrary, capricious, or

unsupported by substantial evidence. *Stephens Media*, 677 F.3d at 1253; *Kiewit Power*, 652 F.3d at 27.

Substantial—and undisputed (*see* Br. 37-48)—evidence supports the Board’s finding that “all four *Atlantic Steel* factors weigh in favor of protection.” (A. 50.) As to the location, the name-calling occurred in Laskaris’ private office and was not witnessed by other employees. (A. 50, 67.) Where disputed conduct occurs in a private setting and there is no disruption to work or employee discipline, the Board, with judicial approval, regularly finds that the first *Atlantic Steel* factor weighs in favor of protection. *See, e.g., HealthBridge Mgmt., LLC*, 362 NLRB 310, 310 (2015) (location weighed “strongly” in favor of protection where incident occurred administrator’s office and without evidence it was overheard by others or caused a disruption), *enforced mem.*, 672 F. App’x 1 (D.C. Cir. 2006); *Inova Health Sys.*, 360 NLRB 1223, 1229, 1248 (2014) (incident occurred in non-work area, a hallway outside of administrative offices, and without disruption), *enforced*, 795 F.3d 68 (D.C. Cir. 2015). Naperville does not dispute that this factor weighs in favor of protection. (Br. 37-48.)

Next, it is undisputed that the subject matter of the discussion concerned protected activity—namely, Bisbikis’ discussion with management about a return-to-work process for the former strikers, the status of permanently replaced strikers (which included himself), and other unit employees’ grievances. (A. 50.) Where,

as here, the incident occurs when the employee is raising union or work-related concerns, this *Atlantic Steel* factor weighs “strongly” in favor of protection.

*HealthBridge*, 362 NLRB at 310, 315 (union delegate was raising employees’ concerns about recent disciplinary actions at time of disputed conduct); *see also Felix Indus., Inc.*, 339 NLRB 195, 196 (2003) (finding it “very significant” in favor of protection that employee was engaged in protected activity—asserting his contractual rights—when he made disputed outburst), *enforced mem.*, 2004 WL 1498151 (D.C. Cir. 2004). Naperville does not dispute that this factor also weighs in favor of protection. (*See Br. 37-48.*)

As to the nature of the outburst, the Board aptly found that it “was brief—a single name-calling incident—and not a sustained course of action.” (A. 50.) It was, moreover, “not accompanied by any threats or menacing behavior.” (A. 50.) Indeed, Bisbikis uttered the pejorative expression in Greek as he exited the room at Laskaris’ direction. Moreover, Laskaris, who habitually resorted to profanity in the workplace, precipitated the name-calling when he ordered Bisbikis to “get the fuck out before I get you the fuck out.” (A. 50, 58; A. 97.) Where the offending conduct is finite, unaccompanied by other misconduct, or occurred in the context of other workplace profanity—considerations all present here—the Board, with court approval, regularly finds that the third *Atlantic Steel* factor weighs in favor of continued protection. *See, e.g., Kiewit Power Constructors Co.*, 355 NLRB 708,

710 (2010) (employees’ outbursts were “single, brief, and spontaneous reactions”), *enforced*, 652 F.3d 22 (D.C. Cir. 2011); *Staffing Network Holdings, LLC*, 362 NLRB 67, 67 n.1, 75 (2015) (employee was neither hostile nor made threats or raised her voice), *enforced*, 815 F.3d 296 (7th Cir. 2016); *Corr. Corp. of Am.*, 347 NLRB 632, 636 (2006) (profanity was common among supervisors and employees and was used in same room where employee uttered profanity).

Finally, as noted above, the Board reasonably found that “Laskaris provoked Bisbikis when he denied Bisbikis’ account of an earlier conversation the two of them had engaged in about terms and conditions of employment, used profanity while dismissing Bisbikis from the meeting, and threatened to remove Bisbikis by force.” (A. 50.) *See* p. 9. Although these uncontested facts were not alleged to constitute a separate unfair labor practice, the Board frequently considers such evidence in finding that the fourth factor weighs in favor of protection. *See, e.g., King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 1, 3, 30, 2016 WL 4474606 (Aug. 24, 2016) (factor weighed in favor of protection although store manager’s conduct—continued misrepresentation of employee’s prior actions—not alleged as unfair labor practice), *enforced in relevant part*, 859 F.3d 23 (D.C. Cir. 2017); *United States Postal Serv.*, 360 NLRB 677, 684 (2014) (employer’s provoking conduct—flatly refusing to discuss grievances with union steward and ordering him to return to work—not explicitly alleged as unfair labor practice); *Network*

*Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007) (operations director provoked employee by asserting that he could not keep breaking the law by informing the union where the employer was going next).<sup>8</sup> Naperville does not appear to dispute that Laskaris provoked Bisbikis. (*See* Br. 43.)

Accordingly, based on substantial evidence, and consistent with precedent, the Board reasonably determined that all four *Atlantic Steel* factors weighed in favor of protection, and thus found Naperville violated Section 8(a)(3) and (1) by discharging Bisbikis.

### **C. Naperville’s Challenges to the Board’s Analysis Are Meritless**

Attempting to throw a monkey wrench into the Board’s well-reasoned *Atlantic Steel* analysis, Naperville raises several meritless claims. First, it asserts that in evaluating the third *Atlantic Steel* factor (the nature of the outburst), the Board erred by citing cases such as *Kiewit*, which purportedly has “[n]o [a]pplication [h]ere.” (Br. 38-39.) To the contrary, *Kiewit* is not rendered inapplicable just because an issue there was whether the employees’ remarks—telling a supervisor that things could “get ugly” and he “better bring [his] boxing gloves”—constituted actual physical threats beyond the Act’s protection. *See* 355

---

<sup>8</sup> The Board relied on *Network Dynamics* in addressing the provocation factor, not the nature-of-the-outburst factor. Accordingly, Naperville misses the mark by claiming that the Board erred in comparing Bisbikis’ name-calling to the conduct of the employee in that case. (Br. 43.)

NLRB at 710. Even under those very different facts, the Board found, and this Court agreed, that the employees did not forfeit the Act’s protection. *See id.*; *Kiewit Power*, 652 F.3d at 28-29. In finding that the third factor weighed in favor of protection, the Board, with this Court’s assent, emphasized that the employees’ remarks were “single, brief, and spontaneous reactions,” *Kiewit*, 355 NLRB at 710, a consideration the Board properly relied on here and in other cases examining non-physically threatening conduct. *See, e.g., Desert Springs Hosp. Med. Ctr.*, 363 NLRB No. 185, slip op. at 14, 2016 WL 2753320 (May 10, 2016) (citing *Kiewit* for this point in context of profanity that was not physically threatening).

Naperville fares no better by arguing that the Board erred in relying on *Staffing Network* and *Correction Corp.* (cases where the Board also found no loss of protection) because their facts are not identical to those here. (Br. 39-42.) Although the *Atlantic Steel* analysis is by nature fact-specific, that does not bar the Board from considering how a factor weighs under analogous circumstances in prior cases. Thus, as the Board aptly noted, although Bisbikis used an epithet, like the employee in *Staffing Network* he did not raise his voice, utter any threats, or engage in intimidating behavior. Moreover, similar to *Correction Corp.*, here the name-calling occurred against a backdrop of workplace profanity—most notably from Laskaris, who unabashedly told Bisbikis to “get the fuck out before I get you the fuck out,” provoking Bisbikis’ Greek retort.

Next, there is no merit to Naperville’s claim that the Board arbitrarily departed from precedent by ignoring prior decisions where employees lost the Act’s protection. (Br. 43-45.) As even a cursory review reveals, the employees in those cases engaged in decidedly more opprobrious conduct than Bisbikis and under circumstances implicating other *Atlantic Steel* factors. *See Pipe Realty Co.*, 313 NLRB 1289-90 (1994) (employee directed repeated profanity toward supervisor, which was overheard by others, and was insubordinate); *Caterpillar Tractor Co.*, 276 NLRB 1323, 1326 (1985) (employee’s epithet-laden, profanity-filled and graphic cartoon of supervisor was malicious and defamatory, and disseminated throughout plant); *Foodtown Supermarkets, Inc.*, 268 NLRB 630, 631 (1984) (employee twice called company president a “son of a bitch,” and was overheard by assistant manager).

Naperville also errs in relying (Br. 46) on *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051, 1055-56 (D.C. Cir. 2001), which involved an employee who engaged in plainly more egregious misconduct than Bisbikis by repeatedly calling his supervisor a “f-king kid,” and not in response to any supervisory profanity. On those very different facts, the Court remanded the case to the Board for re-examination and re-balancing. *Id.* Naperville gains no more ground by citing (Br. 46-47) *Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), which involved an entirely different issue—the facial validity

of workplace rule prohibiting abusive and threatening language. *See id.* at 25-28. Indeed, Naperville's professed concern (Br. 47) with maintaining a workplace free of abusive language rings hollow, given its president's indisputable propensity for such diatribes.

Finally, there is no merit to Naperville's claim (Br. 45-46) that the Board's decision "is even more arbitrary" given the Board's Notice and Invitation to File Briefs in *General Motors LLC*, 368 NLRB No. 68, 2019 WL 4240696 (Sept. 5, 2019). The Notice seeks public input and invites briefs on whether the Board should adhere to, modify, or overrule the standards applied in cases such as *Atlantic Steel* for determining whether employees' profane outbursts and offensive statements of a racial or sexual nature lose the Act's protection. *Id.* at \*2-3. The Board's intention, however, to revisit an area of law does not change extant Board law. *See, e.g., Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1208 (D.C. Cir. 2018) (addressing merits of decision applying then-current joint-employer standard notwithstanding Board's notice of proposed rulemaking on same issue). Thus, the Board's issuance of the Notice does not affect the current appeal, and Naperville offers no support to the contrary.

**IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT NAPERVILLE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY PROHIBITING UNION ACCESS TO EMPLOYEES**

**A. An Employer May Not Change Employees’ Terms and Conditions of Employment Without Notifying and Bargaining with the Union**

Section 8(a)(5) of the Act requires an employer to bargain with its employees’ collective-bargaining representative over mandatory subjects. 29 U.S.C. § 158(a)(5). Section 8(d), in turn, defines those mandatory subjects, setting forth employers’ and unions’ mutual obligation to meet and confer “in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d). Employees’ terms and conditions of employment derive from collective-bargaining agreements as well as established workplace practices. *See Daily News of L.A. v. NLRB*, 73 F.3d 406, 410-11 (D.C. Cir. 1996); *Ernst Home Ctrs., Inc.*, 308 NLRB 848, 848-49 (1992). Mandatory subjects of bargaining include union access to employees whom it represents. *Ernst Home*, 308 NLRB at 848-49. It is settled that an employer violates Section 8(a)(5) and (1) by unilaterally changing an existing term or condition of employment (such as union access) that is a mandatory subject of bargaining without first reaching impasse.<sup>9</sup>

---

<sup>9</sup> “[A]n employer’s violation of [S]ection 8(a)(5)’s duty to bargain also violates [S]ection 8(a)(1).” *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 373 (D.C. Cir. 2017).

*Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 373 (D.C. Cir. 2017).

## **B. Naperville Unlawfully Prohibited Union Access to Employees**

Substantial—and undisputed (*see* Br. 50)—evidence supports the Board’s finding that Naperville violated Section 8(a)(5) and (1) by unilaterally prohibiting union representatives’ access to employees at work. As shown (p. 13), prior to the strike, the Union and its representatives had unrestricted access to unit employees, an established practice reflected in the parties’ collective-bargaining agreements. Specifically, the relevant provision in the successor agreement provided: “A Union representative shall be permitted access to the Employer’s premises for the purpose of adjusting complaints individually or collectively.” (A. 246.) After the strike, however, Naperville barred union representatives Cicinelli and Thomas from its facility, and instituted a new policy requiring the Union to submit requests for access to the dealership and employees. Naperville made this change without first notifying and bargaining with the Union.

Indeed, Naperville does not dispute that the “policy governing Union access to employees was strictly governed by the Successor Contract and any changes to this policy required notification and bargaining.” (A. 70.) *See Ernst Home*, 308 NLRB at 848-49. Naperville, moreover, “concede[d] that it took these unilateral

actions” without notice or bargaining. (A. 69.) Although it proffered “[s]everal unsubstantiated safety reasons” to justify its unilateral actions, the Board found that “none of them [were] compelling.” (A. 70.) The Board therefore reasonably found that Naperville violated Section 8(a)(5) and (1) by its unilateral actions.

Naperville gains no ground by asserting that its actions were lawful because it “simply barred Cicinelli and Thomas from coming [to the dealership], and set a procedure for the Union’s access” to it. (Br. 51.) Naperville’s “defense” all but admits the violation given the ample, uncontested evidence that the established practice granted the Union and its representatives unrestricted access to unit employees, consistent with the broadly worded collective-bargaining agreement.

The Court lacks jurisdiction to consider Naperville’s newly-minted claim (Br. 51-52) that its letter restricting union access merely created a permissible working-time rule for employees under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Naperville failed to raise that legally distinct claim before the Board (A. 45-48), which it needed to do in order to preserve the issue for appellate review. *See* 29 U.S.C. § 160(e); *accord Ozburn-Hessey*, 833 F.3d at 224 n.4. In any event, the record plainly belies its claim that the letter created a working-time rule governing employee solicitation, rather than a unilateral change to an established practice embedded in the collective-bargaining agreement—a practice

that granted the Union unfettered access to the facility for the purpose of adjusting employee complaints. (A. 265.)

**V. THE ADMINISTRATIVE LAW JUDGE, AFFIRMED BY THE BOARD, PROPERLY EXERCISED HIS DISCRETION IN MAKING CERTAIN EVIDENTIARY RULINGS**

**A. To Successfully Challenge an Evidentiary Ruling, a Party Must Show an Abuse of Discretion that Was Prejudicial**

In Board proceedings, evidentiary rulings are reviewed under the abuse of discretion standard. *See Tasty Baking*, 254 F.3d at 123; *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999). To prevail, a party must demonstrate not just that the Board’s administrative law judge abused his discretion, but that the “abuse of discretion was prejudicial.” *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 386 (D.C. Cir. 2017). That requirement comports with the Court’s use of the harmless error rule in reviewing challenges to such evidentiary rulings. *Id.* Under that rule, “error is harmless unless it affected the outcome of the [underlying] proceedings.” *Id.* (alteration in original) (internal quotation marks omitted).

**B. Naperville Failed To Show It Was Prejudiced by the Ruling on Witness Affidavits; in Any Event, the Judge Did Not Abuse His Discretion by Denying Naperville’s Request To Retain Them**

Naperville claims that the Board erred in affirming the judge’s ruling denying its counsel’s request to retain witness affidavits after completing cross-examination and throughout the remainder of the hearing. (Br. 33-34.) Naperville,

however, never made the required showing that it was prejudiced by this ruling (see Br. 33-34), and on that basis alone its claim must be rejected. Additionally, having failed to argue that it suffered any prejudice in its opening brief, it has waived any such claim. *See NY Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments not made in opening brief are waived).

In any event, the Board reasonably concluded that the judge acted well within his discretion in resolving this issue, and Naperville fails to show otherwise. The Board's Rules and Regulations limit the disclosure of confidential witness affidavits to a respondent exclusively "for the purpose of cross-examination." 29 C.F.R. § 102.118(e)(1). *See Wal-Mart Stores, Inc.*, 339 NLRB 64, 64 (2003) ("plain meaning" of regulation "limits the purpose of disclosure to cross-examination"). There is, however, one limited exception: "If counsel for the respondent desires, respondent may be permitted to retain the affidavits until the hearing is closed provided that they are retained for legitimate trial purposes." NLRB Casehandling Manual (Part 1) § 10394.9 (2020), *available at* <https://www.nlr.gov/guidance/key-reference-materials/guidance-documents-manuals>.

Consistent with the foregoing, the Board properly affirmed the judge's denial of a request by Naperville's counsel to retain witness affidavits after he completed cross-examination and throughout the remainder of the hearing. (A. 49

n.1.) This is because Naperville’s counsel failed to establish “legitimate trial purposes” necessitating his retention of affidavits after cross-examination ended. Instead, he simply took the blanket position that he was “entitled” to retain them (A. 136), a claim that Naperville repeats in its brief (Br. 33). The judge, however, reasonably rejected that blanket claim, while also explaining that counsel could have renewed access to the affidavits upon request in connection with further cross-examination. (A. 55 n.3; A. 135-39.) Indeed, the judge subsequently granted Naperville’s counsel renewed access to an affidavit upon his request for that limited purpose during cross-examination. (A. 163-64.) Accordingly, the Board reasonably affirmed the judge’s ruling and Naperville presents no basis for the Court to revisit it.

Naperville’s abuse-of-discretion argument rests on the incorrect premise that it had an absolute “right” to retain witness affidavits, which it could exercise solely in its discretion.<sup>10</sup> (Br. 34.) In making that claim, it erroneously relies on (Br. 33-34) language in *Wal-Mart*, 339 NLRB at 64 n.3, which involved a prior version of the Casehandling Manual that differs from the version in effect during the hearing

---

<sup>10</sup> A similarly meritless argument is presently before the Court in *Napleton 1050, Inc. v. NLRB*, Nos. 19-1025, 19-1064 (argued Dec. 2, 2019).

in this case. As noted, the current version of Section 10394.9 grants the administrative law judge and the Board discretion to grant or deny such requests.<sup>11</sup>

**C. Naperville Fails To Show that the Judge Abused His Discretion by Admitting the October 6 Recording into Evidence**

As shown (pp. 10-11), on October 6 Laskaris held a meeting with the recalled mechanics in which he told them they could take notes and relay everything he said to the Union; Towe then recorded the meeting. Relying on the recording, the Board found that Naperville violated Section 8(a)(1) when Laskaris threatened employees with stricter enforcement of company rules, suggested that filing grievances was futile, and said that he would eat their kidneys. *See* pp. 30-32, 34-37.

Naperville has never disputed the recording's accuracy, and it is uncontested that Laskaris made the statements found unlawful by the Board. (A. 62 n.35.) Instead, Naperville asserts that the Board should not have admitted the recording because Towe allegedly made it in contravention of an Illinois eavesdropping

---

<sup>11</sup> As the Manual's table of revisions shows, the current version of Section 10394.9 has been in effect since at least January 2017. Thus, that version was in effect during the March 2018 unfair-labor-practice hearing here.

statute requiring two-party consent.<sup>12</sup> (Br. 54.) The Board, however, reasonably affirmed the judge’s ruling admitting the recording, and Naperville fails to show otherwise.

Section 10(b) of the Act provides that a Board “proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States.” 29 U.S.C. § 160(b). Under those rules, “evidence obtained by means of a tape recording which is not obtained in violation of the Constitution or Federal law is admissible in Federal court, even though obtained in violation of state law.” *E. Belden Corp.*, 239 NLRB 776, 782 (1978) (admitting recording made in violation of California law), *enforced mem.*, 634 F.2d 635 (9th Cir. 1980).

Indeed, ample precedent holds that “tape recordings of employer meetings with employees [are] admissible as evidence, even when the surreptitious

---

<sup>12</sup> Contrary to Naperville’s assertion (Br. 54-56), it is far from clear that the recording contravenes the statute, which only protects “private conversation[s].” *See* 720 Ill. Comp. Stat. Ann. 5/14-1(d) (defining “private conversation” as “any oral communication between 2 or more persons . . . when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation.”) Here, however, Laskaris was openly addressing a room full of employees, expressly inviting them to take notes and apprise the Union of his remarks. (A. 125.) In this context, Naperville can hardly claim Laskaris intended his communication to be of a private nature. In any event, even in a one-on-one setting, surreptitiously recording an employer’s remarks may constitute protected activity. *See Stephens Media*, 677 F.3d at 1255.

recording violates State law.” *Orange Cty. Publ’ns*, 334 NLRB 350, 354 (2001), *enforced*, 27 F. App’x 64 (2d Cir. 2001). *See NLRB v. Local 90, Operative Plasterers & Cement Masons’ Int’l Ass’n*, 606 F.2d 189, 191-92 (7th Cir. 1979) (recording obtained in violation of Illinois statute “without question admissible” in Board hearing); *Wellstream Corp.*, 313 NLRB 698, 711 (1994) (admitting recordings in violation of Florida law). *See also NLRB v. S. Bay Daily Breeze*, 415 F.2d 360, 365 (9th Cir. 1969) (“[W]here the Board merely accepts and makes use of evidence illegally obtained by private individuals, exclusion of such evidence is not required by the Act”).

Applying this settled rule, the Board found that the judge appropriately admitted the October 6 recording, and rejected Naperville’s reliance on Illinois law, because “recordings are typically admitted in Board proceedings, even if made without the knowledge or consent of a party to the conversation, and even if the taping violates state law.” (A. 62 n.35 (citing cases).) In short, as the Board found, the judge’s ruling admitting the recording was “consistent with Board precedent and neither unreasonable nor an interference with [Naperville’s] case.” (A. 49 n.1 (citing *Orange Cty.*).)

Given that Board precedent accords with the federal courts’ general acceptance of recordings even if obtained in violation of state law, there is no basis for Naperville’s argument that the Board’s ruling is “erroneous,” lacks a “valid

rationale,” and disregards Illinois law. (Br. 55.) Naperville fares no better in claiming (Br. 55) that the judge’s ruling contradicts *Weiss v. United States*, 308 U.S. 321, 326-31 (1939), and *United States v. Stephenson*, 121 F. Supp. 274, 276-79 (D.D.C. 1954). Unlike here, those were criminal cases involving the admissibility of evidence obtained in violation of a federal law, a very different issue.

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

/s/ Julie Brock Broido

JULIE BROCK BROIDO

*Supervisory Attorney*

/s/ Jared D. Cantor

JARED D. CANTOR

*Senior Attorney*

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2996

(202) 273-0016

PETER B. ROBB

*General Counsel*

ALICE B. STOCK

*Deputy General Counsel*

RUTH E. BURDICK

*Acting Deputy Associate General Counsel*

DAVID HABENSTREIT

*Assistant General Counsel*

National Labor Relations Board

August 2020

# Addendum

**STATUTORY AND REGULATORY ADDENDUM  
TABLE OF CONTENTS**

29 U.S.C. § 157 .....	Addendum 2
29 U.S.C. § 158(a)(1).....	Addendum 2
29 U.S.C. § 158(a)(3).....	Addendum 2
29 U.S.C. § 158(a)(5).....	Addendum 2
29 U.S.C. § 158(c) .....	Addendum 2
29 U.S.C. § 158(d) .....	Addendum 3
29 U.S.C. § 160(a) .....	Addendum 3
29 U.S.C. § 160(b) .....	Addendum 3
29 U.S.C. § 160(e) .....	Addendum 4
29 U.S.C. §160(f).....	Addendum 5
29 C.F.R. § 102.118(e)(1).....	Addendum 5
720 Ill. Comp. Stat. Ann. 5/14-1(d).....	Addendum 6

**Relevant Provisions of the National Labor Relations Act,  
29 U.S.C. §§ 151-69:**

**Sec. 7 [Sec. 157]** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

\*\*\*

**Sec. 8(a) [Sec. 158(a)] [Unfair labor practices by employer]** It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

\*\*\*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

\*\*\*

(5) to refuse to bargain collectively with the representatives of his employees . . . .

\*\*\*

**Sec. 8(c) [Sec. 158(c)] [Expression of views without threat of reprisal or force or promise of benefit]** The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

**Sec. 8(d) [Sec. 158(d)] [Obligation to bargain collectively]** For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

\*\*\*

**Sec. 10 [Sec. 160]**

**(a) [Powers of Board generally]** The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

**(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable]** Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States .

. . .

\*\*\*

(e) [Petition to court for enforcement of order; proceedings; review of judgment]  
The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**Relevant Provisions of the National Labor Relations Board's  
Rules and Regulations  
29 C.F.R. §§ 101-103**

**§ 102.118.** Present and former Board employees prohibited from producing documents and testifying; production of witnesses' statements after direct testimony.

\*\*\*

(e) [Production of statement for cross-examination.] Notwithstanding the prohibitions of paragraphs (a) and (b) of this section, after a witness called by the General Counsel or by the Charging Party has testified in a hearing upon a complaint under Section 10(c) of the Act, the Administrative Law Judge must, upon motion of the Respondent, order the production of any statement, as defined in paragraph (g) of this section, of such witness in the possession of the General Counsel which relates to the subject matter as to which the witness has testified.

(1) If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Administrative Law Judge must order the

statement to be delivered directly to the Respondent for examination and use for the purpose of cross-examination.

**Relevant Provisions of Illinois' Eavesdropping Statute,  
720 Ill. Comp. Stat. Ann. 5/14**

**14-1 [Definitions]**

\*\*\*

**(d) [Private conversation]** For the purposes of this Article, “private conversation” means any oral communication between 2 or more persons, whether in person or transmitted between the parties by wire or other means, when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation. A reasonable expectation shall include any expectation recognized by law, including, but not limited to, an expectation derived from a privilege, immunity, or right established by common law, Supreme Court rule, or the Illinois or United States Constitution.

	)	
CADILLAC OF NAPERVILLE, INC.,	)	
	)	Nos. 19-1150
Petitioner/Cross-Respondent	)	19-1167
	)	
v.	)	Board Case No.
	)	13-CA-207245
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,785 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

Dated at Washington, DC  
this 5th day of August 2020

CADILLAC OF NAPERVILLE, INC.,

V.

Respondent/Cross-Petitioner

Nos. 19-1150

19-1167

Board Case No.

13-CA-207245

I hereby certify that on August 5, 2020, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit

David Habenstreit

Assistant General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570-0001

(202) 273-2960

Dated at Washington, DC  
this 5th day of August 2020