

19-1150 / 19-1167
Oral Argument Has Not Been Scheduled Yet

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

CADILLAC OF NAPERVILLE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of Order of National Labor Relations Board

PETITIONER'S FINAL OPENING BRIEF

Michael P. MacHarg (mmacharg@taylorenghish.com)
TAYLOR ENGLISH DUMA LLP
1600 Parkwood Circle, Suite 200
Atlanta, GA 30339
(941) 267-2178

Tae Y. Kim (tkim@freeborn.com)
FREEBORN & PETERS LLP
311 South Wacker Drive, Suite 3000
Chicago, Illinois 60606
(312) 360-6000
Attorneys for Petitioner
Cadillac of Naperville, Inc.

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I. CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Federal Rule of Appellate Procedure 26.1, D.C. Circuit Rule 28(a)(1), and the Clerk's February 8, 2019 Order, Petitioner Napleton 1050, Inc. certifies as follows:

A. Parties and Amici (and Rule 26.1 Disclosure Statement)

Petitioner

Petitioner is Cadillac of Naperville, Inc. ("Petitioner" or "CON"). Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner states that it is a privately held corporation, and that it has no parent company or affiliate company that has issued shares or debt securities to the public.

Respondent

The Respondent is the National Labor Relations Board.

Amici

Petitioner is not aware of any amici in this matter.

B. Rulings under Review

Petitioner seeks review of the National Labor Relations Board's ("NLRB" or "Board") Decision and Order for case 13-CA-207245, dated June 12, 2019. The NLRB's Decision and Order was attached to the Petition, and Petitioner anticipates that it will be part of the yet to be filed Joint Appendix.

C. Related Cases

Petitioner is aware of one case between Petitioner and the union who filed the charge to the NLRB that is based on the same operative facts of the NLRB Order Petitioner now seeks review for. That case is currently underway in U.S. District Court for the Northern District of Illinois, Eastern Division. The case number is 18-CV-07862. However, that case does not, and will not review the Order Petitioner seeks review for here, thus it has no effect on this Petition.

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

Petitioner, hereby submits its Opening Brief, and would show the Court as follows:

STATEMENT OF JURISDICTION AND THE CASE

This matter arose when the International Association of Machinists and Aerospace Workers, Automobile Mechanic's Local 701 (the "Union") filed unfair labor practice charge 13-CA-207245, alleging that CON violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the "Act" or "NLRA"). (JA 274.) CON was alleged to have violated Section 8(a)(1) of the Act by: making threats to employees before and after a strike; informing employees that it would be futile to file grievances; and encouraging employees to resign their membership or become core members in the Union. (JA 55.) CON was also alleged to have violated Section 8(a)(3) by discharging employee John Bisbikis in retaliation for his protected activities. (*Id.*) Last, CON was alleged to have violated Section 8(a)(5) for implementing new policies relating to employee attendance, grievance procedures, free water and work gloves without affording notice to the Union and an opportunity to bargain. (*Id.*)

This case was tried in Chicago, Illinois on March 20-21, 2018, in front of Administrative Law Judge Michael A. Rosas ("ALJ Rosas"). (*Id.*) ALJ Rosas

issued his Decision on June 19, 2018. (JA 35.) ALJ Rosas concluded that CON violated:

- Section 8(a)(1) of the Act by threatening that things would not be the same if employees went on strike, telling permanently replaced employees that if they returned to work it would not be long before they were gone, telling employees that it would lay off recalled employees if work ran out, threatening stricter enforcement of company rules, informing employees that it would be futile to file grievances, encouraging employees to resign their membership or become core members of the Union, telling employees that nonunit employees lost their jobs over the decision to strike, and threatening employees with physical violence (JA 70);
- Section 8(a)(3), (5) and (1) by “enacting new attendance policies, and removing free work gloves and drinking water because of employees' union activity, all without notifying the Union and giving it an opportunity to bargain over the changes” (*Id.*);
- Section 8(a)(5) and (1) of the Act by “prohibiting access to Unit employees at CON, without giving the Union an opportunity to bargain over the changes” (*Id.*); and
- Section 8(a)(3) and (1) of the Act by “discharging John Bisbikis on September 18 because he supported the Union.” (*Id.*)

CON filed timely exceptions to the NLRB on August 31, 2018. (JA 45-48.)

The GC timely filed its limited exceptions on August 23, 2018. (JA 39-44.) On June 12, 2019, the NLRB issued a Decision and Order: (a) reversing the Section 8(a)(1) charge, when Laskaris told employees, “if I were you, I would have changed my [union] membership a week before the strike.”; (b) reversing ALJ Rosas’ “finding that the Respondent violated Section 8(a)(1) when Laskaris told the recalled employees that nonunit employees had lost their jobs over unit

employees' decision to strike"; and (c) adopting and affirming ALJ Rosas' other findings and rulings. (JA 52.)

The NLRB's Decision and Order is a final decision from which an appeal is appropriate because CON is aggrieved by the NLRB's Decision and Order. This Court has jurisdiction over this Petition for Review pursuant to U.S.C. § 160(f). The Petition was timely filed on July 22, 2019. The NLRB subsequently filed its Cross-Application for Enforcement on August 14, 2019. This Court directed the Petition and Cross-Application for Enforcement to be consolidated.

STATEMENT OF THE ISSUES¹

1. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner's counsel could not retain the witness statements for review throughout the entire hearing.

2. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner's statement that "things would not be the same" violated the NLRA.

3. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner violated the NLRA when it terminated Bisbikis.

4. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner threatened Towe with discharge in violation of the NLRA.

5. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner's change of policy concerning the union's representative's access to Petitioner's employees on Petitioner's premises violated the NLRA.

6. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner's statement that it would lay off its employees if there was no work available violated the NLRA.

¹ Petitioner chooses to no longer argue two issues in its original submission of the Statement of Issues to be Raised: (1) whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner violated the NLRA when it removed gloves and bottles of water; and (2) whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner violated the NLRA when it instituted an attendance policy without bargaining with the union.

7. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that the admission of an illegally (under Illinois law) recorded conversion into evidence was proper.

8. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner's statement (that was illegally recorded) that it would more strictly enforce company rules violated the NLRA.

9. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner's statement (that was illegally recorded) that it did not care about grievances violated the NLRA.

10. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner's statement (that was illegally recorded) about eating kidneys violated the NLRA.

11. Whether the NLRB erred, acted unfairly or arbitrarily when it ruled that Petitioner violated the NLRA by expressing doubt on the longevity of Higgins' employment.

STATUTES AND REGULATIONS

Section 2(2) of the NLRA, 29 U.S.C. § 152

The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Section 7 of the NLRA, 29 U.S.C. § 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 158(a)(3) of this title.

Section 8(a) of the NLRA, 29 U.S.C. § 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 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(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: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a

labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 10 of the NLRA, 29 U.S.C. § 160

(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 a 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. 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),

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.

720 Ill. Comp. Stat. Ann. 5/14-2

(a) A person commits eavesdropping when he or she knowingly and intentionally:

(1) Uses an eavesdropping device, in a surreptitious manner, for the purpose of overhearing, transmitting, or recording all or any part of any private conversation to which he or she is not a party unless he or she does so with the consent of all of the parties to the private conversation;

(2) Uses an eavesdropping device, in a surreptitious manner, for the purpose of transmitting or recording all or any part of any private conversation to which he or she is a party unless he or she does so with the consent of all other parties to the private conversation;

(3) Intercepts, records, or transcribes, in a surreptitious manner, any private electronic communication to which he or she is not a party unless he or she does so with the consent of all parties to the private electronic communication;

(4) Manufactures, assembles, distributes, or possesses any electronic, mechanical, eavesdropping, or other device knowing that or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious overhearing, transmitting, or recording of private conversations or the interception, or transcription of private electronic communications and the intended or actual use of the device is contrary to the provisions of this Article; or

(5) Uses or discloses any information which he or she knows or reasonably should know was obtained from a private conversation or private electronic communication in violation of this Article, unless he or she does so with the consent of all of the parties.

(a-5) It does not constitute a violation of this Article to surreptitiously use an eavesdropping device to overhear, transmit, or record a private conversation, or to surreptitiously intercept, record, or transcribe a private electronic communication,

if the overhearing, transmitting, recording, interception, or transcription is done in accordance with Article 108A or Article 108B of the Code of Criminal Procedure of 1963.1

(b) It is an affirmative defense to a charge brought under this Article relating to the interception of a privileged communication that the person charged:

1. was a law enforcement officer acting pursuant to an order of interception, entered pursuant to Section 108A-1 or 108B-5 of the Code of Criminal Procedure of 1963; and

2. at the time the communication was intercepted, the officer was unaware that the communication was privileged; and

3. stopped the interception within a reasonable time after discovering that the communication was privileged; and

4. did not disclose the contents of the communication.

(c) It is not unlawful for a manufacturer or a supplier of eavesdropping devices, or a provider of wire or electronic communication services, their agents, employees, contractors, or vendors to manufacture, assemble, sell, or possess an eavesdropping device within the normal course of their business for purposes not contrary to this Article or for law enforcement officers and employees of the Illinois Department of Corrections to manufacture, assemble, purchase, or possess an eavesdropping device in preparation for or within the course of their official duties.

(d) The interception, recording, or transcription of an electronic communication by an employee of a penal institution is not prohibited under this Act, provided that the interception, recording, or transcription is:

(1) otherwise legally permissible under Illinois law;

(2) conducted with the approval of the penal institution for the purpose of investigating or enforcing a State criminal law or a penal institution rule or regulation with respect to inmates in the institution; and

(3) within the scope of the employee's official duties.

For the purposes of this subsection (d), “penal institution” has the meaning ascribed to it in clause (c)(1) of Section 31A-1.1.

(e) Nothing in this Article shall prohibit any individual, not a law enforcement officer, from recording a law enforcement officer in the performance of his or her duties in a public place or in circumstances in which the officer has no reasonable expectation of privacy. However, an officer may take reasonable action to maintain safety and control, secure crime scenes and accident sites, protect the integrity and confidentiality of investigations, and protect the public safety and order.

INTRODUCTION

The NLRB's Decision and Order from which this Petition arises, directs CON to, *inter alia*, cease and desist from:

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

(b) telling permanently replaced employees that it did not want them back and that it would not be long before they were gone;

(c) telling recalled strikers that it will not employ them for long, and that they should find another job because they engaged in protected activities;

(d) telling recalled strikers that they would be laid off if there was no more work because they engaged in protected activities;

(e) telling employees that because they engaged in protected activities, company rules will be more strictly enforced;

(f) telling employees that filing grievances is futile;

(g) telling employees that it would eat their kidneys because they engaged in protected activities;

(h) prohibiting Union representatives' access to its unit members without collectively bargaining with the Union; and

(i) discharging Bisbikis because he supported the Union.

(JA 52.) However, this Court should grant this Petition, and deny enforcement of the Decision and Order because the NLRB:

(1) failed to follow its precedent by ruling that CON's counsel did not have the discretion to retain witness affidavits throughout the hearing;

(2) failed to follow its precedent by ruling that CON coerced, or threatened its employees in violation of Section 8(a)(1), when Laskaris stated vague, objective opinions;

(3) followed erroneous precedent that permitted the admission of an illegal tape recording into evidence, and the fruits of that ill-gotten recording;

(4) failed to provide adequate analysis, failed to follow its precedent – which is now under scrutiny by the federal courts and itself – by ruling that Bisbikis retained protection of the Act when he called Laskaris a stupid jack off in Greek;

(5) failed to follow its precedent by ruling that Towe retained protection of the Act when he physically blocked CON's customer, when she tried to take a car out for test drive; and

(6) failed to analyze whether CON's letter to the Union setting the guidelines for the Union's access to its unit members at CON during working hours changed what the parties bargained for, and failed to apply U.S. Supreme Court precedent stating that employers have discretion over the Act to dictate how its employees will conduct themselves at work.

First, the NLRB's ruling in *In Re Wal-Mart Stores, Inc.*, states that “[i]f he so desires, counsel may retain the [affidavits] throughout the hearing to use for any legitimate trial purpose.” 339 NLRB 796, fn 3 (2003) (emphasis added). ALJ Rosas erred when he ruled that *Wal-Mart* gave him the discretion to allow CON's counsel to retain the affidavits, and the NLRB erred by adopting his ruling.

Second, each of the Board's rulings that CON violated Section 8(a)(1) when Laskaris made vague, objective predictions goes against the Board's precedent in *Phoenix Glove Co.*, where the NLRB ruled that such statements are “too vague and ambiguous to rise to the level of a violation of the Act.” 268 NLRB 680, 680 fn 3 (1984); and the U.S. Supreme Court's ruling in *N.L.R.B. v. Gissel Packing Co.*, that employers are free to communicate predictions to employees based on objective facts. 395 U.S. 575, 618 (1969)

Third, the Board's ruling admitting evidence procured by criminal acts is erroneous precedent that this Court can and should overrule. See *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, 253 F.3d 19, 26 (D.C. Cir. 2001) (“[t]he NLRB may be bound by its erroneous precedents. We are not.”). The Board's permitting illegally obtained evidence into the record sets irreconcilable precedent because it encourages employees to commit criminal acts to “catch their employers,” where no Court would permit this sort of trial tactic, including this Court.

Fourth, the Board's ruling that Bisbikis could call his supervisor a stupid jack off in his supervisor's native language, and retain protection under the Act lacked the requisite analysis because: the cases it relied upon were inapplicable; the Board failed to cite to cases that contradict its ruling; the Board itself is questioning its own ruling, and has invited *amici* to comment because it realizes that its ruling has been ridiculed by federal judges (including one from this Court), and its own Members; and this Court has established precedent overruling the position that the Board takes here.

Fifth, the Board failed to follow its own precedent by ruling that Towe was protected under the Act, when that precedent clearly establishes that strikers' conduct blocking access to employer premises "is, *per se*, misconduct which forfeits" protection of the Act and justifies refusal to reinstate or discharge. See *Tube Craft*, 287 NLRB 491, 492 (1987); see also *Clear Pine Mouldings*, 268 NLRB 1044, 1047 (1984).

Sixth, the Board failed to provide reasoned justification by ruling that CON's letter to the Union that barred Cicinelli and Thomas from CON, and set parameters from the Union to meet with its unit members at CON during working hours made a change to the agreed upon terms for the Union to access its unit members at CON; and the Board's ruling disallowing CON to set the rules for its own employees during working hours, contrasts the U.S. Supreme Court's ruling

in *Republic Aviation Corp. v. N.L.R.B.*, that affirmatively stated “[w]orking time is for work,” and that the Act cannot prevent an employer from setting rules for its employees, during working hours. 324 U.S. 793, 803 (1945).

As explained further below, the NLRB’s Decision and Order lacks reasoned justification, and clashes with established NLRB precedent as well as this Court’s and the U.S. Supreme Court’s. If enforced, not only will this Decision and Order cause more confusion at the Board level, it could potentially set unintended precedent (in regards to Bisbikis’ termination), overrule this Court’s own precedent as well as the U.S. Supreme Court’s. Accordingly, CON’s Petition must be granted.

STATEMENT OF THE FACTS

I. Petitioner’s Operations

CON is a Cadillac dealership located in Naperville, Illinois, and has been individually owned and operated by its President, Frank Laskaris (“Laskaris”) since 1996. (JA 55.) John Francek (“Francek”) was CON’s vice president of operations, throughout the relevant timeline of this case. (*Id.*) CON has been an employer-member of the New Car Dealer Committee (the “NCDC”), a multi-employer bargaining committee composed of approximately 129 car dealers that collectively bargains with the Union on behalf of all the 129 car dealers. (*Id.*)

II. The Union Strikes the NCDC Dealerships

On May 6, the Union and the NCDC began negotiations for a successor contract. (JA 56.) The Union's negotiation team included Union representatives Sam Cicinelli (“Cicinelli”) Kenneth Thomas (“Thomas”), and John Bisbikis (“Bisbikis”). (*Id.*) On June 29, 2017, Bisbikis approached Laskaris in his office to discuss several shop-related issues. (*Id.*) That discussion led to the on-going labor negotiations, where Laskaris told Bisbikis that if the technicians struck, “things wouldn't be the same.” (*Id.*)

The Union and the NCDC were unable to negotiate a new contract by the July 31 deadline and, on August 1, all of the Union’s technicians across the entire NCDC’s 129 dealerships struck. (*Id.*) CON’s strikers first set up camp across the street from the dealership. (*Id.*) On August 4, CON sent the strikers a letter that notified the strikers that: (1) CON would no longer pay for their health insurance; (2) CON placed ads for replacement technicians, that the technicians would be notified when they are replaced, and if they made an unconditional offer to return to work, they would be placed on a preferential hiring list; and (3) CON would no longer be responsible for their tools, and that they should make arrangements to pick them up. (*Id.*; see also JA 250.)

The strikers removed their equipment and tool boxes during business hours by August 5. (JA 56.) On August 9, the Company sent the following form letters

to 6 of the 13 striking employees - Bisbikis, Louis Mendralla, Michael Wilson, Kenneth Scott, Brian Higgins (“Higgins”) and Mathew Gibbs (“Gibbs”), notifying them that they were being replaced, and stated:

This letter is to advise you that you have been permanently replaced as of today August 9, 2017. You will be placed on a preferential hiring list provided you make an unconditional application for a return to work. In the event you have a tool box or any personal belongings that you have left behind, please call your supervisor to make arrangements to pick them up.

(JA 56-57; see also JA 252.)

After CON sent the August 9 letters, the strikers moved their camp from across the street, to a small side street directly across from CON’s main entrance, and became louder and more vocal. (JA 57.) The strikers blew horns, launched verbal attacks at CON using a loud speaker, engaged CON’s customers, and yelled at CON’s employees who did not strike. (*Id.*) The strikers’ actions against CON’s customers escalated to the point where on one occasion, Patrick Towe (“Towe”) interfered with a customer attempting to take a test drive, by physically blocking her so that she could not leave CON. (*Id.*) CON called the police on the strikers on several occasions, but never filed police reports or unfair labor practice charges. (*Id.*)

III. The Union and NCDC End the Strike

During the strike, the Union engaged individual members of the NCDC, and convinced about 35 dealerships to enter into side deals. (*Id.*) On Friday,

September 15, the NCDC and the Union entered into a strike settlement agreement, contingent upon ratification by the Union's membership. (*Id.*) The Union's membership ratified the settlement agreement, as well as the 2017-2021 collective-bargaining agreement (the "SAA"), on Sunday, September 17. (*Id.*)

IV. Union Representatives Visit CON After the Strike Ends

On September 18, the strikers, along with Cicinelli and Thomas congregated across the street from CON at about 7 a.m. (*Id.*) Cicinelli arrived with preprepared grievance forms in-hand, and had the returning employees sign them. (JA 58.) Cicinelli, Thomas, and Bisbikis then walked across the street to CON to negotiate when and how the strikers would return to work, and entered Laskaris' office, where Francek was also present. (*Id.*) When Cicinelli, Thomas and Bisbikis entered his office, Laskaris told them that he did not want Bisbikis present. (*Id.*) Bisbikis asked Cicinelli what he should do, and Cicinelli told Bisbikis to leave so he and Thomas could resolve the issues with Laskaris and Francek. (*Id.*) Bisbikis left Laskaris' office, and returned to join the strikers across the street. (*Id.*)

With Bisbikis now gone, Cicinelli told Laskaris that he was obligated to reinstate the replaced employees pursuant to the settlement agreement. (*Id.*) Laskaris replied that he needed time to figure out whether to recall the permanently replaced employees, and asked Cicinelli, "can't you find them all jobs?" (*Id.*) Cicinelli said that he probably could, but that they wanted to come back to work at

CON. (*Id.*) At this meeting, Cicinelli called the replacement workers “scabs,” which caused Laskaris to defend the replacement workers. (*Id.*) Laskaris admonished Cicinelli and told him that those “scabs” were “good family men” and that the Union was obliged to represent them too. (*Id.*)

Cicinelli told Laskaris that he did not care, but that the Union would represent the “scabs” if they joined the Union. (*Id.*) Laskaris proposed to Cicinelli that he would pay the strikers \$1,000 or \$2,000 each to find a job elsewhere. (*Id.*) Cicinelli said he would run the offer by the employees, but considered it a futile effort. (*Id.*)

Cicinelli and Thomas left Laskaris' office and communicated his offer to the recalled strikers, which they rejected. (JA 58.) Afterwards, at about 9 a.m., Cicinelli and Thomas returned to Laskaris' office, again with Bisbikis. (*Id.*) Again, Laskaris objected to Bisbikis' presence, and asked why Bisbikis was there. (*Id.*) Cicinelli responded that Bisbikis was there to speak on behalf of the strikers. (*Id.*) Bisbikis then began to explain that the strikers were personally offended after receiving permanent replacement letters. (*Id.*) Bisbikis asked Laskaris why he issued the letters, and if he sent them because the technicians did not get along with Francek. (*Id.*) Bisbikis then attacked Laskaris for his treatment of Bisbikis and the other strikers. (*Id.*) Laskaris asked Bisbikis why he would want to return, and Bisbikis replied that he considered CON his home. (*Id.*) Francek questioned

Bisbikis' statement and the other strikers' loyalty, because of their actions like harassing customers and other employees during the strike. (*Id.*)

Laskaris reiterated that he did not want any of the strikers back, especially the “seven” who received permanent replacement letters. (*Id.*) Cicinelli said that the Union was aware of only five such letters and asked Francek to provide copies of the other two letters. (*Id.*) Francek left the room to retrieve copies of the letters. (*Id.*)

With Francek gone, Bisbikis brought up his June 29 conversation with Laskaris, and asked if Laskaris remembered talking about several of the technicians' concerns. (*Id.*) Laskaris denied having a discussion about the technicians' concerns, and Bisbikis called him a liar. (*Id.*) Laskaris responded by telling Bisbikis to “get the f**k out before I get you the f**k out.” (*Id.*) As Bisbikis got up to leave, Bisbikis spoke to Laskaris in Greek, their native tongue and called Laskaris *χαζό μαλακα*, which translates to masturbating idiot, or stupid jack off. (*Id.*; see also JA 258.) Laskaris then asked Bisbikis what he said, and Bisbikis said he “didn't say a word.” (JA 58.) Cicinelli, with a smirk on his face looked at Thomas and said that he “didn't hear [Bisbikis] say anything. Did you?” (*Id.*) Laskaris then told Bisbikis that he was firing him for insubordination. (*Id.*) Cicinelli told Laskaris that the Union would then also have to file another

grievance regarding Bisbikis' termination, and then asked Bibikis to leave Laskaris' office. (*Id.*)

With Bisbikis now gone, Cicinelli asked Laskaris to clarify his position regarding the recall status of the remaining strikers. (*Id.*) Laskaris agreed to allow the strikers who did not receive permanent replacement letters to bring back their tools. (*Id.*) Cicinelli told Laskaris that some of the technicians could begin returning their tools that afternoon, but Laskaris said that would be too disruptive to dealership. (*Id.*) The meeting ended with Laskaris giving Cicinelli and Thomas a list of technicians and the plan for their return-to-work schedule. (*Id.*) Laskaris agreed to open the shop two hours early on the next day at 5:30 a.m. and told Cicinelli that he needed the technicians to be in their stalls by 7:30 a.m. ready to go. (*Id.*) Cicinelli told Laskaris that it would be a problem for the technicians to get their tools out of storage before 9 a.m. and Laskaris replied, "It's noon. My understanding is 701 has a truck. 701 has a union hall for this purpose. Why don't you go get their tools, put them on the truck, take them down to the hall. Not my issue. Now I need you to get away from the front door and go." (JA 59-60.) Cicinelli and Thomas then left, and Francek followed up with the recalled technicians. (JA 59.) Francek was able to speak with some of the technicians and left messages for others. (*Id.*) Some said they would be ready to start work at 7:30 a.m. (*Id.*)

V. The Union Attempts to Recruit the Striker Replacements

Shortly after his meeting with Cicinelli and Thomas, Laskaris walked into the shop and found Thomas speaking to the five strike replacements. (JA 59.) Laskaris approached Thomas and said, ‘Ken, this is not the time. Guys get back to work. Ken, I’ll set up a private conference room for you before or after work any time you want and you can sit and talk to them all you want, but you’re not going to stop them from working.’” (*Id.*) Thomas then left CON and rejoined the group at the camp site across the street. (*Id.*)

VI. CON Formally Terminates Bisbikis

Later on September 18, CON sent Bisbikis a formal termination letter. (JA 59.) The letter stated that “[y]our insubordinate behavior occurred during a conversation in my office on Monday, September 18, 2017 at or around 9:05 a.m. where you spoke to me in Greek and called me a χαζό μαλακα ... When confronted and told you can’t speak to me that way, there was no apology nor denial of your actions.” (*Id.*; JA 258.) The termination letter further stated that “[t]his offensive and insubordinate behavior is a direct violation of [CON’s] Standards of Conduct. In order to assure orderly operations and provide the best possible work environment, we expect employees to follows rules of conduct that will protect the interests and safety of all personnel... This violation of conduct is a terminable action.” (*Id.*)

VII. The Recalled Strikers Report to CON

At 7 a.m. on September 19, the strikers met at their camp site across the street from CON (JA 59.) Shortly afterwards, Cicinelli, Thomas and the recalled strikers marched to CON. (*Id.*) Laskaris and Francek met them, and Laskaris asked Cicinelli what they were doing. (JA 59-60.) Cicinelli told Laskaris that he wanted to re-discuss the logistics for the employees to bring their toolboxes to CON because the storage facility did not open until 9:30 a.m. (JA 60.) Laskaris replied that it was not his problem and if the technicians were not in their stalls with their tools ready to go at 7:30 a.m. – as Cicinelli agreed to the previous day – he would issue them warning letters. (*Id.*)

Laskaris then escorted the group into the new car delivery area. (*Id.*) While they were passing customers in cars waiting to enter, Cicinelli pointed to the returning strikers and told a customer that “these are the real technicians. Your scabs are in there.” (*Id.*) Francek interjected, reassured the customer that real mechanics were working at the dealership, adding that the individuals walking in “can't do sh*t.” (*Id.*)

Once in the room, Laskaris told the employees, “This is my facility. You're going to listen to me. I don't give a f[*]ck who tells you; listen to me. If I tell you to jump, you ask me how high. This is my--you play by my rules.” (*Id.*) Cicinelli replied to Laskaris and said “as long as you adhere to the terms outlined.” (*Id.*)

Laskaris then told the recalled strikers to bring their tools to CON after 5 or 5:30 p.m. that day. (*Id.*) In response, Cicinelli told Laskaris that he would file another grievance for back pay because Laskaris made it impossible for the employees to bring the tools back since the storage facility closed at 5 p.m. (*Id.*) Laskaris told Cicinelli to have them bring the toolboxes home, or come back the next morning. (*Id.*) Cicinelli told Laskaris that neither option was possible, because the technicians did not all have trailers to transport their tool boxes and/or have room to fit them in their garages, nor could they leave them outside their homes for fear of theft, and the storage facility did not open until 9:30 a.m. (*Id.*) Cicinelli told Laskaris that he was being overly restrictive. (*Id.*) Laskaris reminded Cicinelli that he told technicians the previous day about being ready when reporting to work and that some confirmed they would be ready to go. (*Id.*) After several more exchanges, Laskaris finally relented and agreed to let the recalled strikers bring back their tools after 4:30 p.m. that day. (*Id.*)

VIII. Recalled Strikers Return to Work on September 20

On the morning of September 20, 2017, Laskaris pulled Towe aside to show him a video recording of Towe carrying a sign and walking slowly on the stripe line in the middle of the street in front of CON's entrance. (JA 60.) This video showed that Towe forced a customer who was trying to take a car out for a test drive, to move very slowly behind Towe as he meandered across the parking lot

entrance. (*Id.*) The video showed that when it appeared that Towe was out of the customer's way, as she began to accelerate, "Towe suddenly pirouetted and walked back towards the vehicle, causing the customer to slam her breaks." (*Id.*) "Towe's shenanigans enabled him to block a customer who was waiting to take a test drive." (*Id.*)

After showing Towe the video of himself, Laskaris stated that "he hoped that Towe would refrain from similar conduct." (*Id.*) Laskaris also told Towe that "[w]ell, if this is your home, you wouldn't be doing this and he told Towe to look for another job because he wouldn't be [at CON] very long." (*Id.*)

IX. CON Sends Union Letter Regarding Access to CON and Employees During Work Hours

Before the strike, Thomas would visit the unit employees at CON, during work hours, approximately once every 6 weeks. (JA 60.) After the events that took place at CON on September 18 and 19, Laskaris and Francek sent a letter to the Union on September 21. (*Id.*) That letter stated that "[a]s a result of the intimidating and threatening behavior of union president Sam Cicinelli and B.A. Ken Thomas on Monday and Tuesday 9/18 & 9/19 towards myself, our employees, and shockingly even worse our customers. Neither Cicinelli nor Thomas will be welcome in our dealership or on property." (*Id.*; see also JA 263-65.) That letter also stated that "[Union] representatives will need to make an appointment and request access to our facility and/or our employees while they are at work." (*Id.*)

X. The September 25th Staff Meeting

On September 25, 2017, shortly after the strikers returned to work, Laskaris conducted a staff meeting, attended solely by the recalled technicians, where he expressed his frustration over the Union's leafleting outside the dealership. (JA 51.) During the meeting, Laskaris told the technicians that the leafleting was taking money out of their pockets and that if CON ran out of work, it would lay off all of them. (*Id.*)

XI. The Illegally Recorded October 6th Meeting

At an October 6, 2017 meeting with the technicians, service managers, service advisors, parts department, and management, Laskaris, *inter alia*, informed the technicians: (1) that CON would enforce its rules more strictly; (2) he did not care about petty grievances; (3) if he were one of the strikers, he would have changed his union membership before the strike; (4) that they should consider the nonunit employees who were laid off because of the strike; and (5) that although he could be “the nicest guy in the world,” he could be really nasty if he and his people are messed with. (JA 62-64.)

XII. CON Offers to Recall Higgins

On October 27, 2017 Laskaris called Higgins, and offered him the opportunity to return to work. (JA 67.) During that call, Laskaris expressed to Higgins that if he did return to work, that he thought Higgins would not stay for long. (*Id.*)

SUMMARY OF THE ARGUMENT

CON's Petition should be granted because the NLRB erred in adopting ALJ Rosas' procedural, evidentiary, and substantive rulings. Procedurally, the NLRB's ruling erred because under the Board's ruling in *Wal-Mart*, it is counsel, and not the ALJ who has the discretion to retain the witness affidavits throughout the hearing. *In Re Wal-Mart Stores, Inc.*, 339 NLRB at 65 fn 3 (“if he so desires, counsel may retain the [affidavits] throughout the hearing to use for any legitimate trial purpose.”) (emphasis added). The Board erred in adopting ALJ Rosas' evidentiary ruling that permitted the admission of a criminally illegal tape recording of a 40 minute rant by Laskaris, and the ill-gotten fruit from that recording. This ruling awards and promotes criminal action, and this Court has denied the admissibility of evidence procured in an almost identical manner.

Substantively, the NLRB erred by ruling that:

- Bisbikis retained protection under the Act when he insulted Laskaris in Greek, by calling him a stupid jack off, because: (a) the Board's analysis relied on inapplicable cases; (b) the Board's ruling clashes with its own precedent; (c) it has questioned its own position on what level of opprobrious employee conduct an employee can engage in before losing the Act's protection; and (d) this Court has ruled that conduct less offensive than Bisbikis' has lost protection from the Act;

- CON violated Section 8(a)(5) of the Act when it sent a letter to the Union setting guidelines for Union access to its unit members at CON during working hours, because the guidelines did not in any way alter the collectively-bargained for guidelines; and the NLRB's ruling that CON cannot make rules concerning its employees during work hours, contradicts the U.S. Supreme Court's ruling in *Republic Aviation Corp.*;
- Towe remained protected under the NLRA when he blocked of one CON's customer's ability to take a car out for a test drive by physically blocking the exit, because the NLRB's ruling contradicts past NLRB rulings in *Tube Craft*, and *Clear Pine Mouldings*; and
- That vague, objective predictions are Section 8(a)(1) violations.

STANDING

CON is an "employer" within the meaning of Section 2(2) of the Act, 29 U.S.C. §152(2), and, as such, was subject to the NLRB's jurisdiction to determine whether it engaged in unfair labor practices. Here, the NLRB ruled that CON violated the Act and directed it to, *inter alia*, cease and desist from: (1) threatening its employees that work conditions would not be the same they went on strike; (2) telling returning strikers that they would not be employed for long; (3) telling employees that it would more strictly enforce its rules; and (4) discharging employees because they supported the union. CON is therefore an aggrieved party

within the meaning of Section 10(f) of the Act, 29 U.S.C. §160(f), and accordingly has standing to seek review of the NLRB's final order in this Court.

STANDARD OF REVIEW

Although in most cases the Court should accord substantial deference to the NLRB regarding its decisions, the Court need not enforce an NLRB decision if its findings were not supported by substantial evidence, if it failed to apply the proper legal standard, or if it departed from NLRB precedent without giving reasoned justification. *Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1141 (D.C. Cir. 2011); *citing S&F Mkt. St. Healthcare LLC v. NLRB*, 570 F.3d 354, 358 (D.C. Cir. 2009).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *MECO Corp. v. NLRB*, 986 F.2d 1434, 1436 (D.C. Cir. 1993) (citations omitted). The “substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *CitiSteel USA, Inc. v. NLRB*, 53 F.3d 350, 354 (D.C. Cir. 1995) (citations omitted). “As the Supreme Court has explained, the Board ‘is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.’” *Sutter E. Bay Hosps. v. N.L.R.B.*, 687 F.3d 424, 437 (D.C. Cir. 2012); quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998).

The Board's unexplained departure from its precedent renders its Order "arbitrary and capricious." *Fort Dearborn Co. v. Nat'l Labor Relations Bd.*, 827 F.3d 1067, 1074 (D.C. Cir. 2016); citing *Teamsters Local Union Nos. 822 & 592 v. NLRB*, 956 F.2d 317, 320 (D.C. Cir. 1992). Moreover, even if the NLRB is "bound by its erroneous precedents," this Court is not. *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, 253 F.3d 19, 26 (D.C. Cir. 2001). This Court has observed that "merely applying an unreasonable statutory interpretation for several years [cannot] transform it into a reasonable interpretation." *Id.*; quoting *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996) (internal quotations omitted).

Therefore, the Court in review must examine carefully both the NLRB's findings and its reasoning. *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445-46 (D.C. Cir. 2004) (citation omitted). The Court in review simply will not "rubber stamp" the NLRB's decision. (*Id.*) Nor will the Court construct grounds not advanced by the NLRB to sustain its erroneous rulings. *Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006). When the NLRB's "decision lacks adequate justification because it is neither logical nor rational, or because it fails to offer a coherent explanation of agency precedent, the judgment under review is wanting for lack of reasoned decision-making." *NBCUniversal Media, LLC v. N.L.R.B.*,

815 F.3d 821, 823 (D.C. Cir. 2016); citing *Fox v. Clinton*, 684 F.3d 67, 80 (D.C. Cir. 2012).

ARGUMENT

I. The NLRB Erred by Ruling that CON's Counsel Could Not Retain Witness' Affidavits Throughout the Hearing

During the hearing, CON's counsel requested a witness affidavit for a witness prior to cross-examination, as common in NLRB hearings. (JA 135.) Counsel for the General Counsel then requested that CON's counsel return a different witness affidavit, where in response, CON's counsel stated he was entitled to retain that witness' affidavit and all the other witness affidavits throughout the hearing, pursuant to the NLRB's ruling in *In Re Wal-Mart Stores, Inc.*, 339 NLRB at 65 fn 3. (JA 136-37.) ALJ Rosas stated that the Board's *Wal-Mart* decision gave him the discretion to allow CON's counsel to retain the witness affidavit, and stated that it was his practice to not allow counsel to retain the affidavits throughout the hearing. (*Id.*)

In his Decision, ALJ Rosas wrote, “[a]s I ruled at the time, that the Board’s holding in that decision, as well as Section 102.118 of the Board’s Rules and Regulations, is not inconsistent with my practice of permitting renewed access to witness affidavits upon request in connection with the cross-examination of other witnesses.” (JA 55, fn 3.) The NLRB affirmed ALJ Rosas’ ruling denying CON’s counsel’s request to retain the witness affidavits throughout the hearing, stating

“[t]he plain meaning of Sec. 102.118(B) of the Board’s Regulations limits the purpose of disclosure [of witness statements] to cross-examination.” (JA 49, fn 1; quoting *In Re Wal-Mart Stores, Inc.*, 339 NLRB 64.)

ALJ Rosas erred when he recited the rule in *Wal-Mart*, and when he denied CON’s counsel the right to retain the witness affidavits throughout the hearing because, pursuant to *Wal-Mart*, “[i]f he so desires, counsel may retain the [affidavits] throughout the hearing to use for any legitimate trial purpose.” *In Re Wal-Mart Stores, Inc.*, 339 NLRB at 65 fn 3 (emphasis added). The NLRB’s ruling in *Wal-Mart* is clear; counsel, not the ALJ, has the discretion to decide whether to keep the affidavits throughout the hearing. Thus, ALJ Rosas was wrong, and the NLRB erred when it adopted his ruling, which directly contradicts the ruling in *Wal-Mart*.

II. The NLRB Erred by Ruling that Laskaris’ Statement that “things would not be the same” Violated the NLRA

On June 29, 2017, Bisbikis initiated a conversation with Laskaris about employee concerns. (JA 51.) During this conversation, Laskaris responded to Bisbikis and said that “things would not be the same” if employees went on strike. (*Id.*) ALJ Rosas acknowledged that Laskaris’ statement was vague, but determined that the timing of the statement was significant because it was made a month before the strike began. (JA 65; citing *United Aircraft Corp.*, 192 NLRB 382, 383 (1971).) Ultimately, ALJ Rosas ruled that Laskaris’ statement was unlawful

because it did not “communicate any objective facts or predictions as to the effects of a potential strike,” and that “the statement cannot be viewed as anything but a threat that a strike would produce only negative consequences for the [u]nit.” (JA 65.)

The NLRB adopted ALJ Rosas’ ruling, and stated that: “Laskaris’ statement that ‘things would not be the same’ is similar to other statements the Board has found unlawful.” (JA 51; citing *Colonial Parking*, 363 NLRB No. 90, slip op. at 7 (2016); *Valmet, Inc.*, 367 NLRB No. 84, slip op. at 2 fn. 7 (2019). However, Member Emanuel disagreed with the panel, and stated that Laskaris’ statement was “too vague to constitute a threat of reprisals, and neither the timing alone nor [CON’s] subsequent conduct [wa]s sufficient to render it coercive.” (JA 51, fn. 7.) The NLRB erred when it ruled that Laskaris’ statement that “things would not be the same” was coercive because (a) the authority ALJ Rosas and the Board relied on are inapplicable here; and (b) its ruling contracts Board and U.S. Supreme Court precedent.

ALJ Rosas wrongly paralleled Laskaris’ statement to the statement in *United Aircraft Corp.*, because the employer in that case stated that “[a] lot of people are going to get hurt and a lot of people won’t be coming back,” two days before a pending strike. 192 NLRB at 383. That statement made by the employer in *United Aircraft Corp.* – in contrast to Laskaris’ statement – is a clear unambiguous

statement by the employer that the employees' strike will cause them hurt, and job loss.

The NLRB also relied on non-analogous cases as well. In *Colonial Parking*, the supervisor warned his employee that the “terms and conditions of employment would change for the worse because of his protected activities.” *Colonial Parking & Unite Here Local 23*, 363 NLRB No. 90, slip Op. at 7. In *Valmet*, the NLRB ruled that the employer’s statement “[j]ust remember who hired you” was coercive, when it was corroborated with an affidavit that the employer told that employee that “he hired [the employee] and could fire [the employee].” *Valmet, Inc.*, 367 NLRB No. 84, slip op. at 2. The Board concluded that the “remember that I hired you remark was a not-so-subtle reminder of his authority over Leonard, which he could exercise to Leonard's detriment if he so chose.” *Id.*, at fn 7 (internal quotations omitted).

As noted by Member Emanuel, Laskaris’ statement is vague, at best. See *Phoenix Glove Co.*, 268 NLRB 680, 680 fn 3 (1984) (Statement that employees would be “messing up” if they got the union in is too vague and ambiguous for Section 8(a)(1) violation.) Accordingly, it was legal error to conclude that the statement “things would not be the same,” violates Section 8(a)(1).

III. The NLRB Erred by Ruling that Bisbikis was Protected by the NLRA

The NLRB ruled that Bisbikis' conduct was protected by the NLRA pursuant to the *Atlantic Steel* factors, where the Board considers: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice.” (JA 50; citing *Atlantic Steel*, 245 NLRB 814, 816 (1979).) For the first two factors, the NLRB ruled that the fact that Bisbikis' outburst was in Laskaris' office, and the subject matter of the conversation that led to Bisbikis' outburst concerned the “return-to-work process” and the permanent replacement letters, leaned toward protection under *Atlantic Steel*. (*Id.*) For the third factor, the NLRB ruled that Bisbikis' outburst was protected by the NLRA because “[t]he outburst was brief – a single name-calling incident – and not a contained course of action,” (citing *Kiewit Power Constructors, Co.*, 355 NLRB 708, 710 (2010); Bisbikis' outburst was not accompanied by threats or menacing behavior (citing *Staffing Network Holdings, LLC*, 362 NLRB 67, fn 1, 75 (2015); and Laskaris himself cursed in the workplace, and during the meeting (citing *Corrections Corp. of America*, 347 NLRB 632, 636 (2006). (JA 50.) For the fourth factor, the NLRB ruled that Bibikis' conduct was protected because the Board determined that Laskaris provoked Bisbikis when he denied Bisbikis' account of the June 29 conversation the two purportedly had, that Laskaris used profanity while

dismissing Bisbikis from the first meeting, and threatened to remove Bisbikis with force. (*Id.*; citing *Network Dynamics Cabling*, 351 NLRB 1423, 1429 (2007).)

However, the NLRB's ruling that Bisbikis retained protection under the Act when he called Laskaris a stupid masturbator, or jack off in Greek fails because (1) none of the cases the NLRB relied upon to rule that Bisbikis was protected under the Act apply here; (2) the NLRB's Decision that Bisbikis was protected under the Act contradicts its own precedent; and (3) this Court has ruled that conduct less opprobrious than Bisbikis' has lost protection of the Act.

A. The Cases Relied on by the NLRB Have No Application Here

Kiewit Power Constructors Co.

In *Kiewit*, an employer's supervisor and union representative were going out to issue oral warnings to employees that they could no longer take breaks in a certain area. *Kiewit Power Constructors Co.*, 652 F.3d at 25. When an employee asked if they would receive a written warning if they took their breaks there, and the supervisor said yes, a different employee responded that he had "been out of work for a year," and that if he got "laid off it's going to get ugly and [the supervisor] better bring [his] boxing gloves." *Id.* Another employee also told that supervisor that he had recently been out of work for eight months and repeated the comment that "it's going to get ugly." *Id.* The two employees were fired for physically threatening their supervisor. *Id.*

The NLRB ruled, and this Court agreed that the employees did not lose protection of the NLRA because the employees' comments were "single, brief, and spontaneous reactions... not physical threats, but only expressed vocal resistance to a policy they thought was unfair and unsafe." *Id.*, at 28-29. This Court emphasized that "[t]he absence of any physical gestures or other reasons to think [the employees] were threatening actual violence supports that view." *Id.*

The NLRB improperly relies on *Kiewit* to reason that Bisbikis' "single name-calling incident" remained protected under the Act because a single name-calling incident is not what happened in *Kiewit*. The NLRB takes *Kiewit* out of context. As shown, the employer's reason for terminating the two employees in *Kiewit* was for physically threatening their supervisor, and thus the NLRB and this Court analyzed whether the employees' comments were physical threats. *Id.*, at 28-29. The analysis was not whether "a single, brief verbal outburst weighed in favor of protection." Accordingly, the NLRB's reliance on *Kiewit* to reason that Bisbikis' calling Laskaris a stupid masturbator/jack off fails. (See JA 50.)

Staffing Network Holdings, LLC

In *Staffing Network Holdings*, the employer's supervisor sent an employee home, purportedly because of his bad attitude. *Staffing Network Holdings, LLC & Griselda Barrera*, 362 NLRB at 70. The other employees on the line responded and told the supervisor that his actions were unfair. *Id.* The supervisor argued

otherwise, and told the other employees to go back to work, and that he could also send them home because of their attitude. *Id.* Shortly afterwards, the supervisor came back to check on the employees and asked one particular employee if everything was fine, and stated that if she had an issue, he could send her home too. *Id.* That employee then asked the supervisor if he was threatening her, and if so she could send a letter to the Department of Human Rights. *Id.* The supervisor responded by sending the employee home. *Id.*

The NLRB determined that the employee did not raise her voice, use profane language, or utter any threats. *Id.*, at 74. Accordingly, the NLRB ruled that the employee's behavior was not truly insubordinate and that her actions did not lose the protection of the NLRA. *Id.*

The NLRB cannot compare the employee's conduct in *Staffing Network Holdings* with Biskikis' because the employee in *Staffing Network Holdings* did not raise her voice at, curse at, or insult her supervisor. Whereas here, Bisbikis first called Laskaris a liar and then insulted him profanely in his native tongue. Thus, the NLRB's reliance on *Staffing Network Holdings* to reason that Bisbikis' outburst weighed in favor of protection fails. (See JA 50.)

Corrections Corporation

In *Corrections Corporation*, an employee was admonished for using profanity during a morning meeting, when at the meeting he noticed that his co-

workers were not paying attention to an Assistant Supervisor's instructions for logging in and out. *Corr. Corp. of Am. & Int'l Union, Sec., Police, & Fire Professionals of Am. (Spfpa) & Edward Carroll*, 347 NLRB at 635. Upset by his co-workers' behavior, he stood up and said, “This is bull sh[*]t. You guys need to pay attention. She's trying to make you understand how not to get in trouble like I'm getting in trouble.” *Id.*

The NLRB ruled that the employee's use of profanity did not cause him to lose protection under the Act because profanity was commonly used by his co-workers and supervisors, and more importantly, the profanity was directed at his fellow co-workers, and not at his supervisor. *Id.*, at 636; citing *Wal-Mart Stores, Inc.*, 341 NLRB 796, 807-808 (2004) (protection because employee did not direct profanity toward his supervisors or other employee; rather, he used it to describe a new system in the work process); *Aluminum Co. of America*, 338 NLRB 20, 21-22 (2002) (no protection because employee engaged in “repeated, sustained, ad hominem” profanity that was “sever[e],” “vituperative,” and directed at supervisors).

Corrections Corporation has no application here because the employee did not direct the profanity at his supervisor, but to his co-workers. Here, Bibikis directed his profane insult to Laskaris. As such, the NLRB erred by relying on *Corrections Corporation* to reason that Bisbikis retained protection under the Act

because “profanity was commonly used by employees and supervisors and was used in the room where the employee’s conduct occurred.” (See JA 50.)

Network Dynamics Cabling

In *Network Dynamics Cabling*, an employee and his supervisor got into a “heated discussion,” where the supervisor told the employee that he “couldn't continue ... breaking the law by telling [the union organizer] where [the Respondent] was going.” *Network Dynamics Cabling, Inc. & Int'l Bhd. of Elec. Workers, Local 98, Afl-Cio*, 351 NLRB at 1428. The employee then asked his supervisor if the reason he was not getting more work was because he was seen talking with the union. *Id.*

The NLRB ruled that the employee did not lose the Act’s protection because he only had a heated discussion with his supervisor, he did not curse at him, and that to the extent the employee raised his voice at his supervisor, his outburst was provoked by comments such as supervisor's assertion that the employee “couldn't continue ... breaking the law by telling [union organizer] where [the Respondent] was going.” *Id.*, at 1429.

In *Network Dynamics Cabling*, the employee and his supervisor simply engaged in a “heated discussion,” where the employee may have raised his voice. However, the exchange between the supervisor and employee in *Network Dynamics Cabling*, is far different than the exchange between Bisbikis and

Laskaris. The employee in *Network Dynamics Cabling* did not call his supervisor a liar, or insult him with profane name calling in his native tongue. Whereas, this exactly what Bisbikis did. As such, the NLRB erred in relying on *Network Dynamics Cabling* to reason that Biskikis' behavior was an acceptable response to Laskaris' provocation. (See JA 50.)

B. The NLRB Itself Found that Employees Lost Protection Under the Act for Less Opprobrious Conduct Than Bisbikis'

Not only did the NLRB rely on the cases that have no application here to rule that Bisbikis' actions remain protected under the Act, the NLRB ignored its own Decisions where employees lost protection from the Act for less offensive conduct than Bibikis'.

In *Pipe Realty*, during a discussion about using a new program, the employee in a loud and belligerent voice told his supervisor that: (1) "he did not treat the men like men, but like animals"; (2) nobody had the "balls" to tell him; (3) the supervisor was "f[]king with his job"; and (4) a lot of employees thought the supervisor was "a f[]king a[]hole." *Pipe Realty Co. & Stone*, 313 NLRB 1289 (1994). When the employee continued on, the supervisor disciplined the employee by telling him that he was taking off the next day with no pay. *Id.*

The NLRB stated that "although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." *Id.*, at 1290. The

NLRB ruled the employee's conduct "cost him any protection to which he otherwise might have been entitled under the Act," because "[e]ven if swearing was common in the workplace," the employee's swearing was directed at the supervisor. *Id.*

In *Foodtown Supermarkets*, during a discussion about grievances, an employee called his supervisor a "son of a b*tch," and the supervisor terminated him. *Foodtown Supermarkets*, 268 NLRB 630, 631 (1984). The NLRB ruled that although the employee engaged in covered activity, "[n]either this Act nor any other federal labor law protects an employee from insubordinate conduct of the type engaged in by [the employee]," when he called his supervisor a "son of a b*tch." *Id.*

The NLRB's rulings in *Pipe Realty* and *Foodtown* are just a couple of examples of the NLRB's position that employee conduct less opprobrious than Bisbikis' lost protections under the Act. See also, *Caterpillar Tractor Co.*, 276 NLRB 1323, 1326 (1985) ("[I]nsulting, obscene personal attacks [by an employee against a supervisor] need not be tolerated [.]") However, the NLRB's ruling here that Bisbikis was protected under the Act contradicts those rulings, and the Board does not provide an explanation for why it was departing from precedent. Thus, the Board's unexplained divergence from established precedent renders its ruling "arbitrary and capricious." See *Fort Dearborn Co.*, 827 F.3d at 1074.

The NLRB's ruling is even more arbitrary considering that while the NLRB argues here that Bisbikis' conduct remained under the protection of the Act, in *General Motors*, the NLRB recognizes that its position on "the nature of the employee's outburst" under *Atlantic Steel* has not been consistent; and that when it has determined that profane language used by employees (like Bisbikis used here) remained protected under the Act, it has "been criticized as both morally unacceptable and inconsistent with other work-place laws by federal judges," including ones from this Court and the NLRB itself. *Gen. Motors LLC & Charles Robinson*, 368 NLRB No. 68 (Sept. 5, 2019). Accordingly, in *General Motors*, the NLRB has invited parties and *amici* to file briefs to the NLRB to address:

- a. "[u]nder what circumstances should profane language or sexually or racially offensive speech lose the protections of the Act?" 368 NLRB No. 68, 2;
- b. to what extent the Board's principles that employees must be granted some leeway when engaged in Section 7 activity because "disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses?" *Id.*;
- c. should the Board continue to "consider[] the norms of the workplace, particularly whether profanity is commonplace and tolerated," "[i]n determining whether an employee's outburst is unprotected?" *Id.*;
- d. "[t]o what extent, if any, should the Board continue to consider context – e.g., picket-line setting – when determining whether racially or sexually offensive language loses the Act's protection?" *Id.*; and

- e. “[w]hat relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee’s statements lose the protection of the Act?”

Id. Thus, to the extent that the NLRB ruled that Bibikis’ conduct remained protected under the Act, not only does this ruling go against its own precedent, it at the same time concedes that it must reconsider the position it takes here.

C. This Court’s Rulings Oppose the NLRB’s Ruling That Bisbikis Retained Protection Under the Act

Not only does the NLRB’s ruling have zero basis in law, contradict its past rulings, and draw criticism from federal judges and the NLRB itself, this Court has overruled the position that the NLRB takes here. In *Felix Indus., Inc.*, this Court ruled that an employee lost protection under the Act when he was terminated after calling his supervisor “just a f—king kid,” and saying, “I don’t have to listen to a f—king kid.” *Felix Indus., Inc. v. N.L.R.B.*, 251 F.3d 1051, 1053 (D.C. Cir. 2001).

In *Adtranz*, this Court admonished the NLRB when the NLRB ruled that an employer could not tell its employees that it “prohibits the use of ‘abusive or threatening language to anyone on company premises.’” *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, 253 F.3d 19, 25 (D.C. Cir. 2001).

In *Adtranz*, the NLRB and union took the position that it is “perfectly acceptable to use the most offensive and derogatory racial or sexual epithets, so long as those using such language are engaged in union organizing or efforts to vindicate protected labor activity,” and that “it is unfair to expect union members

to comport themselves with general notions of civility and decorum when discussing union matters or exercising other statutory rights.” *Id.*, at 26. However, this Court properly disregarded the NLRB’s and union’s pleas that working people are incapable “of discussing labor matters in intelligent and generally acceptable language,” and noted that “the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt” rules against employees using abusive and threatening language at work. *Id.*, at 26-27.

This Court also recognized that “[u]nder both federal and state law, employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment. Abusive language can constitute verbal harassment triggering liability under state or federal law.” *Id.*, at 27; citing, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Further, in *Adtranz*, when this Court overruled the NLRB, this Court held that “where the NLRB adopts an unreasonable or otherwise indefensible interpretation of Section 8(a)(1)’s prohibition, we will deny enforcement and vacate the Board’s order.” *Id.*

D. The NLRB’s Ruling is Unreasonable and Indefensible

Bisbikis first called Laskaris a liar, which caused Laskaris to tell Biskibis to “get the f**k out” of his office, and while leaving, Bisbikis called Laskaris a stupid masturbator/jack off in Greek, Laskaris’ native tongue. (JA 58.) The NLRB’s ruling that Bisbikis retained protection under the Act is not only based on

inadequate legal authority, Bisbikis' conduct is precisely what this Court, and the NLRB has ruled cost an employee to lose protection of the Act. Moreover, the NLRB itself concedes that its ruling has been criticized by federal judges (including ones from this Court), as well as its own members, and needs reconsideration. See *General Motors, supra*. The NLRB's ruling that Bisbikis' actions retained protection under the Act simply cannot stand.

IV. The NLRB Erred by Ruling that CON Threatened Towe, Violating the NLRA

After Laskaris showed Towe the video of himself blocking a customer trying to take a test drive, Laskaris told him that “he hoped that Towe would refrain from similar conduct,” and that “[w]ell, if this is your home, you wouldn't be doing this and he told Towe to look for another job because he wouldn't be [at CON] very long.” (JA 60.)

Under the circumstances, ALJ Rosas ruled that “Laskaris' statement of doubt as to Towe's continued employment was a threat of discharge in response to protected union activity in violation of Section 8(a)(1).” (JA 65; citing *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995) (coercive threats may be implied rather than stated expressly); *National By-Products, Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991) (same).”) However, for some reason – which he did not explain – ALJ Rosas analyzed Laskaris' statement to Towe under cases where statements were made in jest, and took the position that Laskaris' with Towe on September 20

concerned Towe's overall participation in the strike, and not Towe's actions in the video. (*Id.*)² The NLRB adopted the ALJ Rosas' ruling that Towe was threatened with discharge on Sept. 20, 2017, without providing any analysis. (JA 59, fn 2.)

The NLRB erred in adopting ALJ Rosas' ruling that Laskaris threatened Towe because he struck, instead of his actions that blocked CON's customer from test driving a car, which caused him to lose protection of the Act. See *Tube Craft*, 287 NLRB at 492 (Strikers' conduct blocking access to employer premises "is, *per se*, misconduct which forfeits" protection of the Act and justifies refusal to reinstate or discharge.); see also *Clear Pine Mouldings*, 268 NLRB at 1047 (Strikers have no right to block the employer's premises, and lose NLRA privileges.)

The evidence adduced at the hearing unequivocally showed that Towe blocked CON's customer's ability to take a car out for a test drive. As such, ALJ Rosas and the NLRB failed to apply the proper legal standard when it was determined that Laskaris unlawfully threatened Towe, thus the NLRB's decision lacks adequate justification, and was in error. See *Jackson Hosp. Corp.*, 647 F.3d at 1141.

² *Electri-Flex Co.*, 238 NLRB 713, 716 (1978) (finding an 8(a)(1) violation where employer offered discredited testimony that the threat of discharge was a joke); cf. *Baker Machinery Co.*, 184 NLRB 358, 361 (1970) (rejecting a Section 8(a)(1) claim where foreman joked that an employee's days were numbered.)

V. The NLRB Erred by Ruling that CON's Letter to the Union Unlawfully Changed the Union's Right to Access CON's Technicians

Before the strike, Thomas would visit the unit employees at CON, during their work hours, approximately once every 6 weeks. (JA 60.) After the events that took place at CON on September 18 and 19, including when Thomas was soliciting the “scabs” during work hours, Laskaris and Francek sent a letter to the Union on September 21. (JA 59-60.) That letter stated that “[a]s a result of the intimidating and threatening behavior of union president Sam Cicinelli and B.A. Ken Thomas on Monday and Tuesday 9/18 & 9/19 towards myself, our employees, and shockingly even worse our customers. Neither Cicinelli nor Thomas will be welcome in our dealership or on property.” (*Id.*; see also JA 265.) That letter also stated that “Local #701 representatives will need to make an appointment and request access [*sic*] our facility and/or our employees while they are at work.” (JA 265.)

ALJ Rosas found that “[t]he policy governing Union access to employees was strictly governed by the SAA and any changes to this policy required notification and bargaining.” (JA 79.) ALJ Rosas then determined that Laskaris and Francek unilaterally changed the SAA in regards to the Union's access to its unit members, and thus violated Section 8(a)(5). (*Id.*) The NLRB adopted ALJ Rosas' ruling without explanation, or supporting authority. (JA 49, fn 2.) However, ALJ Rosas' ruling that Laskaris' and Francek's letter violated Section

8(a)(5) is wrong because (1) that letter did not unilaterally change the Union's access to its unit members at CON; and (2) that ruling contradicts the U.S. Supreme Court's ruling in *Republic Aviation Corp.*

Union access to its members at CON is governed by Article 8, Section 2 of the SAA and states “[a] Union representative shall be permitted access to the Employer's premises for the purpose of adjusting complaints individually or collectively.” (JA 241.) Laskaris’ and Francek’s letter did not restrict the Union from having access to CON’s premises “for the purpose of adjusting complaints individually or collectively”; that letter simply barred Cicinelli and Thomas from coming to CON, and set a procedure for the Union’s access to CON, whether it came to CON for complaints, or generally. As such, that letter did not violate Section 8(a)(5) of the Act.

Moreover, the Board’s ruling contradicts the U.S. Supreme Court’s ruling in *Republic Aviation Corp.*, that states “[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours.” 324 U.S. 793, 803 (1945). As stated in Laskaris’ and Francek’s letter to the Union, CON only sought to set a procedure whereby the Union would have access to its unit members at CON during working

hours. (See JA 265.) According to the U.S. Supreme Court, CON was well within its rights to do as such. Therefore, not only did the NLRB err by ruling that CON unilaterally changed the terms of the SAA, it erred because it ruled that CON could not set the rules for its employees, during their working hours.

VI. The NLRB Erred by Ruling that CON's Statement that it Would Lay Off Employees if There was No Work Available Violated the NLRA

On September 25, 2017, shortly after the strikers returned to work, Laskaris conducted a staff meeting, attended solely by the recalled technicians, where he expressed his frustration over the Union's leafleting outside the dealership. (JA 51.) During the meeting, Laskaris told the technicians that the leafleting was taking money out of their pockets and that if CON ran out of work, it would lay off all of them. (*Id.*) ALJ Rosas found that Laskaris' statement, which “cast union activity as inimical to [u]nit members' employment security,” was a threat and not a lawful, fact-based prediction of economic consequences beyond the employer's control. (*Id.*) The Board adopted ALJ Rosas' ruling, and reasoned that “Laskaris singled out the recalled strikers, rather than employees in general,” and targeted them because they engaged in protected activity. (*Id.*) The Board thus ruled that “Laskaris went beyond the mere prediction of economic consequences beyond his control.” (*Id.*) Member Emanuel disagreed and concluded that Laskaris' statement that CON would have to lay off all the technicians if CON ran out of

work was a lawful prediction. (JA 51, fn 8; citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

The NLRB erred in adopting ALJ Rosas' ruling that Laskaris' statement to the recalled technicians that CON would lay them off if CON ran out of work was an unlawful threat, because as Member Emanuel noted: "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.' He may even make a prediction as to the precise effects he believes unionization will have on his company." *N. L. R. B.*, 395 U.S. at 618; quoting *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20 (1965). Not only was Member Emanuel correct by relying on *Gissel*, he correctly pointed out that only striking employees were in attendance at the meeting regarding leaflets, and thus they were the only employees who could be referenced at such meeting. (JA 51, fn 8.) Accordingly, the NLRB erred when it ruled that CON violated Section 8(a)(1) when Laskaris told the recalled technicians that CON would lay them off if CON ran out of work.

VII. The NLRB Erred by Allowing an Illegally Recorded Conversation Into Evidence

CON objected the admission of the recording of the October 6, 2017 meeting into evidence at the administrative hearing, because Laskaris did not consent to being recorded, thus a violation of Illinois law. See 720 ILCS 5/14-

2(a)(2).³ (JA 49RB, p. 1 fn 1; JA 51-52.) CON's objection was overruled, and the NLRB affirmed that ruling, reasoning that the NLRB finds tape recordings that violate state law admissible as evidence. (JA 49; citing *Orange County Publications*, 334 NLRB 350, 354 (2001).) As a result, the NLRB ruled that CON violated the NLRA by: (1) "threaten[ing] employees with stricter enforcement rules; (2) suggesting that grievance "were futile"; and (3) that Laskaris' comment "eat your kidney"... would reasonably tend to coerce employees in the exercise of their Section 7 rights." (JA 51-52; citing *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, 1 fn 6 (2016).)

However, the NLRB's evidentiary ruling that permits – and essentially encourages – a state criminal law violation cannot stand simply because it is easier to produce ill-gotten evidence than to provide detailed witness testimony and corroborating witnesses. CON concedes that current Board precedent holds that tape recordings made in violation of state law are admissible. However, that precedent is erroneous because it disregards the will of Illinois' Legislature. In 2014, the Illinois Supreme Court in ruled that Illinois' original eavesdropping

³ (a) A person commits eavesdropping when he or she knowingly and intentionally:
(2) Uses an eavesdropping device, in a surreptitious manner, for the purpose of transmitting or recording all or any part of any private conversation to which he or she is a party unless he or she does so with the consent of all other parties to the private conversation. 720 Ill. Comp. Stat. Ann. 5/14-2.

statute was unconstitutional. See *People v. Melango*, 2014 IL 114852 (2014); *People v. Clark*, 2014 IL 115776 (2014). In response, the Illinois legislature passed and the governor signed into law the current statute, which became effective in January 1, 2016. See 720 Ill. Comp. Stat. Ann. 5/14-2. Illinois' swift action making recordings without dual consent a criminal act, clearly evidences a strong public policy in Illinois disfavoring the surreptitious tape recording that took place on October 6, 2017. Given the establishment of an overwhelming desire of the state of Illinois to prohibit surreptitious recordings of conversation, the Board cannot establish a valid rationale to disregard such a law.

Moreover, in addition to being an Illinois law criminal law violation, the NLRB's ruling contradicts the principles of similar rulings of courts in this Circuit, and the U.S. Supreme Court. See *United States v. Stephenson*, 121 F.Supp. 274, 279 (D.D.C 1954) (Evidence obtained through the recording of telephone call without the consent of the other party was violation of the Communications Act ruled, and thus inadmissible.); *Weiss v. United States*, 308 U.S. 321, 331 (1939). As this Court ruled in *Adtranz*, "[t]he NLRB may be bound by its erroneous precedents. We are not." *Adtranz ABB Daimler-Benz Transp., N.A., Inc.*, 253 F.3d at 26. The NLRB's ruling that criminally procured evidence and the fruits of this ill-gotten evidence therefrom are admissible cannot stand.

VIII. The NLRB Erred by Ruling that CON's Statements that was Unlawfully Recorded Violated the NLRA When Laskaris stated: (1) that CON Would More Strictly Enforce its Rules; (2) He Did Not Care About Grievances; and (3) He'd Eat Kidneys

As argued at length *supra*, the admission of the illegally recorded October 6, 2017 meeting opened a Pandora's Box of legal issues. Unfortunately, the admission of this tape colored the impressions of the entire proceeding. The recording is admittedly intense and at times profane. It is most certainly passionate. Although nothing stated therein is unlawful, ALJ Rosas allowed it to color his view of the entire proceeding. Accordingly, ALJ Rosas determined that Laskaris' forty minute speech yielded five NLRA violations. The Board reversed two of those, but of the three statements were held to be NLRA violations, they were vague statements, and far from the type of clear threats that are frequently uttered during such a divisive time. (JA 51-52.)

First, the Board incorrectly found that Laskaris' statement that if "[he] chose to enforce the rules as written, things would be much harder for them" violated Section 8(a)(1). (JA 51.) The Board summarily concluded that this was a threat of stricter enforcement of rules. However, by the statement's plain meaning, it is not. The words uttered were an expression that Laskaris believed a stricter reading of the collective bargaining agreement would be more onerous for the employees than their standard working arrangements. Laskaris does not state that he will "crack down" or review the way things are done. Laskaris does not even state that he is

going to enforce the collective bargaining agreement as written, rather, he just states that if he were to do so, it would be harder on the employees. As such, Laskaris' statement is not a statement that threatened stricter rules, and thus not a 8(a)(1) violation.

Next, Laskaris did not violate the Act when he said he did not care about grievances. As Member Emanuel properly noted that the statement was too vague to constitute a threat of futility. (JA 51, fn 9.) Laskaris' statement was simply an expression of frustration with the dozens of grievances filed in a short span of time – *e.g.*, Bisbikis' termination. Never did Laskaris express or imply that he would not process grievances or resolve them. Thus, this vague statement is not a 8(a)(1) violation. See *Phoenix Glove Co.*, 268 NLRB at 680 fn 3 (Statements that are “too vague and ambiguous,” do not rise to the level of a violation of the Act.)

Finally, the Board found the statement, “you f[**]k with me and my people, I'm going to eat your kidney out of your body and spit it at you,” would coerce employees in the exercise of the Section 7 rights. (JA 51-52.) Again, Laskaris' ranting was an expression of frustration to the dozens of grievances that he believed had no merit. The NLRB correctly concluded that Laskaris' statement was not a threat of physical violence. However, the Board took Laskaris' statements out of context when he was simply expressing the fact that he would not

allow his employees to be harassed at work. In context, this statement would not reasonably tend to coerce a union member from exercising his/her rights.

IX. The NLRB Erred by Ruling that CON Violated the NLRA by Expressing Doubt on the Longevity of Higgins's Employment

During the October 27, 2017 call with Higgins, when Laskaris offered him the opportunity to return to work, Laskaris expressed to Higgins that if he did return to work, that he thought Higgins would not stay for long. (JA 67.) ALJ Rosas ruled that Laskaris' expression of doubt as to Higgins' longevity with CON was a coercive threat that violated Section 8(a)(1). (*Id.*; citing *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995). The Board adopted ALJ Rosas' ruling, but failed to provide its own analysis for its decision. (JA 49, fn. 2) Instead, the Board adopted ALJ Rosas' ruling, which was in error because *Concepts & Designs*, does not apply here. However, *Gissell* does.

In *Concepts & Designs, Inc.*, the NLRB ruled that an employer violated Section 8(a)(1) of the Act, when during a union campaign, the company's president made a comment to an employee while handing him his paycheck "it would sure be nice to get one of these every week, wouldn't it? I am sure [your daughter] would like to know that there is always going to be money for food and clothing." *Concepts & Designs, Inc.*, 318 NLRB at 954. The president made this statement after he had already previously told the employee that, if the company unionized, it would "close the doors." *Id.*

In determining whether the company violated Section 8(a)(1), the NLRB determined that the president's comment to the employee that it would sure be nice to get a paycheck every week was probably "too ambiguous and vague to rise to the level of an implied threat," but combined with his statement that "he was 'sure' that [the employee's] daughter 'would like to know that there is always going to be money there for food and clothing,'" the president's comments were unlawful implied threats. *Id.*, at 954-55.

The context of the president's statement in *Concepts & Designs* and Laskaris' are completely different. In *Concepts & Designs*, the employer sent the message that if the employee brought in the union, it would terminate the employee.⁴ Here, Laskaris' statement to Higgins was made while he was offering Higgins the opportunity to come back to work after a highly-contentious strike, where like in his discussions with the other technicians, Laskaris questioned Higgins' commitment to working at CON. (See JA 58 (When Laskaris asked Bisbikis why he wanted to return, Bisbikis replied that "he had... considered [CON] his home."); see also JA 60 (Laskaris commented to Towe, "[w]ell, if this is your home, you wouldn't be doing this.").)

Laskaris' statement was his prediction that Higgins would not stay at CON long after his reinstatement based on his belief that Higgins and the other

⁴ That same employee was also terminated by the employer. 318 NLRB at 952.

technicians were not committed to working at CON. Accordingly, Laskaris' prediction was not a threat, and thus not a Section 8(a)(1) violation. See *N.L.R.B.*, 395 U.S. at 618 (Employers are free to communicate predictions to employees based on objective facts.). Moreover, Laskaris' expression that Higgins would not stay at CON for long is "too vague and ambiguous to rise to the level of a violation of the Act." See *Phoenix Glove Co.*, 268 NLRB at 680 fn 3 (Statement that employees would be "messing up" if they got union one is too vague and ambiguous for Section 8(a)(1) violation.) Therefore, the NLRB erred in ruling that CON violated Section 8(a)(1) when Laskaris expressed to Higgins that he would not work at CON for an extended time after his reinstatement.

CONCLUSION

Although the NLRB has broad discretion, it is not immune from scrutiny from illogical rulings. Petitioner has shown throughout that not only is the NLRB's Decision and Order illogical, and lack the requisite reasoned decision-making, the Decision and Order is arbitrary and capricious. Accordingly, for the reasons stated herein, Petitioner requests that this Court grant its Petition, and deny the NLRB's Cross-Application for Enforcement.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a), CON respectfully requests an opportunity to argue the issues set forth in its Brief because it believes oral argument will assist the Court in its determination of the issues herein.

Respectfully submitted,

Cadillac of Naperville, Inc.

By: /s/ Tae Y. Kim

One of Its Attorneys

Dated: August 12, 2020

Michael P. MacHarg (mmacharg@taylorenglish.com)

TAYLOR ENGLISH DUMA LLP

1600 Parkwood Circle, Suite 200

Atlanta, GA 30339

(941) 267-2178

Tae Y. Kim (tkim@freeborn.com)

Freeborn & Peters LLP

311 S. Wacker Drive, Suite 3000

Chicago, Illinois 60606

(312) 360-6000

(312) 360-6520 (Fax)

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing is being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record, this 12th day of August, 2020.

/s/ Tae Y. Kim

Tae Y. Kim
Freeborn & Peters LLP
311 S. Wacker Drive, Suite 3000
Chicago, Illinois 60606
(312) 360-6000
(312) 360-6520 (Fax)

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