

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

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

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CADILLAC OF NAPERVILLE, INC.,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

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Petition for Review of Order of National Labor Relations Board

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**PETITIONER'S FINAL REPLY BRIEF**

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## SUMMARY OF THE ARGUMENT

The National Labor Relations Board’s (hereafter “Board” or “NLRB”) Decision under review (“Decision”) directly controverted well-established law – both in NLRB proceedings and the Circuit Courts of Appeals for the United States – as well as lacked the requisite, adequate reasoning to make its rulings. Petitioner, Cadillac of Naperville, Inc. (“CON”) brought these issues to light in its Opening Brief. The Board’s unexplained divergence from established precedent renders its Order “arbitrary and capricious.” See *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, because the Board’s Decision lacks the adequate reasoning to bridge the gap between the facts in the case and its dispositive conclusions, its Decision “fails to reflect the reasoned decision making required of administrative agencies.” *United Food & Commercial Workers Int’l Union, AFL-CIO, Local 150-A v. N.L.R.B.*, 880 F.2d 1422, 1436 (D.C. Cir. 1989).<sup>1</sup>

In its Decision and Response, the Board was required to explain the significant conflicts its Decision created. *Id.*, at 1437 (“When the Board adopts an ALJ opinion that is in tension with intervening Board precedent, a duty arises for the Board to explain the significant conflicts.”). However, in its Response, the

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<sup>1</sup> Hereafter, “*United Food*.”

Board misstates the law, facts, and creates *post hoc* arguments that appear nowhere in its Decision. See *Nat'l Labor Relations Bd. v. Sw. Reg'l Council of Carpenters*<sup>2</sup>, 826 F.3d 460, 465 (D.C. Cir. 2016) (“We may consider only the Board’s own reasons, not the rationalizations of counsel”); quoting *Charlotte Amphitheater Corp.*, 82 F.3d at 1080; *NLRB v. Special Mine Services, Inc.*, 11 F.3d 88, 90 (7th Cir.1993); *SEC v. Chenery Corp.*, 318 U.S. 80, 95, (1943). The Court must not “rubber stamp” the Board’s Decision, however. See *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445-46 (D.C. Cir. 2004). Instead, the Court must uphold its “duty to hold the Board accountable for the rationality of its decisions.” *United Food*, 880 F.2d at 1439.

## ARGUMENT

### **I. The Board Abused its Discretion by Ruling that CON’s Counsel Could Not Retain the Witness Affidavits Throughout the Hearing.**

In its argument that the Board correctly ruled that ALJ Rosas properly denied CON’s attorney’s request to retain the witness affidavits throughout the hearing, the NLRB (1) argues that its ruling in *Wal-Mart* did not give CON’s attorney the right to retain the affidavits throughout the hearing when he requested; and (2) argues (*post hoc*) that *Wal-Mart* refers to an older version of a Casehandling Manual, and the Board’s current Casehandling Manual “grants the

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<sup>2</sup> Hereafter, “*Council of Carpenters*.”

administrative law judge and the Board discretion to grant or deny” CON’s requests to retain the witness affidavits throughout the hearing. (Br. p. 53-54.)<sup>3</sup>

The Board’s argument that CON “erroneously relies on... language in *Wal-Mart*” is wrong. *Wal-Mart* explicitly states that: “[i]f he so desires, counsel may retain the [affidavits] throughout the hearing to use for any legitimate trial purpose. 339 NLRB 64, 65 fn 3 (2003) (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. The Board’s Decision overrules *Wal-Mart*, without explanation for why it was departing from its ruling in *Wal-Mart*. As such, the Board’s ruling that CON’s counsel was not entitled to keep the witness affidavits throughout the hearing is “arbitrary and capricious.” See *Fort Dearborn Co.*, 827 F.3d at 1074, *supra*.

Next, the Board’s *post hoc* argument that its Casehandling Manual supersedes its ruling in *Wal-Mart* fails for numerous reasons. First, this Court cannot accept the Board’s *post hoc* rationalization that its new Casehandling Manual makes its ruling correct. See *Council of Carpenters*, 826 F.3d at 465, *supra*.

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<sup>3</sup> “Br.” refers to the Board’s response brief. “OB” refers to CON’s opening brief.

Second, Federal Appellate Courts, and even the Board itself, recognize that the Board's Casehandling Manual does not have any legal binding effect. The NLRB's Casehandling Manual states that:

The Manual is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board... The Manual is also not intended to be a compendium of either substantive or procedural law, nor can it be a substitute for a knowledge of the law.

(<https://www.nlr.gov/sites/default/files/attachments/pages/node-174/ulp-manual-july-2020.pdf>, Purpose of Manual, p. 22); see also *N.L.R.B. v. Black Bull Carting Inc.*, 29 F.3d 44, 46 (2d Cir. 1994) (Board guidelines are not intended to be and should not be viewed as binding procedural rules.) The Board lacks candor by arguing that its Casehandling Manual supersedes its own rulings.

## **II. The Board Fails to Show That Bisbikis Retained the Act's Protection When He Profanely Name-Called Laskaris.**

The Board fails to respond in kind to CON's challenges that: (1) the cases it relied on to rule that Bisbikis retained the Act's protection do not apply; (2) in the *Atlantic Steel* cases that do apply, the Board and this Court ruled that the employee lost the Act's protection; and (3) The Board itself is rethinking its position on the *Atlantic Steel* factors in *Gen. Motors LLC*, because the position that it takes here has been widely criticized.

Instead, the Board: (a) continues to rely on inapposite cases, where the employee misconduct was not name-calling their supervisors; (b) provides a *post*

*hoc* denial that Bisbikis' profane name-calling of Laskaris is on par with employees' conduct in other cases where the employees lost the Act's protection because they cursed at and called their supervisors names; and (c) misrepresents what it invited *amici* to brief on in *Gen. Motors LLC*, which the Board just ruled.

**A. The Cases Relied on by the Board Have No Application Here Because the Employees Did Not Call Their Supervisors Names in Those Cases.**

The Board continues to rely on *Kiewit Power Constructors, Co., Staffing Network Holdings, LLC*, and *Corrections Corp. of America*, to argue that Bisbikis' calling Laskaris a "stupid jack off" did not cause him to lose the Act's protection. (Br. pp. 42-43.) However, as explained thoroughly in CON's Opening Brief, those cases have no application here, because the employees in those cases did not profanely call their supervisor names, whereas Bisbikis did. (See OB, pp. 38-42.)

The Board fares no better by arguing that Laskaris precipitated the name-calling when he ordered Bisbikis to "get the f[]k out before I get you the f[]k out." (Br. p. 42.) First, the Board misstates the record. The conversation began when Bisbikis brought up a purported June 29 conversation he had with Laskaris, and Laskaris denying having that conversation with Bisbikis; it was at this moment when Bisbikis called "[Laskaris] a liar," and Laskaris replied by shouting "get the f[]k out before I get you the f[]k out." (JA 58; see also JA 155:1-23.) Bisbikis,

determined to get in the first and last insult, then called Laskaris a stupid jack off.

(*Id.*) Contrary to what the Board argues, Bisbikis precipitated Laskaris' cursing.

Moreover, the Board wrongly relies on *King Soopers, Inc.*, and *Network Dynamics Cabling, Inc.*, to argue that "Laskaris provoked Bisbikis," and thus had the right to call Laskaris a stupid jack off because in those cases, the employers' unfair labor practices caused the provocation – the 4th element of the *Atlantic Steel* analysis. (Br. pp. 43-44.) See also *United States Postal Serv. & Nat'l Ass'n of Letter Carriers Branch 11*, 360 NLRB 677, 684 (2014) (The supervisor's conduct that "evinces an intent to interfere with protected rights," weighs on employee's outburst.).

In *Network Dynamics Cabling, Inc.*, the 4th *Atlantic Steel* element favored the employee because the manager provoked the employee by admonishing him, to stop engaging in union activity. 351 NLRB 1423, 1429 (2007). In *King Soopers*, the employee's alleged insubordination took place during the employee's grievance meeting, where the supervisor admitted to violating the collective bargaining agreement. 859 F.3d 23, 36 (D.C. Cir. 2017).<sup>4</sup> It was because the employee's "insubordination" took place during the meeting discussing the

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<sup>4</sup> At the meeting regarding the employee's grievances, even though the supervisor admitted that the employee was not supposed to bag groceries under the terms of the CBA, he still accused the employee of insubordination when the employee told the supervisor that the employee was not supposed to bag groceries.

employer's unfair labor practice, the 4th *Atlantic Steel* element favored the employee. *Id.* Here, no unfair labor practice was alleged to provoke Bisbikis.

The Board's Decision lacks the requisite, adequate reasoning to bridge the facts regarding Bisbikis' calling Laskaris a stupid jack off, and the conclusions it reached by relying on cases that have no application to Bisbikis' conduct. Thus, the Board's Decision "fails to reflect the reasoned decision making required of administrative agencies." See *United Food*, 880 F.2d at 1436, *supra*.

**B. The Board's *Post Hoc* Denial That Less Offensive Conduct Than Bisbikis' Profane Name-Calling Caused Employees to Lose the Act's Protection in Other Cases Fails.**

In its Decision, the Board was required to provide adequate reasoning for why Bisbikis' calling Laskaris a stupid jack off did not cause him to lose the Act's protection, but it failed to do so. (JA 50.) In responding to CON's illustration of cases – the Board's and this Court's – where the employee lost the Act's protection for profanely calling their supervisors names, the Board, *post hoc*, seeks to downplays Bisbikis' name-calling, and claims that it did not break with its own precedent, or this Court's. (Br. pp. 46-47.) However, the Court cannot entertain the Board's *post hoc* attempt to compare and downplay Bisbikis' conduct, because the Board never provided this reasoning in its Decision. See *Council of Carpenters*, 826 F.3d at 465, *supra*.

Nonetheless, even if the Court could entertain the Board's *post hoc* argument that Bisbikis' name-calling is less offensive than others where the employees lost the Act's protection, its argument fails because "[n]either th[e] Act nor any other federal labor law protects an employee from insubordinate conduct or calling a supervisor an s.o.b." *Care Initiatives, Inc.*, 321 NLRB 144, 151 (1996); quoting *Foodtown Supermarkets*, 268 NLRB 630, 631 (1984) (internal quotations omitted). "[I]nsulting, obscene personal attacks by an employee against a supervisor need not be tolerated," even when they occur during otherwise protected activity. *Media Gen. Operations, Inc. v. N.L.R.B.*, 560 F.3d 181, 188 (4th Cir. 2009); citing *Care Initiatives*, 321 N.L.R.B. at 151; quoting *Caterpillar Tractor Co. v. Wagner*, 276 N.L.R.B. 1323, 1326 (1985) (internal punctuation omitted).

Bisbikis' calling Laskaris a stupid jackoff in Greek is, at the very least, just as offensive as being called a son of a b\*tch. (See also OB. pp 43-44, 46-47; discussing *Pipe Realty Co. & Stone*, *Foodtown Supermarkets*, *Felix Indus., Inc.*, *Adtranz ABB Daimler-Benz Transp., N.A., Inc.*) However, the Board failed to undergo this requisite analysis in its Decision. Accordingly, the Board's Decision lacks the requisite "reasoned decision making," and failed to explain the significant conflicts its Decision created with its precedent, in cases such as *Pipe Realty Co. & Stone*, and *Foodtown Supermarkets*, as it is required to, thus also making its ruling

“arbitrary and capricious.” See *United Food*, 880 F.2d at 1436, and *Fort Dearborn Co.*, 827 F.3d at 1074, *supra*. Bisbikis’ obscene personal insult to Laskaris cost him protection under the Act.

**C. The Board Misstates What it Sought Input for in *Gen. Motors LLC*, Where the Board Recently Overruled *Atlantic Steel*.**

The Board claims that it only sought input on “whether employees’ profane outbursts and offensive statements of a racial or sexual nature lose the Act’s protection.” (Br. p. 47.) This is false. The Board invited *amici* to address “[u]nder what circumstances should profane language or sexually or racially offensive speech lose the protections of the Act?” (OB. P. 45; quoting 368 NLRB No. 68, 2). Nevertheless, the Board’s argument is now meaningless, because the Board overruled *Atlantic Steel*.

On July 21, 2020, the Board issued its ruling in *Gen. Motors LLC*, where it recognized that its “setting-specific” analysis of whether an employee’s abusive conduct under *Atlantic Steel*, and other “setting-specific standards aimed at deciding whether an employee has or has not lost the Act’s protection, has failed to yield predictable, equitable results,” and “have conflicted alarmingly with employers’ obligations under federal, state, and local antidiscrimination laws.” 369 NLRB No. 127, slip Op. 1. The Board “believe[s] that, by using these standards to penalize employers for declining to tolerate abusive and potentially illegal conduct in the workplace, the Board has strayed from its statutory mission.” *Id.*

The Board then took a deep-dive into the conflicting decisions *Atlantic Steel* generated, and the Act itself. *Id.*, at 4-9. The Board came to the conclusion that it “read nothing in the Act as intending any protection for abusive conduct from nondiscriminatory discipline, and, accordingly, [it] will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful.” *Id.*, at 8. The Board further stated that “nothing in the text of Section 7 suggests that abusive conduct is an inherent part of the activities that Section 7 protects or that employees who choose to engage in abusive conduct in the course of such activities must be shielded from nondiscriminatory discipline.” *Id.*

Ultimately, the Board overruled *Atlantic Steel*, stating:

We do not read the Act to empower the Board to referee what abusive conduct is severe enough for an employer to lawfully discipline. Our duty is to protect employees from interference in the exercise of their Section 7 rights. Abusive speech and conduct (e.g., profane ad hominem attack or racial slur) is not protected by the Act and is differentiable from speech or conduct that is protected by Section 7 (e.g., articulating a concerted grievance or patrolling a picket line). Accordingly, if the General Counsel fails to show that protected speech or conduct was a motivating factor in an employer’s decision to impose discipline, or if the General Counsel makes that showing but the employer shows that it would have issued the same discipline for the unprotected, abusive speech or conduct even in the absence of the Section 7 activity, the employer appears to us to be well within its rights reserved by Congress.

*Id.*, 8-9.

Despite what the Board argues here, its position is clear: abusive speech and conduct is not protected by the Act. Bisbikis was lawfully terminated.

**III. The Board Fails to Show That CON Violated the Act When it Set Forth a Procedure For How the Union Would Access its Employees During Company Time.**

The Board erred by ruling that CON unilaterally changed the SAA when it sent the union a letter setting forth a protocol for the union to meet with CON's employees during work hours, because the Board did not even state what in the SAA, CON's letter changed. (JA 70.) In its Decision, the Board relied on *Angelica Healthcare Servs. (Id.)*, but *Angelica Healthcare Servs.*, has no application here because that case concerned an employer's unilateral "changes in work schedules, transfers, and layoffs." 284 NLRB 844, 853 (1987). In its Response, the Board again fails to address how CON's letter unilaterally changed the SAA, and relies upon inapposite authority to argue that any change to the union's access to CON – even if it did not change what the SAA provides – is unlawful. (Br. pp. 49-51.)

Article 8, Section 2 of the SAA states "[a] Union representative shall be permitted access to the Employer's premises for the purpose of adjusting complaints individually or collectively." (JA 241) CON's letter states:

[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... Local #701 representatives will need to make an appointment and request access to our facility and/or our employees while they are at work.

(JA 265.) Nothing in CON's letter restricts the union from having access to CON "for the purpose of adjusting complaints individually or collectively."

The Board cites *Ernst Home Centers, Inc.*, as authority that CON was required to bargain with the union before it sent the letter regarding the union's procedure to access its members at CON. (Br. pp. 49-50.) However, *Ernst Home Centers, Inc.*, has no application here. In *Ernst Home Centers, Inc.*, during a union decertification campaign, the employer granted people who promoted decertification with greater access to its employees, and decreased the union's access to its employees. 308 NLRB 848, 865 (1992). Importantly, the collective bargaining agreement between the union and the employer "was silent on the subject of union visitations." *Id.*, at 858. The NLRB ruled that because union visitation is a mandatory bargaining subject, whether it is addressed in the collective-bargaining agreement, or not, the employer violated the NLRA when it unilaterally changed what was previously negotiated and agreed to by the union and the employer. *Id.*, at 865.

Here, as stated above, and in the Opening Brief, CON did not change the SAA's provisions concerning the union's access to its members at CON, during

work hours. Thus, CON did not violate the NLRA when it sent the letter to the union setting forth the procedure for the union to access CON's employees, while at work. See *Peerless Food Prod.*, 236 NLRB 161, 164 (1978) (NLRB dismissed complaint that employer unlawfully changed union access to premises, where collective-bargaining agreement was silent on union access – because rule change did not “intend to deny or inhibit [union’s] investigation or processing of a grievance-leads.”)

Last, the NLRB's argument that CON cannot rely on the U.S. Supreme Court's ruling in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), which states that an employer has the right to restrict union access to employees while at work, because CON failed to raise the issue of changing union access to the Board fails. (Br. p. 50.) CON did raise the issue of the effect of its letter as an Exception to the Board. (JA 48, para. 17.) CON did not violate the NLRA when it set forth a procedure for the union to gain access to its employees while at work, either under the Board's precedent, of the U.S. Supreme Court's. See *Fort Dearborn Co.*, 827 F.3d at 1074, *supra*.

#### **IV. Laskaris' Vague Pre-Strike Comment That “Things Wouldn't be the Same,” is Not an Unlawful Threat.**

The Board argues that its ruling that Laskaris' statement, “things wouldn't be the same,” if the union employees went on strike was an unlawful threat is consistent with its past rulings; and that Laskaris' conduct which occurred months

later, showed that Laskaris' statement foreshadowed that he would make things worse for the union employees if they went on strike. (Br. pp. 23-26.) The NLRB's arguments fail because (1) in each and every case that the NLRB uses to analogize with Laskaris' comments, the employers in those cases did threaten their employees, based on their protected activity; and (2) it provides no authority for judging the context of Laskaris' statement, based on future conduct.

As illustrated in CON's Opening Brief, in every case the Board relied upon to rule that Laskaris' statement "things wouldn't be the same" if the union employees went on strike was an unlawful threat, there actually was a threat. (OB. pp. 34-36.) Laskaris' statement that "things wouldn't be the same," is not on par with a comment that things will get worse. As such, these cases have no application here.

Moreover, the "ample, additional precedent" cited by the Board in its Response, actually offers it no support. (Br. pp. 24-25.) In *Ozburn-Hessey Logistics, LLC*, the supervisor told an employee that he did not want her working on a specific account "because he did not want 'this union s[\*\*]t in his account"; the supervisor asked an employee if they were for the union, and that the supervisor told that employee that "there would be repercussions if she discussed their conversation with other employees." 357 NLRB 1456, 1490 (2011). There is

a clear message from the supervisor in *Ozburn-Hessey Logistics, LLC*, that if an employee engages in protected activity, things will get worse for them.

In *F.W. Woolworth Co.*, during a bargaining session that grew out of the union's efforts to secure changes in a supervisor's scheduling practices, after the union raised employees' scheduling complaints to that supervisor, that supervisor said "[i]f they think that I'm a bitch now, wait." 310 NLRB 1197, 1200 (1993). There, the supervisor made an unlawful threat, because she made it clear that "she meant to, and did, exercise the discretion vested in her by the Company to the detriment of employees," if they engaged in protected activity. *Id.*, at 1203.

As shown, every case that the NLRB relies upon to rule – and subsequently argue – that Laskaris' statement that "things wouldn't be the same" is unlawful, are in fact inapposite. Laskaris' statement is more innocuous and vague than the statement made by a supervisor in *Phoenix Glove Co.*, who said "that the employees did not need a union and that they would be 'messing up' if they got one." 268 NLRB 680, 680 (1984). There, the Board ruled that the supervisor's comments were "too vague and ambiguous." *Id.* The Board's Decision fails to show how Laskaris' statement is on equal terms to the threats made in the cases it relies on, and fails to reconcile the fact that its Decision clashes with its precedent.

Moreover, the Board wrongly relies on *Aldworth Co., Inc.*, and *Aircraft Plating Co.*, as the basis of being able to look to Laskaris' future actions as

justification that Laskaris' past statement was a foreshadowing that things would get worse for the union members. (See JA 51, fn 7.)

In *Aldworth Co., Inc.*, the Board ruled that an employer, by warning to employees that by “grab[bing] onto” those union proponents, they too could be swept out of a job,” was an unlawful threat. 338 NLRB 137, 141 (2002). “Contemporaneous with th[at] meeting,” the Respondent had subjected the employees with “one foot out the door” to discriminatory treatment. *Id.* There, was no distant future analysis to rule that the employer threatened employees in the past. *Id.*

In *Aircraft Plating Co.*, the supervisor made a threat that there would be a loss of benefits and job loss if the union came. 213 NLRB 664, 678 (1974). The Board ruled that the supervisor's threat was an unlawful statement on its own, not because of future acts. *Id.*

The Board fails to justify its quantum leap analysis for how statements made four months after a contentious strike serve as the basis of making a past statement unlawful. Thus, the Board's Decision lacks the adequate reasoning to bridge the gap between the facts in the case and its dispositive conclusions, and its Decision “fails to reflect the reasoned decision making required of administrative agencies.” See *United Food*, 880 F.2d at 1436, *supra*.

**V. Towe's Action Caused Him to Lose the Act's Protections.**

The Board argues that there was a clear conversation switch during the disciplinary meeting where Laskaris showed Towe the video of himself blocking a customer trying to take a test drive, and Laskaris commenting to Towe about his actions in the video. (Br. pp. 26-27.) Thus, the Board contends, its ruling that Laskaris' statement was an unlawful threat of discharge, in response to protected activity, was proper. (Br. pp. 27-28; citing *Concepts & Designs, Inc.*) The Board is wrong.

In *Concepts & Designs, Inc.*, during a union campaign, a supervisor – while handing the employee a paycheck – asked an employee “[i]t would sure be nice to get one of these every week, wouldn't it?” 318 NLRB 948, 954 (1995). The supervisor then told the employee that “I am sure [your daughter] would like to know that there is always going to be money there for food and clothing.” *Id.* The Board ruled that the supervisor's statements threatened “economic reprisals,” if that employee supported the union. *Id.*, at 955.

The employee in *Concepts & Designs, Inc.*, did nothing that would strip him of the Act's protection, and thus that was not part of the analysis. However, Towe did when he blocked a customer from test driving a car. See *Tube Craft*, 287 NLRB 491, 492-93 (1987) (Strikers who blocked access to employer premises violated the Act, and thus lost protection of the Act, making their discharge

lawful.); see also *Clear Pine Mouldings*, 268 NLRB 1044, 1047 (1984) (Employer rightfully discharged strikers who blocked the employer's premises, because their acts cost them NLRA privileges.) Accordingly, Towe lost the Act's protection.

Last, the Board's assertion that this Court cannot consider CON's argument that Towe's conduct cost him protection under the Act, because CON did not raise the issue of Towe's conduct before the Board in its Exceptions fails. (Br. p. 28.) CON's Exception 6 states that CON excepted to "[t]hat portion of the ALJ's decision finding that Laskaris's conversation with [T]owe, wherein [T]owe's picket line conduct was questioned, constitutes a threat." (JA 46, para. 6.)

**VI. Laskaris' Factual Statement that He Would Layoff the Technicians if There was No Work, is a Lawful Statement.**

The Board jumbles facts, and mis-cites law to argue that Laskaris unlawfully told the union members that if CON ran out of work, he would lay them off. (Br. pp. 28-30.) First, Laskaris' telling the union members who were leafleting that their leafleting was taking money out of their pockets is not a NLRA violation. See *N. L. R. B. v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) ("[A]n 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.").

Second, as Member Emmanuel stated, because Laskaris was only talking to the technicians who were leafleting, the only people at the meeting about the leafleting was the union technicians. (JA 51, fn 8). Third, the Board wrongly relies on *Gen. Elec. Co.*, *Mass Coastal Seafoods, Inc.*, and *Savers*, to argue that Laskaris' statement was an unlawful threat, and not a lawful prediction, based on facts outside of his control (Br. p. 29). These cases only show that Laskaris' statement was a lawful prediction under *Gissel*.

In *Mass Coastal Seafoods, Inc.*, an employer made statements to its employees that “if a union comes in, no way will this place keep running.” 293 NLRB 496, 511 (1989). The employer made an unlawful threat because the employer based the statement that things would get worse for them, on engaging in protected activity. *Id.*, at 513.

In *Savers* – which the Board relies on to distinguish Laskaris' statement (Br. p. 29.) – the supervisor “stated that if the union ever did come in, the store wasn't making enough money to . . . pay off higher wages, and it would be a possibility that everybody would lose their job.” 337 NLRB 1039, 1039 (2002). The Board ruled that because the supervisor did not state that things will get worse if the employees engage in protected activity, but instead stated that if there was not enough money to pay the employees, there could be job loss, the supervisor's statement was not an unlawful threat, but one “based upon objective fact.” *Id.*

In *Gen. Elec. Co.*, the Board ruled that the employer's handbills were unlawful threats, because (as this Court pointed out) those handbills "combine to create the threat that General Electric would temporarily lay off employees simply because the employees chose to unionize, rather than because of the likely economic consequences of unionization." 117 F.3d 627, 635 (D.C. Cir. 1997).

Importantly, the Board fails to mention that in *Gen. Elect. Co.*, this Court overturned the NLRB's ruling that a supervisor's statement that the union divided the company's forces, and predicted a shut if the company could not work together was an unlawful statement, and ruled that it was in line with *Gissel. Id.*, at 633. This Court reemphasized that the employer's statements such as "work will only be done at [this] plant 'if we can maintain our competitive advantage,'" and "your job security depends on our being able to provide [our buyer] with the best product and the best service at the best price," are lawful predictions. *Id.*

This Court also noted that the ALJ "turned the company's concerns into warnings," and stated "[i]f the Board may take management statements that very emphatically assert a risk, twist them into claims of absolute certainty, and then condemn them on the grounds that as certainties they are unsupported, the [employer's section 8(c)] free speech right is pure illusion." *Id.*, quoting *Crown Cork & Seal Co. v. N.L.R.B.*, 36 F.3d 1130, 1140 (D.C. Cir. 1994) (internal quotations omitted).

Laskaris' statement that he would lay off the technicians if there was no work, was a lawful prediction because he did not predicate layoffs on the union members undertaking protected activity. See *Gen. Elec. Co.*, at 634 (The "because was a set of objective factors beyond [employer's] control," and thus lawful.") (internal quotations omitted). The Board failed to explain its ruling that conflicted with established precedent (as required), and thus its ruling is arbitrary and capricious. See *Fort Dearborn Co.*, 827 F.3d at 1074, *supra*.

## **VII. Illegal Recordings Should Not Be Admissible as Evidence.**

The Board argues that it's "precedent accords with the federal courts' general acceptance of recording even if obtained in violation of state law." (Br. p. 56.) However, the Board fails to cite a non-Board case where a federal court admitted a recording that was illegal according to state law. The Board's precedent is of its own creation.

As detailed in *Stephens Media, LLC* (Br. p. 55, fn 12.), this Court allowed a secret recording, because under the Board's test for admitting secret recordings, the employee engaged in protected activity when making the recording, and reasonably believed that the employer was going to violate the employee's rights. 677 F.3d 1241, 1255–56 (D.C. Cir. 2012). Here, Towe was not engaged in protected activity when he attended the meeting conducted by Laskaris, nor did Towe reasonably believe that Laskaris was going to violate his rights at that

meeting. Thus, the Board fails to meet its own test for admitting Towe's illegal tape recording, despite its suggestion that all recordings that are deemed illegal under state law are admissible in NLRB hearings.

Moreover, the problem with allowing illegal tape recordings in NLRB hearings is that one cannot know how many hundreds of these unlawful recordings are made that end with no improper conduct. It is only in those rare instances, such as here, where the wrongdoer comes forward with an unlawful bounty that only serves to prejudice a hearing against the employer. However, if CON, or any other employer did what Towe did here, it would have violated the NLRA. See *Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005) (surveillance of union activity is unlawful). There is no good public policy reason to encourage these illegal recordings, or to allow these illegal recordings into evidence. The Board attorneys, like every other attorney should be required to procure evidence through lawful means, and only have lawfully procured evidence admitted into evidence. This Court has the ability to end the Board's wrongful precedent, and it should. See *Adtranz ABB Daimler-Benz Transp., N.A., Inc.*, 253 F.3d at 26, *supra*.

**VIII. Laskaris' Factual Statement That Stricter Enforcement of the Rules Would Make Work-Life Harder is Not an NLRA Violation.**

There is a fundamental difference between Laskaris' statement "if I follow that [rule] book your life [] will get harder" (JA 66), and the statements made by the employers in the cases relied upon by the Board – *Long-Airdox Co., Mid-*

*Mountain Foods, Inc.*, and *Miller Indus. Towing Equip., Inc.* As shown below, those cases have no application here.

In *Long-Airdox Co.*, the supervisor stated that the employer “would never accept the union and that they would close the doors,” “he wanted a guarantee that the Union would not be elected as the employees' representative,” in addition to stating “that some of the employees are not putting out 100 percent and he was going to start writing things up for that.” 277 NLRB 1157, 1164 (1985) (internal quotations omitted). The Board ruled that the supervisor’s statements “were predicated upon the success of the union organizing campaign,” and thus “[t]hese threats clearly contain implications of reprisal for engaging in union activities.” *Id.*, at 1166.

In *Mid-Mountain Foods, Inc.*, the supervisor “told the employees that if the employees voted for the Union, ‘he would enforce the work rules.’” 332 NLRB 229, 237–38 (2000). Accordingly, the employer “did threaten employees with stricter enforcement of plant rules if they selected the Union.” *Id.*, at 238. In *Miller Indust. Towing Equip., Inc.*, the supervisor told employees that if the union came in, the employees’ break times would not be as flexible. 342 NLRB 1074, 1079–80 (2004).

Here, Laskaris did not predicate stricter enforcement of the rules, with the technicians’ engagement in protected activity. Instead, Laskaris simply made a

prediction that if he did enforce the rules, life would be harder for the technicians. See *Gissel*, 395 U.S. at 618, *supra* (Employers are free to communicate predictions to employees based on objective facts.); see also See *Gen. Elec. Co.*, at 634, *supra*. The Board failed to explain the significant conflicts its Decision created with *Gissel*, and *Gen. Elec. Co.*, as it is required to, making its ruling “arbitrary and capricious.” See *Fort Dearborn Co.*, 827 F.3d at 1074, *supra*.

**IX. Laskaris’ Vague Statement that Grievances Will Get You Nowhere, is Not an Unlawful Threat.**

The Board fails to show how Laskaris’ statement that he does not care about grievances violates the NLRA. The Board relies on *M.D. Miller Trucking & Topsoil, Inc.*, to argue that when a supervisor tells employees that filing grievances will get them nowhere, it is a *per se* violation. (Br. p. 35.) However, in *M.D. Miller Trucking & Topsoil, Inc.*, during a meeting, the supervisor: (1) called an employee “a f--king jackoff” “stupid,” “a real piece of s—t”; (2) said the employee “would never see overtime again”; and (3) terminated the employee for insubordination, when the employee told him “not to speak to him in such a manner.” 361 NLRB 1225, 1230 (2014). The employee then told the supervisor that he was going to file a grievance, and the supervisor replied by stating “[g]o file a grievance. You’ll get nowhere.” *Id.* The Board ruled that the supervisor’s statement that the terminated employee’s specific grievance will go nowhere violated the NLRA. *Id.*, at 1234.

Here, Laskaris' statement was not in response to a specific grievance.

Instead, as Member Emmanuel stated, Laskaris was "simply expressing frustration with the filing of grievances that, in Laskaris' view, lacked merit." (JA 51, fn 9.)

As such, Laskaris' statement was "too vague and ambiguous" to violate the NLRA.

See *Phoenix Glove Co.*, 268 NLRB 680, 680 fn 3, *supra*.

**X. Laskaris' Ridiculous Statement that He Would Eat the Technicians Kidneys is Not a Statement That Would Coerce Union Activity.**

The Board fails to provide authority that Laskaris' 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.) As stated in CON's Opening Brief, The Board correctly ruled that Laskaris' statement was not a threat of physical violence, but it took Laskaris' statement out of context. (OB. pp. 57-58.)

Laskaris' statement was made right after he showed the technicians the video of Towe obstructing a woman trying to take a car for a test drive, and after he told the technicians that "[t]here's more videos of behavior... that will make your stomach turn... I expected more loyalty towards the 70 families here... Refer to these guys as scabs and see what happens." (JA 18:3-4, 16-19.) Laskaris then told the technicians that "I have [the union] guys here who want to work, who are hungry and happy and respect coworkers jobs, so next time they face a horrible

decision they'll know what they're walking into instead of obstructing customers and dealers who are trying to sell cars.” (JA 18:27-32.)

In context, Laskaris' statement was his expression that he would not allow his customers or employees (including union ones) to be harassed at work. (JA 19:34-42.) Laskaris' statement was not statement that he would take action if a technician undertook a protected activity, and thus not an unlawful statement made to coerce protected activity. See *Gen. Elec. Co.*, at 634, *supra*.

**XI. Laskaris' Statement to Higgins Was Not Based on Higgin's Protected Activity, Thus Not an NLRA Violation.**

The Board – as it did in its Decision – attempts to analogize the statements made by the supervisor in *Concepts & Designs, Inc.*, with the statements made by Laskaris to Higgins. (Br. p. 33.) However, as stated in CON's Opening Brief and above, the employer in *Concepts & Designs, Inc.*, sent the message that if the employee brought in the union, it would terminate that employee. 318 NLRB at 954; (Op. Br. pp. 58-60.).

Nowhere in his conversation with Higgins, did Laskaris predicate his “expression of doubt as to Higgins' longevity,” with Higgins' protected activities. (See JA 67; JA 172-73.) Laskaris was within his rights to let Higgins know that he did not want to bring the union technicians back. See *Gissel Packing Co.*, 395 U.S. at 618, *supra*. Accordingly, Laskaris' statement to Higgins is either “too vague and ambiguous to rise to rise to the level of a violation of the Act” under

*Phoenix Glove Co.*, 268 NLRB at 680, *supra*, or a lawful prediction under *Gissel*. See also *Gen. Elec. Co.*, F.3d at 635, *supra*. The Board failed to show how Laskaris' statement to Higgins violated the NLRA.

### **CONCLUSION**

For the foregoing reasons, CON respectfully requests that the Court grant its Petition for Review, and deny the Board's Cross-Application for Enforcement.

Respectfully submitted,

Cadillac of Naperville, Inc.

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Dated: August 12, 2020

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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.

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