United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

August 13, 2020

Mark J. Langer, Esquire
Clerk, United States Court of Appeals
for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue NW, Room 5423
Washington, DC 20001-2866

Re: *Cadillac of Naperville, Inc. v. NLRB*, D.C. Cir. Nos. 19-1150, 19-1167
Status: Briefed, but not yet set for argument

Dear Mr. Langer:

In its recent decision in *General Motors, LLC*, 369 NLRB No. 127 (July 21, 2020) (attached), the Board overruled *Atlantic Steel Co.*, 245 NLRB 814 (1979), and announced that *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), instead provides the appropriate test for analyzing employee misconduct occurring in the context of protected activity.

In the decision currently on review, the Board, applying *Atlantic Steel*, concluded that Cadillac of Naperville violated Section 8(a)(3) and (1) of the NLRA by discharging a union steward following an outburst he directed at the company president during a meeting about recalling strikers. (Appendix 49-50.) The Board also found that Naperville committed other violations of Section 8(a)(1), (3) and (5), none of which rested on *Atlantic Steel*. (Appendix 49, 51-52.)

Whether the discharge is unlawful under *Wright Line* is a question for the Board in the first instance. Accordingly, because the Board applied the now-overruled analysis set forth in *Atlantic Steel* in finding that the steward's discharge was unlawful, the Board no longer seeks enforcement of the discharge finding. Instead, the Board requests that the Court remand that single issue to the Board for

reconsideration after the conclusion of appellate proceedings. With respect to the remaining violations, the Board respectfully urges the Court to uphold those findings, none of which rely on *Atlantic Steel* (NLRB Br. 21-37, 48-51), and several of which are uncontested before the Court and therefore appropriate for summary enforcement (NLRB Br. 19-20).

Respectfully submitted,

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General Motors LLC *and* Charles Robinson. Cases 14–CA–197985 and 14–CA–208242

July 21, 2020

DECISION AND ORDER REMANDING

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

The National Labor Relations Board has been repeatedly asked to determine whether employers have unlawfully discharged or otherwise disciplined employees who had engaged in abusive conduct in connection with activity protected by Section 7 of the National Labor Relations Act. By way of example, recent scenarios presented to the Board include employers discharging employees who had (1) unleashed a barrage of profane ad hominem attacks against the owner of an employer during a meeting in which the employee also raised concerted complaints about compensation,[1] (2) posted on social media a profane ad hominem attack against a manager, where the posting also promoted voting for union representation,[2] or (3) shouted racial slurs while picketing.[3] In deciding these cases, the Board has assumed that the abusive conduct and the Section 7 activity are analytically inseparable. In other words, the Board has presumed a causal connection between the Section 7 activity and the discipline at issue, rendering the *Wright Line*[4] standard—typically used to determine whether discipline was an unlawful response to protected conduct or lawfully based on reasons unrelated to protected conduct—inapplicable.[5] As a result, the Board has not taken into account employers' arguments that the discipline at issue was motivated solely by the abusive form or manner of the Section 7 activity or that the employer would have issued the same discipline for the abusive conduct even in the absence of Section 7 activity.

Instead, the Board has presumed that discipline based on abusive conduct in the course of Section 7 activity violates Section 8(a)(3) and (1) (or, when no union activity is involved, just Section 8(a)(1)) unless the Board determines, under one of its setting-specific standards, that the abusive conduct lost the employee the protection of the Act. For outbursts to management in the workplace, the Board has applied the four-factor *Atlantic Steel* test, under which it 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, in any way, provoked by an employer's unfair labor practice."[6] For social-media posts and most cases involving conversations among employees in the workplace, the Board has examined the totality of the circumstances.[7] And for picket-line conduct, the Board applies the *Clear Pine Mouldings* standard, which asks whether, under all of the circumstances, nonstrikers reasonably would have been coerced or intimidated by the abusive conduct.[8]

These setting-specific standards aimed at deciding whether an employee has or has not lost the Act's protection, however, have failed to yield predictable, equitable results. In some instances, violations found under these standards have conflicted alarmingly with employers' obligations under federal, state, and local antidiscrimination laws. We believe 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.

Accordingly, we hold that, going forward, these cases shall be analyzed under the Board's familiar *Wright Line* standard. In our view, abusive conduct that occurs in the context of Section 7 activity is not analytically inseparable from the Section 7 activity itself. If the General Counsel

[1] *Plaza Auto Center, Inc.*, 360 NLRB 972, 977–980 (2014) (finding the employer violated Sec. 8(a)(1) for discharging an employee after the employee called the owner a "fucking mother fucking," a "fucking crook," an "asshole," and "stupid"; told him nobody liked him and everyone talked about him behind his back; and threatened that the owner would regret firing him, if he did).

[2] *Pier Sixty, LLC*, 362 NLRB 505, 506–508 (2015) (finding the employer violated Sec. 8(a)(3) and (1) for discharging an employee following a Facebook post stating that a certain manager "is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!"), enfd. 855 F.3d 115 (2d Cir. 2017).

[3] *Cooper Tire & Rubber Co.*, 363 NLRB No. 194, slip op. at 7–10 (2016) (finding the employer violated Sec. 8(a)(3) and (1) for discharging a white employee after, while picketing, he shouted to black replacement workers: "Hey, did you bring enough KFC for everyone," and "Hey, anybody smell that? I smell fried chicken and watermelon."), enfd. 866 F.3d 885 (8th Cir. 2017).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[5] See, e.g., *Roemer Industries, Inc.*, 362 NLRB 828, 834 fn. 15 (2015) ("Where an employer defends disciplinary action based on employee conduct that is part of the res gestae of the employee's protected activity, *Wright Line* is inapplicable. This is because the causal connection between the protected activity and the discipline is not in dispute."), enfd. 688 Fed. Appx. 340 (6th Cir. 2017), quoted in part in *Entergy Nuclear Operations, Inc.*, 367 NLRB No. 135, slip op. at 1 fn. 1 (2019).

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

[7] See *Desert Springs Hospital Medical Center*, 363 NLRB No. 185, slip op. at 1 fn. 3 (2016); *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015).

[8] *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985). In practice, the *Clear Pine Mouldings* standard has excused most speech that does not threaten violence. See, e.g., *Cooper Tire*, 363 NLRB No. 194, slip op. at 7–10.

alleges discipline was motivated by Section 7 activity and the employer contends it was motivated by abusive conduct, causation is at issue. As in any *Wright Line* case, the General Counsel must make an initial showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity.[9] If the General Counsel has made his initial case, the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of the Section 7 activity.[10] We overrule all pertinent cases to the extent they are inconsistent with this holding.

I. BACKGROUND

Charging Party Charles Robinson works as a union committeeperson at the Respondent's automotive assembly facility in Kansas City, Kansas. Robinson is employed by the Respondent, but he has represented bargaining unit members as his full-time job since 2012. In 2017, the Respondent suspended Robinson three times following three separate incidents in which he engaged in profane or racially offensive conduct towards management or at bargaining meetings in the course of union activity.

On April 11, 2017, Robinson had a heated exchange with manager Nicholas Nikolaenko near management offices about overtime coverage for employees away on cross-training. Robinson yelled at Nikolaenko that he did not "give a fuck about your cross-training," that "we're not going to do any fuckin' cross-training if you're going to be acting that way," and that Nikolaenko could "shove it up [his] fuckin' ass." The Respondent suspended him for 3 days.

On April 25, 2017, Robinson attended a meeting on subcontracting paint-shop work with two other union committeepersons and a dozen managers. Robinson became very loud and pointed his finger while speaking. When Manager Anthony Stevens told Robinson he was speaking too loudly, Robinson lowered his voice and mockingly acted a caricature of a slave. Referring to Stevens, Robinson said, "Yes, Master, Your Master Anthony," "Yes, sir, Master Anthony," "Is that what you want me to do, Master Anthony?," and also stated that Stevens wanted him "to be a good Black man." The Respondent suspended him for 2 weeks.

On October 6, 2017, Robinson attended a manpower meeting with another union committeeperson and four managers, including Stevens. At the meeting, Robinson kept repeating the same questions. When Stevens said they were going to move on, Robinson said he would "mess [Stevens] up." Stevens asked if that was a threat, and Robinson replied Stevens could take it how he wanted. Later in the meeting, Robinson began playing loud music from his phone that contained profane, racially charged, and sexually offensive lyrics. The music went on for 10 to 30 minutes. When Stevens left the room once or twice, Robinson turned off the music, only to turn it back on when Stevens returned. The Respondent suspended him for 30 days.

On September 18, 2018, Administrative Law Judge Donna N. Dawson issued the attached decision. The judge applied the four-factor *Atlantic Steel* standard to analyze whether Robinson's abusive conduct while engaged in union activity lost him the Act's protection. The judge concluded that Robinson's conduct retained the protection of the Act on April 11, 2017, notwithstanding his profanity-laced outburst to manager Nikolaenko regarding cross-training, but that his conduct lost him the protection of the Act during the course of the April 25 and October 6, 2017 meetings. Accordingly, the judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act only by suspending Robinson for his April 11 conduct.

The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.[11]

On September 5, 2019, the National Labor Relations Board issued a Notice and Invitation to File Briefs in this matter that asked the parties and interested amici to address the following questions:

> 1. Under what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act? In *Plaza Auto*, although the nature of Aguirre's outburst weighed against protection, the Board found that the other three *Atlantic Steel* factors favored protection, and it concluded that Aguirre retained the Act's protection. And although the *Plaza Auto* majority did not say that the nature of the outburst could never result in loss of protection where the other three factors tilt the other way, it also did not say that it ever could. Are there circumstances under which the "nature of the employee's outburst" factor should be dispositive

[9] See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6, 8 (2019).

[10] See *Hobson Bearing International, Inc.*, 365 NLRB No. 73, slip op. at 1 fn. 1 (2017).

[11] The General Counsel's exceptions relate only to the suspension for the April 25 conduct and the judge's recommended remedy. There are no exceptions to the judge's finding that the suspension for the October 6 conduct was lawful.

as to loss of protection, regardless of the remaining *Atlantic Steel* factors? Why or why not?

2. The Board has held that employees must be granted some leeway when engaged in Section 7 activity because "[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.,* 282 NLRB 130, 132 (1986). To what extent should this principle remain applicable with respect to profanity or language that is offensive to others on the basis of race or sex?

3. In determining whether an employee's outburst is unprotected, the Board has considered the norms of the workplace, particularly whether profanity is commonplace and tolerated. See, e.g., *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982). Should the Board continue to do so? If the norms of the workplace are relevant, should the Board consider employer work rules, such as those that prohibit profanity, bullying, or uncivil behavior?

4. Should the Board adhere to, modify, or abandon the standard the Board applied in, e.g., *Cooper Tire*, supra, *Airo Die Casting*, 347 NLRB 810 (2006), *Nickell Moulding*, 317 NLRB 826 (1995), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), and *Calliope Designs*, 297 NLRB 510 (1989), to the extent it permitted a finding in those cases that racially or sexually offensive language on a picket line did not lose the protection of the Act? To 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? What other factors, if any, should the Board deem relevant to that determination? Should the use of such language compel a finding of loss of protection? Why or why not?

5. What 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? How should the Board accommodate both employers' duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights?

The General Counsel and the Respondent filed briefs. Amicus or amici curiae briefs were filed by Association of Corporate Counsel (ACC); American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); American Federation of Teachers, Asian Pacific American Labor Alliance, PFLAG National Office, and Pride at Work, jointly (AFT); American Hospital Association and Federation of American Hospitals, jointly (AHA); Coalition for a Democratic Workplace, American Hotel and Lodging Association, Associated Builders and Contractors, HR Policy Association, Independent Electrical Contractors, International Foodservice Distributors Association, International Franchise Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Restaurant Association, National Retail Federation, Restaurant Law Center, Retail Industry Leaders Association, and Western Electric Contractors Association, jointly (CDW); Communications Workers of America (CWA); Council on Labor Law Equality (COLLE); Center for Workplace Compliance (CWC); Equal Employment Opportunity Commission (EEOC); FordHarrison LLP; HR Policy Association (HRPA); Law Office of Nicholas E. Karatinos; LIUNA Mid-Atlantic Regional Organizing Coalition; National Federation of Independent Business (NFIB); National Nurses United (NNU); National Treasury Employees Union (NTEU); SEIU Local 32BJ; Society for Human Resource Management (SHRM); United States Postal Service (USPS); and Weinberg, Roger & Rosenfeld.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding. We remand the case to the judge to reopen the record and afford the parties an opportunity to present evidence relevant to the standard we adopt today, and to prepare a supplemental decision containing findings of fact, conclusions of law, and a recommended Order, consistent with this Decision and Order Remanding.

II. DISCUSSION

A. Positions of the Parties and Amici

Several amici urge the Board to adhere to its current precedent without change.[12] Most of these amici contend it would be impermissible to address factual scenarios outside of the face-to-face workplace interactions with management presented by this case and currently analyzed under *Atlantic Steel*. And, they continue, there is no reason to disrupt the well-established body of law under *Atlantic Steel*. They view *Atlantic Steel* as properly recognizing that speech protected by Section 7 of the Act can be coarse because of the passions such topics inflame and that it should not be censored or hindered. Insofar as *Atlantic*

[12] These amici are AFL–CIO, AFT, CWA, Law Office of Nicholas E. Karatinos, LIUNA Mid-Atlantic, NNU, NTEU, SEIU Local 32BJ, and Weinberg, Roger & Rosenfeld.

Steel may result in an employee's sexually or racially offensive speech retaining the Act's protection, these amici see no conflict with antidiscrimination laws such as Title VII because single instances of such speech would rarely create a legally actionable hostile work environment under those laws.

The General Counsel, the Respondent, and several other amici believe the Board should revise its treatment of abusive conduct connected to Section 7 activity in all settings, including the workplace, online, and on the picket line. Their suggested approaches fall into two general categories.

The first group, including the General Counsel, proposes that the Board categorize certain types of abusive conduct per se unprotected in all settings.[13] Amici vary in what they would categorize as per se unprotected. Some would only include conduct that is offensive on the basis of race or sex. Others would include conduct that is offensive on the basis of any protected status, including religion, color, national origin, age, and disability in addition to race and sex. Still others would go beyond conduct that implicates antidiscrimination law and also deem per se unprotected conduct that would reasonably lead to violence, or profanity used as an ad hominem attack. Some amici in this group also recommend various changes to *Atlantic Steel* for conduct that does not rise to the level of the per se rule. Amici argue that the per se approach renders unprotected conduct that is unrelated to the purposes of the Act, respects employers' legal responsibility to prevent a hostile work environment on the basis of protected characteristics, and recognizes employers' right to maintain order and respect.

The second group, including the Respondent, asserts the Board should drop its setting-specific standards altogether and uphold employers' enforcement of facially neutral work rules prohibiting profane, racist, or sexist conduct unless the evidence shows that the employer used such conduct as a pretext to interfere with Section 7 activity.[14] This approach would recognize that the abusive form or manner of conduct during Section 7 activity is analytically separable from the fact that it happened in the context of Section 7 activity, and that an employer is not discriminating against Section 7 activity if it would have issued the same discipline even in the absence of Section 7 activity. Amici base this approach on employers' right to suspend and discharge employees for cause under Section 10(c), as well as considerations of reconciling the protection of Section 7 rights with employers' duties to adhere to antidiscrimination laws and to operate a safe, respectful workplace.

B. The Existing Setting-Specific Standards for Determining When Abusive Conduct Loses the Protection of the Act

Under the precedent before today's decision, the Board has found that an employer violates the Act by disciplining an employee based on abusive conduct "that is part of the res gestae" of Section 7 activity, unless evidence shows that the abusive conduct was severe enough to lose the employee the Act's protection. *Stanford Hotel*, 344 NLRB 558, 558 (2005). This precedent was based on the view that "employees are permitted some leeway for impulsive behavior when engaged in concerted activity," and the accommodation of such behavior is "balanced against an employer's right to maintain order and respect." *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005) (quoting *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994)). Whether specific abusive conduct is severe enough to lose protection has been determined by applying different standards specific to the context of the Section 7 activity at issue. In ascending order of leeway, the Board purports to grant employees, it has applied different standards to workplace discussions with management, social media posts and other conversations among employees, and picketing.

1. *Atlantic Steel*—Workplace discussions with management

To determine whether abusive conduct in the course of otherwise-protected workplace conversations with management was severe enough to lose the Act's protection, the Board has applied the four-factor standard set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979): "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." Id. at 816. The Board has not assigned specific weight to any of the factors generally, and it has chosen in specific cases to give certain factors more or less weight without adequately explaining why. As a result, as demonstrated in just a few examples below, the Board's application of the *Atlantic Steel* factors has produced inconsistent outcomes.

For example, in *Tampa Tribune*, 351 NLRB 1324 (2007),[15] where applying the four *Atlantic Steel* factors yielded a two-two tie, the Board found that an employee's reference to a vice president as a "stupid fucking moron"

[13] Amici in this group are CDW, CWC, HRPA, SHRM, and USPS. ACC similarly proposes a rebuttable presumption.

[14] Amici in this group are COLLE, Ford Harrison, NFIB, AHA (for healthcare settings), and SHRM (for profane language unrelated to a protected status).

[15] Enf. denied 560 F.3d 181 (4th Cir. 2009).

retained protection by subtly grading the weight of factors on either side: "We find that the location and subject matter of [the employee's] statements, which weigh moderately to strongly in favor of his retaining the Act's protection, more than offset the nature of his outburst and the lack of provocation by unfair labor practices of the Respondent, which weigh slightly to moderately against protection." Id. at 1326–1327. By contrast, in *Trus Joist Macmillan*, 341 NLRB 369 (2004), the Board found that the fact that the "nature of the outburst" factor weighed against protection was alone enough for the conduct to lose the protection of the Act where an employee had called a manager a "liar," "lying bastard," and "prostitute" and had grabbed his own crotch. Id. at 369–372. The final example we will cite is *Plaza Auto Center, Inc.*, 360 NLRB 972 (2014). There, the United States Court of Appeals for the Ninth Circuit had remanded the case back to the Board to reweigh the factors in light of the court's finding that the Board had improperly concluded that the nature of the outburst (profane personal attacks on the owner) did not disfavor protection. On remand, the Board concluded again that the employee retained the Act's protection by adding an additional counterweight to other factors that favored protection—newly describing them as "heavily" weighing in favor of protection. Id. at 978. In other words, as Member Johnson noted in his dissent, "[the majority] rebalance[s] the original Board majority's weighting of those factors by stating that the place-of-discussion and provocation factors now weigh 'heavily' in favor of protection. . . . [T]he majority's approach in now reweighing 'heavily' both factors one and four is essentially anachronistic, implicitly assuming that the same events frozen in the past and by the law of the case can now illogically grow more significant and persuasive through reimagination." Id. at 985.

Beyond the pliability of *Atlantic Steel*'s four-factor test, another problem with that test is that the second factor—the subject matter of the discussion—*always* tilts the scale in favor of employees retaining protection for abusive conduct because *Atlantic Steel* only applies when the subject matter of the discussion is related to Section 7 activity. A standard predisposed to favoring protection in each case hardly is a meaningful or fair analytical tool.

Further, it is clear that *Atlantic Steel* has failed to produce reliably consistent results that provide clear guidance for when an employer will violate federal labor law by disciplining an employee who has engaged in abusive conduct in the course of otherwise-protected activity. On one hand, for example, the Board found the employees lost protection for their abusive conduct, and the employers' discipline was thus lawful, in *Verizon Wireless*, 349 NLRB 640 (2007), and *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005). In *Verizon Wireless*, involving an employee who engaged in abusive conduct while soliciting coworkers in an open work area, the employer gave the employee written warnings for referring to a supervisor as "that bitch" and telling one coworker to show an email about the union to her "fucking supervisors." 349 NLRB at 641–643. In *DaimlerChrysler*, the employer gave a union steward a written warning for a verbal exchange with a supervisor in an open work area regarding when to schedule a grievance meeting where the union steward said "bullshit, I want the meeting now," "fuck this shit," and he didn't "have to put up with this bullshit," and he called the supervisor an "asshole." 344 NLRB at 1328–1330.

On the other hand, when seemingly presented with more seriously abusive conduct, the Board found that employees retained the Act's protection, and the employers' discipline was thus unlawful, in *Postal Service*, 364 NLRB No. 62 (2016), and *Plaza Auto*, above. In *Postal Service*, the employer gave a warning letter to a union steward who, in a one-on-one grievance meeting with a supervisor in a breakroom, called the supervisor "an ass," unleashed a stream of profanity, forcefully stood up, stepped toward the supervisor, shook her finger within striking distance, and continuously screamed, "I can say anything I want," "I can swear if I want," and "I can do anything I want." 364 NLRB No. 62, slip op. at 2–4. In *Plaza Auto*, during a meeting with the owner and two managers in one of their offices, an employee became enraged while discussing concerted complaints about compensation. 360 NLRB at 973. The employee called the owner a "fucking mother fucking," a "fucking crook," an "asshole," and "stupid"; told the owner nobody liked him and everyone talked about him behind his back; stood up, pushing the chair aside; and threatened that the owner would regret firing him, if he did. Id. The owner discharged him on the spot. Id.

Finally, cases such as *Postal Service* and *Plaza Auto* also raise serious concerns that the Board is giving little, if any, consideration to employers' right to maintain order and respect. Cf. *NLRB v. Starbucks Coffee Co.*, 679 F.3d 70, 73–74, 79–80 (2d Cir. 2012) (concluding the Board's application of *Atlantic Steel* to find protected an employee's outburst—"You can go fuck yourself, if you want to fuck me up, go ahead, I'm here"—to an off-duty manager in front of customers "improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers"), denying enf. 355 NLRB 636 (2010); *Tampa Tribune v. NLRB*, 560 F.3d 181, 184–189 (4th Cir. 2009) (concluding the Board misapplied *Atlantic Steel* in finding an employee retained the Act's protection

despite referring to a vice president as a "fucking idiot," reasoning that "[t]he Act's protections are not limitless, . . . and where they do not reach, employers cannot be compelled to tolerate language or behavior that undermines workplace discipline"), denying enf. 351 NLRB 1324 (2007).

Atlantic Steel has failed to be an effective legal standard. Multifactor tests "lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why." *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). The Board has been unable to provide the necessary clarity. Such "totality of the circumstances" analyses can become "simply a cloak for agency whim." Id. As shown above, we believe that *Atlantic Steel* has been used as just such a cloak.

2. Totality of the circumstances—Social-media posts and coworker discussions

The Board has held that *Atlantic Steel* does not apply to abusive conduct on social media or in workplace discussions among coworkers. See *Desert Springs Hospital Medical Center*, 363 NLRB No. 185, slip op. at 1 fn. 3 (2016); *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015), enfd. 855 F.3d 115 (2d Cir. 2017). Instead, the Board has applied a totality of the circumstances approach unmoored from any specific factors.[16] Based on the few cases decided under this approach, it appears that the Board's flexibility in considering a wider of range of facts in each specific circumstance promises to create the same, if not more, inconsistency and unpredictability as has been found in cases applying *Atlantic Steel*. Cf. *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 123–124 (2d Cir. 2017) ("While we are not convinced the amorphous 'totality of the circumstances' test adequately balances an employer's interests, Pier Sixty did not object to the ALJ's use of the test in evaluating Perez's statements before the Board. For that reason, we need not, and do not, address the validity of that test in this opinion."). Indeed, in *Pier Sixty*, the Board applied this amorphous standard to find that the respondent violated Section 8(a)(3) and (1) by discharging an employee for posting on Facebook the following attack on a manager and his family: "Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!" 362 NLRB at 506–508.

3. *Clear Pine Mouldings*—The picket line

With regard to abusive conduct taking place on the picket line, the Board has applied *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984), which provides that abusive conduct loses the Act's protection, and the employer accordingly may lawfully refuse to reinstate or otherwise discharge an employee, where "'the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'" *Clear Pine Mouldings, Inc.*, 268 NLRB at 1046 (quoting *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977)), enfd. mem. 765 F.2d 148 (9th Cir. 1985). Cases applying *Clear Pine Mouldings* have found picket-line misconduct to lose the protection of the Act only where it involves an overt or implied threat or where there is a reasonable likelihood of an imminent physical confrontation. See, e.g., *Catalytic, Inc.*, 275 NLRB 97, 98 (1985). As a result, the Board has found appallingly abusive picket-line misconduct to retain protection, including racially and sexually offensive language. See, e.g., *Cooper Tire & Rubber Co.*, 363 NLRB No. 194, slip op. at 7–10 (2016) (finding protected a white picketer saying to black replacement workers, "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon."), enfd. 866 F.3d 885 (8th Cir. 2017); *Airo Die Casting, Inc.*, 347 NLRB 810, 812 (2006) (finding protected a striker shouting "fuck you nigger" to a black security guard); *Nickell Moulding*, 317 NLRB 826, 828–829 (1995) (finding protected a striker carrying a sign targeted at one particular nonstriker that read: "Who is Rhonda F [with an X through the F] Sucking Today?"), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996); *Calliope Designs, Inc.*, 297 NLRB 510, 521 (1989) (finding protected repeatedly calling nonstrikers "whores" and telling one she could make more money by selling her nonstriker daughter at the flea market).

4. The setting-specific standards are in tension with antidiscrimination laws

Federal, state, and local antidiscrimination laws impose on employers a legal duty to protect employees from discrimination in the workplace on the basis of protected

[16] The Board has analyzed whether social-media posts are unprotected by the Act on the basis of disparagement of or disloyalty to the employer by applying *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966). See *Desert Cab, Inc. d/b/a ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 fn. 1, 15–16 (2019); *Triple Play Sports Bar & Grille*, 361 NLRB 308, 310–313 (2014), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015). This precedent is inapplicable when the employer cites abusive conduct, rather than disparagement or disloyalty, for its discipline. See *Novelis Corp.*, 364 NLRB No. 101, slip op. at 2–3 fn. 12 (2016), enf. denied in part on other grounds 885 F.3d 100 (2d Cir. 2018). Because today's decision only addresses abusive conduct, precedent on disparagement or disloyalty is beyond its scope.

characteristics such as race, color, religion, sex, national origin, age, and disability. The amicus brief filed by the EEOC, the principal federal agency tasked with administering and enforcing federal laws prohibiting employment discrimination, helpfully outlines employers' duties under laws within its purview.[17] Under EEO law, when an employee creates a hostile work environment—by engaging in objectively and subjectively severe or pervasive harassment based on a protected characteristic—the employer is liable so long as it knew or should have known about the offending conduct and failed to take prompt and appropriate corrective action. The EEOC stresses that it is

> critical that employers are able to take corrective action as soon as they have notice of harassing conduct—even if the harassing conduct has not yet risen to the level of a hostile work environment. . . . This is because if the employer *fails* to take corrective action, and the harassment continues and rises to the level of an actionable hostile work environment, then the employer may face liability. The "primary objective" of Title VII is "not to provide redress but to avoid harm."

EEOC Amicus Brief at 18 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)).

EEO laws, unlike the Board's current setting-specific standards, do not forgive abusive conduct because, for instance, it arises from heated feelings about working conditions or because crude language is common in the workplace. Further, the EEOC notes that "[e]mployers may also be liable under Title VII for conduct occurring outside of work when that conduct impacts the employee's working environment . . . . Employees subjected on the picket line—or through social media—to racist or sexist comments or conduct outside the workplace may thus be impacted by that conduct, including when they return to work after picketing and must work alongside their harasser." EEOC Amicus Brief at 14.

The Board's current standards for analyzing abusive conduct, however, have been wholly indifferent to employers' legal obligations to prevent hostile work environments on the basis of protected traits. See *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.") This indifference has not escaped the notice of reviewing courts. Notably, the United States Court of Appeals for the District of Columbia Circuit recently denied enforcement of a Board decision finding an employee who had written "whore board" on the top of overtime signup sheets on a bulletin board retained the Act's protection under *Atlantic Steel*. *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546 (D.C. Cir. 2019), denying enf. 366 NLRB No. 131 (2018). The court found that the Board had failed to grapple with the employer's argument that its duty to comply with antidiscrimination laws, which might require taking prompt action against the offending employee, seemed to be in conflict with its duties under the Act.[18] Id. at 551–552.

C. Wright Line Is the Proper Standard

For all the reasons discussed above, we believe that the Board must consider a different standard for deciding cases where employees engage in abusive conduct in connection with Section 7 activity, and the employer asserts it issued discipline because of the abusive conduct. In cases such as *Postal Service*, above, we believe it entirely plausible that the employer's decision to give the longtime union steward a warning letter was based entirely on her abusive conduct—calling the supervisor "an ass," unleashing a stream of profanity, forcefully standing up, stepping toward the supervisor, shaking her finger within striking distance, and continuously screaming, "I can say anything I want," "I can swear if I want," and "I can do anything I want"—rather than her union activity. See 364 NLRB No. 62, slip op. at 2–4. Likewise, it seems plausible in *Pier Sixty*, above, that the employer discharged an employee for the profane and vituperative attack on the manager in the Facebook post, which would make it difficult for the two to work together again, and not because the post also happened to conclude with a pro-union message. 362 NLRB at 506–508. Just as it seems plausible in *Cooper Tire*, above, that when it discharged a striker, the employer took the prompt and appropriate corrective action anticipated by antidiscrimination laws for his racist bullying—"[h]ey, did you bring enough KFC for everyone" and "[h]ey, anybody smell that? I smell fried chicken and watermelon"—and was not motivated by his protected picketing activity. 363 NLRB No. 194, slip op. at

[17] These laws include Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

[18] Further, the picket-line cases referenced earlier in this decision, where the Board found that racially and sexually offensive language retained the Act's protection, similarly demonstrate the inherent conflict between employers' duties under the Act under current law, pursuant to which corrective action could be found unlawful, and their duties under antidiscrimination laws, which require prompt and appropriate corrective action.

7–10. Absent evidence of discrimination against Section 7 activity, we fail to see the merit of finding violations of federal labor law against employers that act in good faith to maintain civil, inclusive, and healthy workplaces for their employees. These results simply do not advance the Board's mission of promoting labor peace or any of the other principles animating the Act.

1. Abusive conduct is not protected by the Act and should be differentiated from conduct that is protected by the Act.

The Board's fundamental rationale in applying its setting-specific standards has been that employees need a certain amount of leeway in exercising Section 7 rights for those rights to be meaningful. As the Board wrote in *Consumer Power Co.*, 282 NLRB 130 (1986), "The Board has long held . . . that there are certain parameters within which employees may act when engaged in concerted activities. The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." Id. at 132. We believe, however, that this rationale is overstated and has largely swallowed employers' concomitant right to maintain order, respect, and a workplace free from invidious discrimination. We read nothing in the Act as intending any protection for abusive conduct from nondiscriminatory discipline, and, accordingly, we will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful.

Section 7 of the Act relevantly provides that "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." American workers engage in these activities every day without resorting to abuse, and 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.[19] Accord *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001) (noting that it was "preposterous" and condescending to assume that employees were not capable of exercising their statutory rights "without resort to abusive or threatening language").

Moreover, there are any number of matters, such as individual gripes and interpersonal conflicts wholly unrelated to Section 7 activity, that would be just as likely to engender ill feelings and strong responses as concerted disputes over terms and conditions of employment. Employers draw boundaries in every workplace, based on specific conditions and circumstances, as to what amount of leeway is appropriate in navigating such emotionally charged matters. Much more often than not, employees comport themselves civilly when engaged in Section 7 activity, and no leeway is needed. That said, Section 7 rights can thrive in the same space afforded other challenging topics, and it is reasonable for employers to expect employees to engage all such topics with a modicum of civility. As eloquently written by former Member Johnson in his *Pier Sixty* dissent:

> We live and work in a civilized society, or at least that is our claimed aspiration. The challenge in the modern workplace is to bring people of diverse beliefs, backgrounds, and cultures together to work alongside each other to accomplish shared, productive goals. Civility becomes the one common bond that can hold us together in these circumstances. Reflecting this underlying truth, moreover, legal and ethical obligations make employers responsible for maintaining safe work environments that are free of unlawful harassment. Given all this, employers are entitled to expect that employees will coexist treating each other with some minimum level of common decency.

362 NLRB at 510.

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

[19] Again, Sec. 7 protects self-organization; forming, joining, or assisting labor organizations; bargaining collectively; and other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Discipline motivated by a purpose to interfere with, restrain, or coerce employees in exercising their right to engage in any of these is unlawful. Nothing in our decision today disturbs this principle. We simply reject the assumption underlying the setting-specific standards—namely, that where an employer disciplines an employee who engaged in abusive conduct in the course of Sec. 7 activity, the Board either cannot or ought not separate the two analytically and determine whether the employee's Sec. 7 activity was a motivating factor in the employer's decision to discipline the employee and, if so, whether the employer has shown that it would have taken the same action even absent the employee's Sec. 7 activity.

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.

As the Supreme Court wrote in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937):

> The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts.

Id. at 45–46. Indeed, Section 10(c) of the Act expressly prohibits the Board from ordering reinstatement or backpay for any employee "suspended or discharged for cause." The Board's analyses under the setting-specific standards, however, pay no attention to the real possibility that employers may have discharged employees for abusive conduct—a reason entirely apart from a purpose to intimidate or coerce employees in the exercise of their rights under the Act—and such conduct is "cause" by any conventional notion. By analogy, employers' acknowledged right to maintain discipline, short of discharge, should likewise not be infringed. Cf. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945).

That the Board's setting-specific standards have failed is further shown by the following. When an employer imposes discipline for abusive conduct in the course of union activity, and the Board (applying a setting-specific standard) finds no loss of protection, the Board has typically found that the employer violated Section 8(a)(3). Section 8(a)(3) declares it is unlawful "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"; accordingly, an 8(a)(3) violation requires evidence of discrimination and an antiunion motivation. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32–33 (1967). None of the setting-specific standards, however, actually require any showing of discrimination or antiunion motivation. Instead, the Board has mistakenly assumed discrimination and antiunion motivation by treating union activity as inseparable from related abusive conduct. Accordingly, if an employer admits the discipline was for the abusive conduct, then the employer also admits it was discriminating against the inseparable union activity. For example, in *Aztec Bus Lines, Inc.*, 289 NLRB 1021 (1988), the Board established that an employer can violate Section 8(a)(3) by refusing to reinstate strikers either when (1) it treated strikers and nonstrikers disparately even if the misconduct was severe enough to lose protection under *Clear Pine Mouldings*, or (2) it treated strikers and nonstrikers the same but the misconduct was not severe enough to lose protection under *Clear Pine Mouldings*. Id. at 1026–1029.[20]

The flawed principle that Section 7 activity is analytically inseparable from abusive conduct committed in the course of Section 7 activity is also the reason the Board has relied upon for not applying *Wright Line*, 251 NLRB 1083 (1980),[21] to these cases. The Board has explained, "Where an employer defends disciplinary action based on employee conduct that is part of the res gestae of the employee's protected activity, *Wright Line* is inapplicable. This is because the causal connection between the protected activity and the discipline is not in dispute." *Roemer Industries, Inc.*, 362 NLRB at 834 fn. 15. Again, we fundamentally disagree that the Section 7 activity is inseparable from the abusive conduct, and by recognizing that they are severable, the causal connection between protected activity and discipline *is* properly in dispute.

2. The Board's longstanding *Wright Line* framework appropriately allows the Board to protect Section 7 activity without erroneously extending the Act's protection to abusive conduct.

For the reasons set forth above, we conclude that the *Wright Line* burden-shifting framework is the appropriate standard for cases where the General Counsel alleges that discipline was motivated by Section 7 activity, and the employer asserts that it was motivated by abusive conduct. We find that *Wright Line* applies in these cases regardless of the setting involved, whether it be a workplace, social media, or picket line.[22]

[20] Nondiscriminatory discipline may violate Sec. 8(a)(1) if it interferes with Sec. 7 activity, but the Board has always categorized these cases as 8(a)(3) violations when involving union activity or 8(a)(1) violations when involving other protected concerted activity. And we reject here that Sec. 7 activity necessarily encompasses some undefined amount or degree of abusive conduct with which the discipline could interfere.

[21] Enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[22] Although the instant case only presents workplace conversations with management, which had been analyzed under *Atlantic Steel*, we announce that *Wright Line* will be applied more broadly to other settings because we find nothing specific to the other settings that make it any more or less applicable than here. We overrule all relevant cases to the extent they are inconsistent with today's holding.

Under *Wright Line*, the General Counsel must initially show that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6, 8 (2019); see also *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1–2 (2020). Our decision today does not alter this standard. We specifically note that the General Counsel is not required, as part of his initial burden, to disprove the existence of other, lawful motivating factors for the discipline. Consistent with the principles stated in this decision, however, evidence is probative of unlawful motivation only if it adds support to a reasonable inference that the employee's Section 7 activity was a motivating factor in the employer's decision to impose discipline.[23]

Once the General Counsel makes his initial case, the employer will be found to have violated the Act unless it meets its defense burden to prove that it would have taken the same action even in the absence of the Section 7 activity. See *Hobson Bearing International, Inc.*, 365 NLRB No. 73, slip op. at 1 fn. 1 (2017). Consistent with established precedent, however, if the evidence as a whole "establishes that the reasons given for the [employer's] action are pretextual—that is, either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

The application of *Wright Line* to these cases promises more reliable, less arbitrary, and more equitable treatment of abusive conduct than the Board's experience under *Atlantic Steel*, the "totality of the circumstances" standard, and *Clear Pine Mouldings*. The Supreme Court has approved the *Wright Line* framework,[24] and the Board has vast experience applying it. Under this approach, the Board will properly find an unfair labor practice for an employer's discipline following abusive conduct committed in the course of Section 7 activity when the General Counsel shows that the Section 7 activity was a motivating factor in the discipline, and the employer fails to show that it would have issued the same discipline even in the absence of the related Section 7 activity.[25] This realignment honors the employer's right to maintain order and respect. It will also avoid potential conflicts with antidiscrimination laws. The Board will no longer stand in the way of employers' legal obligation to take prompt and appropriate corrective action to avoid a hostile work environment on the basis of protected characteristics.[26]

Further, the application of *Wright Line* in this context will ensure that employees' Section 7 rights continue to be protected. Under *Wright Line*, it is unlawful for employers to target employees who engage in Section 7 activity and subject them to discipline that would not have occurred but for that protected activity. At the same time, employees who engage in abusive conduct in the course of Section 7 activity will not receive greater protection from discipline than other employees who engage in abusive conduct. This is consistent with the recognition in *Wright Line* that Section 7 rights are "'sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the'" Section 7 activity. *Wright Line*, 251 NLRB at 1086 (quoting *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285–286 (1977)).[27]

D. Retroactive Application of Wright Line

We find it appropriate to apply *Wright Line* retroactively to all pending cases in which the Board would have determined, under one of its setting-specific standards, whether abusive conduct in connection with Section 7

[23] For example, although suspicious timing is commonly relied on as evidence that contributes to sustaining the General Counsel's initial burden of proof under the *Wright Line* standard, see, e.g., *Parkview Lounge, LLC d/b/a Ascent Lounge*, 366 NLRB No. 71, slip op. at 2 (2018), enfd. 790 Fed. Appx. 256 (2d Cir. 2019), such evidence would not necessarily be probative of unlawful motivation in cases where the Sec. 7 activity and the abusive conduct occur during the same event, unless surrounding circumstances like disparate treatment make it probative.

[24] *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[25] With this approach, we finally engage in the proper analysis. See *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, 475 (1953) ("The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge.").

[26] If an employer is unable to prove it would have taken the same action against, for instance, racist conduct in the absence of Sec. 7 activity, perhaps because of a history of tolerating such conduct, the Board would still find the violation under *Wright Line*. The Board's role is to protect employees from interference, restraint, or coercion—including unlawful discipline—in the exercise of their Sec. 7 rights. The Board's role is not to affirmatively sanction an employer for failing to take steps to prevent a hostile work environment or otherwise fight discrimination on the basis of protected classes. Under the standard we adopt today, however, we are confident that the Board will no longer interfere with an employer's good-faith efforts to fulfill its obligations under antidiscrimination laws and protect its employees.

[27] Nothing in this decision should be read as conflicting with *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23–24 (1964). The test we announce today, like the setting-specific standards today's decision overrules, presupposes that the employee actually engaged in the misconduct.

activity had lost an employee or employees the Act's protection. "The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage,'" unless retroactive application would work a "manifest injustice." *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). Under Supreme Court precedent, "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

Here, we find that any ill effects are outweighed by the potential harm of producing results contrary to the Act's principles and potentially at odds with antidiscrimination law. We acknowledge it is possible that employees may have engaged in abusive conduct related to Section 7 activity in reliance on their belief that the Board's setting-specific standards would protect them from discipline. Such reliance would certainly not be well-founded for workplace discussions with management analyzed under *Atlantic Steel* or for social-media posts or discussions with coworkers analyzed under the totality of the circumstances. The standards were too flexible and inconsistently applied to reasonably count on protection. But even assuming some reasonable reliance on those standards by employees, the Act offers no specific protection for abusive conduct, whereas it plainly reserves to employers the right to issue discipline unmotivated by a purpose to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Continuing to find violations of the Act, under the overruled standards, where employers were simply exercising their right to maintain a civil, safe, nondiscriminatory workplace for their employees would be the greater injustice.

E. Remand for Application to this Case

In the case before us, the judge applied *Atlantic Steel* in deciding that the Respondent had violated Section 8(a)(3) and (1) by suspending Robinson following his abusive conduct in the April 11, 2017 discussion with manager Nikolaenko but had not committed a violation by suspending Robinson following his abusive conduct during the April 25 and October 6, 2017 bargaining meetings. The parties have not had an opportunity to address how *Wright Line* applies to this case. Moreover, because different facts are relevant under *Wright Line* than were under *Atlantic Steel*, the record is missing facts necessary to decide this matter. The General Counsel has not offered evidence that the Respondent had animus against Robinson's Section 7 activity, and the Respondent was blocked by the General Counsel's relevance objection from presenting evidence now relevant to whether the Respondent would have suspended Robinson for his abusive conduct even in the absence of Section 7 activity. Accordingly, we will remand the allegations regarding the April 11 and 25 conduct (set forth in paragraphs 5(a) and (b) of the complaint) to the judge for further proceedings consistent with this decision, including reopening the record to allow the parties to introduce evidence relevant to analyzing the 8(a)(3) and (1) allegations under *Wright Line*.[28]

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Donna N. Dawson for the purpose of reopening the record and preparing a supplemental decision addressing the allegations in paragraphs 5(a) and (b) of the complaint under the new standard adopted above, setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that the allegation in paragraph 5(c) of the complaint that Robinson was unlawfully suspended on October 17, 2017, is dismissed.

Dated, Washington, D.C. July 21, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lauren Fletcher, Esq. and *William F. LeMaster, Esq.,* for the General Counsel.

Keith E. White, Esq. (Barnes & Thornburg, LLP), for the Respondent.

[28] In the absence of exceptions, we affirm the judge's dismissal of the allegation in complaint par. 5(c) regarding Robinson's suspension for the October 6 conduct.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Overland Park, Kansas, on November 14, 2017. The Charging Party, Charles Robinson, filed the charges in this case on May 3, 2017 (14–CA–197985), and October 19, 2017 (14–CA–208242). The General Counsel issued the complaint On July 26, 2017, and the consolidated complaint on October 31, 2017.[1] The complaint alleges that management violated the Act by taking three disciplinary actions against Robinson between April and October, as he engaged in protected activity on behalf of the Union and its members. Respondent denies violating the Act, and argues that Respondent either lost or never enjoyed the protection of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent General Motors LLC, a limited liability company, engages in the manufacture and nonretail sale of automobiles at its Fairfax assembly facility in Kansas City, Kansas (facility/Fairfax facility). In conducting its operations during the 12-month period ending on March 31, 2017, Respondent sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the State of Kansas, and also purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Kansas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 31 (Union/Local 31) has been, for all times relevant to this case, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Charging Party, Charles (Chuckee) Robinson (Robinson)[2], has worked for Respondent at its Fairfax automotive assembly for over 20 years. He began his employment as a production worker, and subsequently completed the apprenticeship program to become an electrician. Since 2010, Robinson has been a Union committeeperson, first as an alternate, and since 2012, as a full-time skilled trades committeeperson. As such, he works and maintains an office in the Fairfax facility. His represents the bargaining unit members on the first and second shifts with contract concerns, discipline, and in bargaining over terms and conditions of their employment with management. He also serves as a delegate for the Union's international constitution.

In his capacity as committeeperson, Robinson and other committeepersons regularly meet with members of management (including plant department heads) to discuss bargaining unit issues involving potential changes to the terms and conditions of members' work. For example, they convene weekly "paragraph 183 meetings," part of a contracting out notification process, during which they meet to discuss Respondent's subcontracting out of bargaining unit work. They also convene weekly manpower meetings to discuss job openings, moving workers from one shift to another to cover vacancies in the plant and other shift changes. These weekly meetings take place in closed door conference rooms on the facility's mezzanine level, which are separate from the plant work floor and nonmanagement production employees. (Tr. 40, 60, 145, 156.) Robinson also regularly interacts with supervisors and managers individually on and off the work floor to address bargaining unit issues.

Management officials involved in this case include labor relations supervisor, Ca-Sandra Tutt and her labor relations manager, Randy Gallinger. Tutt testified about her involvement in a weekly paragraph 183 subcontracting meeting, as well as her role in investigating and conducting disciplinary investigatory interviews, also known as paragraph 76(a) interviews, in connection with Robinson. Gallinger was not personally involved with any of the incidents, but testified about the one paragraph 76(a) investigatory meeting he conducted with Robinson in October. Other management officials who testified included Nicholas Nikolaenko (maintenance shift lead/body shop) and Anthony Stevens (plant manufacturing engineer director), who engaged in altercations with Robinson and initiated disciplinary charges against him. In addition, several other management officials testified as witnesses to the incidents at issue.

Zone committeeperson, Billy Gay, represented Robinson in connection with his disciplinary proceedings, but did not testify. Two other union committeemen, Benjamin Miller and James Walton, testified on Robinson's behalf as witnesses to two of the altercations between Robinson and management officials.

Central to this case are several verbal altercations between Robinson, in his capacity as a union representative, and management officials over contentious issues affecting unit members. There is no dispute that the relationship between Robinson and management was somewhat strained. Robinson aggressively questioned and challenged management officials' decisions affecting his constituents, and believed that management disciplined him in retaliation for his zealous representation. Management officials perceived Robinson's behavior in dealing with them on the occasions in question as offensive, intimidating, disruptive, outside the parameters of union representational protected activity, and at times, in violation of the Company's standards of conduct.

B. April 11, 2017 Incident

On April 11, Robinson and Nikolaenko, maintenance shift lead, engaged in a verbal altercation on the plant floor. Prior to arriving to work that morning, Robinson received a telephone

[1] All dates are 2017 unless otherwise indicated, and include all times relevant to this case. The parties stipulated at trial that "material times" in the consolidated complaint refer to the time period 6 months prior to the time of the initial charge (in other words, the 6 months prior to May 3, 2017) (Tr. 16).

[2] At work, the Charging Party is also referred to as "Chuckee." (Tr. 22.)

call from millwright team leader, Bob Burton. Burton complained that Nikolaenko was not abiding by an agreement between the Union and management to cover team leaders (also bargaining unit employees), when they were sent for cross-training.[3] Cross-training is contractually mandated by and memorialized in the national collective-bargaining agreement between Respondent and the UAW, but overtime unit personnel coverage for team leaders while they cross-train is neither mandated nor mentioned in the national agreement.[4] (Tr. 95, 171–172; Jt. Exh. 1 at 588–590.) The local agreement between Respondent and UAW Local 31 covering bargaining unit employees at the Fairfax facility does not address cross-training or related overtime coverage. (Jt. Exh. 2.) However, Robinson testified and believed that the local union and Respondent's managers had verbally agreed that management would provide overtime coverage (presumably by unit employees) for unit employees while cross-training in another trade area.

Upon arriving at the facility, Robinson called Nikolaenko via radio to find out why Nikolaenko was not offering overtime to support mechanical cross-training. Nikolaenko testified that he could tell that Robinson was "getting a little bit upset and frustrated," so he asked him to meet him in person to discuss his concerns in the section of the plant called "Zebra Zebra 29," also known as "ZZ-29." (Tr. 174–176, 181–182.) Nikolaenko testified that this office area was located within "10 to 14 feet of the two production lines" on which employees were working. (Tr. 179; R. Exs. 1–2.) This large area encompassed an open space with a desk and bulletin boards, where he was working at the time, and an office behind a closed door where management employees worked. A "team center" was located in the vicinity where employees took breaks and ate lunch, but there was no evidence that it was within earshot of ZZ-29. Robinson testified that when he and Nikolaenko began talking, they stood about 2 feet apart, with production employees about 20-30 feet or more away. (Tr. 26–27.) The photographs of the area show this manager's office area separated from the automobile production line and conveyor belt by railings, a platform and a walkway. (R. Exh. 2.) There was no dispute that the production lines, including conveyor belts, were up and running, and creating loud noise while they met. (Id.)

When Robinson questioned Nikolaenko about why he was not offering overtime to support cross-training for team leaders, Nikolaenko responded that he was not obligated to provide such coverage. Nikolaenko testified that he tried to explain to Robinson that they did not need to use nonscheduled overtime because he had sufficient manpower for cross-training opportunities. (Tr. 181–182.) Robinson accused Nikolaenko of not bargaining in good faith as they (management) had previously agreed to cover the team leaders, and that "we're not going to do any cross-training then" if management would not cover the team leaders as agreed.[5] Nikolaenko said that he could do the cross-training the way that he wanted to, and that Robinson could not direct his employees' work or give them orders. Robinson testified that as he walked away, he heard Nikolaenko tell him that he was putting him on notice, which he understood to mean that he would be disciplined. At that point, their disagreement escalated as Robinson turned and walked back towards Nikolaenko. Nikolaenko told Robinson that he was putting him on notice or reporting him because Robinson told him to "shove something up his ass." (Tr. 27–28.) Robinson claimed that he noticed body shop planner and maintenance coordinator, Dean Erwin (Erwin), walking by, about 10-15 feet away, as well as "some management people coming out of the office area," "[r]ight when [he] . . . asked [Nikolaenko]: Shove what up your ass?" Robinson denied telling him to shove anything up his ass, but admitted that as he "came back up towards Nikolaenko," he told him that "we're not going to do any fuckin' cross-training if you're going to be acting that way." Nikolaenko did not respond, and that he (Robinson) turned and left the area. (Tr. 28–30.)

Nikolaenko testified that during their conversation, Robinson became "temperamental," and asked "you want to play fucking games with me? That's what we'll do, okay?" (Tr. 183–184.) Nikolaenko claimed that Robinson also said that he was "going to tell the guys not to do mechanical cross-training." He testified that after he admonished Robinson about giving employees orders, Robinson started to walk away, commenting that "I run the Body Shop. You know, you don't run the Body Shop." Nikolaenko admitted telling Robinson that he would be "seeing [him] in Labor" if he ordered employees not to cross-train. (Tr. 184–185.) According to Nikolaenko, Robinson turned around, walked back towards him, and said, "[w]ell, you can shove it up your fucking ass." (Tr. 185.) Nikolaenko explained, "at that point that's when I felt that the situation had escalated way out of control, and that's when I said: You know, you're on notice. I'm going to call Labor. Which I did." He immediately called Tutt and told her that he "had put Chuckee on notice for his abusive action and behavior towards [him]." (Tr. 185–186.) He testified that Robinson's behavior "was too aggressive to not allow . . . some sort of disciplinary action to occur." When asked if he had concern for his safety, he responded, "the answer would be yes because my fight or flight mechanism kicked into high gear. And I think that because of that. . . I reacted as quickly as I could, and I felt that something had to be done immediately to try to suppress the situation so it wouldn't get out of control." (Tr. 186.) However, he admitted that nothing else occurred, and the testimony from the two witnesses, discussed below, supports a conclusion that he did not call Tutt until after Robinson walked away and left the area.

Erwin and Rob Politte (Politte) overheard part of the conversation between Robinson and Nikolaenko. Erwin testified that

[3] Burton did not testify, but Respondent did not dispute Robinson's testimony regarding Burton's complaint.

[4] Respondent intended cross-training to erase lines of "demarcation" among the mechanical trades in the facility. Nikolaenko testified that Respondent required all plant assemblies to reach a goal of 100 percent cross-training by the end of June, and that by April, they were behind schedule. (Tr. 173–174).

[5] Robinson testified that management had previously agreed to cover the team leaders in a March 2017 meeting with the team leaders. (Tr. 27.) Nikolaenko never denied that this meeting took place. Nor did he specifically deny that there had been some sort of verbal understanding regarding cross-training coverage at the Fairfax facility. Rather, he testified that he was not obligated to provide such coverage when it was not necessary, and that it was not addressed in the local or national agreements. (Tr. 181–182.)

he had been positioned outside the body shop office, working about 10 feet away. Politte testified that he had been inside the body shop office, but stepped out of the office after hearing loud voices. Both testified that the loud voices and intensity of the outburst got their attention. Erwin also testified that "I could hear Chuckee say: 'You don't run this, I do. And if you want to play. . . this fucking game, we'll play this fucking game.'" He also heard Nikolaenko respond, but could not hear what he said from where he (Erwin) stood. He next heard Chuckee tell Nikolaenko, "Fuck you, and you can shove the cross-training up your ass. . . [a]gain, it was extremely loud, and that's when I believe Rob had come out of the office at that time." (Tr. 199.) Erwin stated that when Robinson commented about shoving something up Nikolaenko's ass, Robinson was "like less than a one foot—I mean like a one foot—they were pretty much face to face." Erwin further testified that when he noticed them "face to face," he felt like someone might need to intervene, or that he as a "bystander" needed to do something. However, he recalled that "they separated I believe from then on Chuckee left the area, and I don't know what happened after that." (Tr. 199–200.)[6]

Politte testified that when he opened the door to see what was going on, he saw Robinson walking away and saying, "I don't give a fuck about your cross-training. You can shove it up your fuckin' ass." Next, he witnessed Robinson turn around, walk towards Nikolaenko, "put his finger in his face rather close and [say]: 'I don't care, call fuckin' Labor, take me to Labor.'" (Tr. 216–217.) At that point, he saw Nikolaenko walk into the office and Robinson get on his scooter and drive away. Politte testified that "[y]ou could tell [Nikolaenko] was visibly—I mean he was shaking." He explained that he (Politte) was concerned because "[he] honestly felt that Nikolaenko was going to get punched in the face. The altercation was that close."[7] (Id.)

Neither Erwin nor Politte intervened, and no one called or attempted to call or radio for security.

After receiving the call from Nikolaenko, Tutt investigated and received written statements from him, Erwin and Politte. Tutt attempted to schedule a "76(a) interview" with Robinson. After his initial refusal to meet, Tutt finally conducted the interview on April 13 with Robinson and his union representative, Gay.[8] (Tr. 252.) Tutt testified that "[h]e basically denied the whole entire incident and claimed that Mr. Nikolaenko was actually the aggressor in the incident." (Tr. 255.) She did not believe his version of what occurred with Nikolaenko, and on April 21, issued Robinson a notice of disciplinary action for the April 11 incident for the balance of shift (BOS) plus 3 days on the record.[9] The notice stated that:

> You became loud and abusive yelling 'and you can shove the fucking cross training up your ass…you don't run this I do!' in stating [his] resistance to management's direction and yelled that [he] would take steps to coordinate resistance to for the cross-training. You also yelled 'you want to play that fucking game, we'll play the fucking game?' Your conduct clearly violates acceptable standards of conduct and for this you are assessed BOS+3 days…

(Jt. Exh. 3).[10] Robinson refused to sign the initial disciplinary notice as written, maintaining that he never told Nikolaenko to shove something up his ass. In resolution of the matter, Tutt reissued the disciplinary notice on April 24, stating instead that Robinson had "[become] loud with a member of management [and used] abusive language," conduct violating the acceptable standard of conduct. (Tr. 32–35, 255–257; Jt. Exh. 4.) Robinson agreed to and initialed the revised notice because he did not want to miss an upcoming Union election. He also claimed that by then, the NLRB had become involved and cleared his record of some prior discipline.[11] (Tr. 34–38.)

Credibility Findings[12]

Regarding this incident, I credit the testimony of Nikolaenko, Erwin, and Politte over that of Robinson. Their testimony was

[6] Also see Tr. 29, 181, 199, 217–218.

[7] There is no evidence that Robinson physically touched Nikolaenko, or threatened to do so.

[8] Tutt testified that she arranged an interview date with Robinson's union representative, Gay, for April 13, but that Robinson told her that she would have to call security to find him and the Kansas City police to get him there. (Tr. 252). Robinson denied this, testifying that instead, he told Tutt that he would not meet without his union representative. He said that at the time, he did not know that Gay was already scheduled to be present. (Tr. 103-104). Nevertheless, Robinson presented later in the day for his interview, and there is no evidence that Tutt mentioned, or used, his initial refusal to meet earlier in the day as a basis for any discipline. (Tr. 252–253.)

[9] Robinson testified that then Union shop chairman, Johnny McEntire negotiated a suspension for the balance of his April 21 shift plus 3 days of suspension. He returned to work on April 25. This was not controverted. (Tr. 35.)

[10] Respondent did not state which acceptable standards of conduct in the disciplinary notice. However, plant rule, number 26, set forth in the local agreement between the Union and Respondent list "[a]busive language to any employee or supervision." (Jt. Exh. 2, p. 97.)

[11] Respondent's attempt to discredit Robinson's testimony that his prior discipline had been removed failed. Tutt testified that it was reduced, but never removed. (Tr. 263–269; R. Exhs. 3–4.) However, the General Counsel rebutted her testimony with communications from Respondent's own in-house counsel, Holly Georgell. Georgell confirmed that Robinson's prior 2015 discipline had been removed by Respondent as of April 8, 2016 (related charge no. 150486 withdrawn on April 8, 2016) (GC Exh. 8, 12). Similarly, Georgell confirmed on May 1, 2017 that the "LR" team had removed Robinson's 2016 discipline such that it could not be used against him for future progressive discipline (related charge no. 169148 withdrawn on May 3, 2017). (GC Exhs. 11, 13; 5–7, 9–10.)

[12] Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Such is the case here.

consistent, straightforward, and believable. Erwin and Politte testified that they heard Robinson tell Nikolaenko that he did not "give a fuck about your cross-training," and that Nikolaenko could "shove it up your fuckin' ass." Moreover, Robinson admitted to telling Nikolaenko that he did not care about his "fuckin' cross-training," and that he would basically tell his members not to do any cross-training. I find it believable that given the language that he resorted to, and the credible and consistent testimony by Erwin and Politte, that Robinson also told Nikolaenko that he could shove the fuckin' cross-training up his ass or that he could shove " it" up his ass, referring to the cross-training. Robinson also denied putting his finger in Nikolaenko's face or being closer than about 3 feet from Nikolaenko. Since neither Nikolaenko nor Erwin testified that Robinson pointed his finger in Nikolaenko's face, I only credit and find that Robinson came within about 1 foot from Nikolaenko during their April 11 encounter. I do not doubt that Nikolaenko may have appeared to have been visibly shaken immediately following the altercation, but he did not convey to either Politte, Erwin, or Tutt that he felt physically threatened by or afraid of Robinson. (See Jt. Exhs. 3–4.)

C. April 25, 2017 Incident

Robinson returned from his suspension on April 25, and at about 7:30 a.m., went into the weekly 183 meeting. Robinson, James Walton (Walton) and Ben Miller (Miller), skilled trades committeepersons, represented the Union. Plant manufacturing engineer director Anthony Stevens; engineering manager Paul Sykes; stamping operations manager Paul Fraelich, paint maintenance manager Christopher Degner, manufacturing engineer/maintenance shift leader Robert Pudvan; manager of project equipment installations Arthur Lambert; labor relations supervisor Ca-Sandra Tutt; Erwin; and Nikolaenko represented management. Robinson sat in between Walton and Miller at one end of a long conference table and the management representatives sat on either side of the table. (Tr. 41, 43–45, 115–117, 188; GC Exh. 4.)

The attendees met to discuss the subcontracting out of work in the paint shop. Degner made the case for subcontracting the work. Robinson testified that when he began asking questions about the work, hours and shifts for the bargaining unit employees, Stevens interrupted telling him not to worry about it. Stevens also cautioned that he was getting too loud. Robinson also asked management officials when the Union would receive documents that it had requested via an April 23 email to Stevens (and also other managers).[13] (Tr. 47–48; GC Exh. 3.) Tutt responded that his general request for all costs for contractors was a "fishing expedition." Despite Tutt asking him for clarification about what specific costs he was referencing, Robinson repeatedly demanded "all of the costs," rather than any specific costs associated with the paint shop or other area which was slated for subcontracting out work. (Tr. 46–47, 151, 190, 202, 258.) Tutt warned Robinson that he was too loud and told him to stop pointing at her. (Tr. 150–152.) Stevens also told him he was too loud. Robinson responded to Stevens by asking him, "[w]hat is loud doing to you?" Robinson testified that at some point Stevens accused him of "intimidating" him, and that he asked Stevens, "Sir, you want me to speak like this, sir, so I don't be intimidating you, sir?" (Tr. 49.) According to Robinson, when Stevens told him that he was "acting unprofessional," he told him that he was "trying to speak this way so I don't be intimidating you because you believe I'm intimidating you." Union representative Miller described Robinson's tone as "sarcastic" in nature, and stated that he spoke "like maybe a smart aleck." (Tr. 127–128.) However, Union representative Walton testified that Robinson spoke in "kind of a mock servile type fashion where he said: Is this how you want me to talk, Mister? Something like that." (Tr. 119–120.) The meeting ended shortly after Robinson's speech. (Tr. 191.)

According to Tutt and management witnesses Nikolaenko, Stevens, Erwin, and Degner, Robinson grew "extremely more agitated and aggressive," as he repeatedly questioned Degner and Sykes about the process, and Tutt about the costs. Stevens testified that when Sykes tried to move forward since they had gone through the subcontracting checklist for the meeting and answered his questions, Robinson raised his voice such that he became very "agitated and irritated through his yelling at that point." Stevens said that he asked him to please lower his voice again, and at this point, Robinson leaned over and said, "Yes, Master, sir. Yes, Master, sir." Stevens testified that, "Chuckee repeatedly hunched over in his chair and repeated the 'Yes, Master, sir. Is this what you look for Master, sir?'" He described Robinson's tone as that of a slave speaking to a master. Stevens testified that after the meeting, when he and Sykes walked out onto the work floor, Robinson, who was standing with another employee, repeated, "'Master, Master, Master'" as they passed by.[14] (Tr. 150–154.)

Degner testified that when Tutt and Stevens asked Robinson to lower his voice, Robinson told them that they could not tell him how to speak, and that Tutt said that he did not have to "speak in that tone," or point his finger. Degner stated that Robinson's tone changed when he asked Stevens, "Is that what you want me to do, Master Anthony? Is that what you're telling me to do?" He also recalled Robinson referencing that, or asking if, Stevens wanted him to be a "good Black man."[15] (Tr. 202–203). Degner testified that Robinson's demeanor and manner of speaking made him uncomfortable. (Tr. 205.)

Politte described Robinson as getting "very loud, pointing at Ca-Sandra," and becoming very upset when Sykes said that management would go forward with the subcontracting plan. He also

[13] On April 23, Stevens sent an email to members of the management-labor 183 meeting team, with an attached April and May contractor and UAW schedule. In an email response to Stevens, Robinson expressed his dismay with Respondent subcontracting out work generally, threatened to file additional grievances over the matter and requested that Respondent remove all contractors and allow bargaining unit members to do all remaining work. He also indicated that he "would like to know how are you paying the contractors?" (GC Exh. 3.)

[14] Sykes did not testify.

[15] Robinson never testified that he asked Stevens if he wanted him to be "a good Black man," or referenced "good black man." When asked on cross-examination if he had told management that Black men naturally talk loudly, Robinson responded that he has told management that "Black men talk with authority. I'm a Black man, and I speak with authority if that's what you're saying." (Tr. 90–91.)

recounted how Robinson began talking in "a slower, less intelligent voice than he normally uses," when he addressed Stevens as, "Yes, Master, I'll do whatever you say Master." (Tr. 224.)

Pudvan also recalled Robinson calling Stevens, "Master," because as his voice escalated and several people asked him to quiet down, he responded, "How might I talk, Master?" "You want me to talk like this, Master?" Pudvan believed his speech to be "indicative of slavery talk." (Tr. 235–236.)

Tutt testified that she told Robinson that he did not have to point at her, and asked him to lower his voice. When Sykes tried to move forward, Robinson "got even louder . . .[a]t which point Anthony Stevens said, 'Hey, Chuckee, you need to lower your voice.'" She testified that, "Chuckee bent over," saying, "Yes, Master. Yes, Master Stevens . . . This is how you want me to talk, yes, Master?" Tutt explained that she was offended because she was "not a slave," and Robinson was acting "like a slave." (Tr. 259–260.) Tutt believed that by his comments, tone and behavior, Robinson had violated Respondent's anti-harassment policy. She also believed that this was a "personal attack against Anthony Stevens." (Tr. 260; Jt. Exh. 1, pp. 555–565.)

Following the meeting, Robinson visited plant manager Bill Kulhanek's office to complain about what happened at the meeting.[16] Robinson testified that he felt "railroaded." While he waited to speak to Kulhanek, Tutt contacted him by radio to inform that he was being put on disciplinary notice. (Tr. 50–53.) During his conversation with Kulhanek, Kulhanek advised him to apologize to Tutt and Stevens. (Id.)[17] Robinson admitted that "[he] didn't apologize for [his] behavior," but at the same time, testified that he apologized for offending her by saying "Yes, Mr. Sir," and her taking it as his acting like a "slave boy." He also claimed to have apologized to her "before when [he] said, 'I'm just an old country boy from the Midwest.'" (Tr. 107.) Tutt testified that later that day, when Robinson wanted to apologize, she did not want to discuss the incident with him at that time. (Tr. 261.)

On April 26, Robinson attended an investigatory interview with Tutt and Gay. Tutt asked Robinson why he spoke in a "slave voice" or "southern slave voice" like on television. Robinson claimed not to know what a southern voice was and not to know what she meant. Tutt then asked why he had said, "Yes, Master" to Stevens, and Robinson maintained that he did not say "Master," but had instead said "Yes Mister." Tutt asked what the difference was, and Robinson insisted that he was only trying to show Stevens respect. When Tutt asked if he thought Stevens was a racist, Robinson responded that he did not know him well enough to make that "judgment." The meeting recessed until April 27, during which time Tutt issued Robinson a notice of disciplinary action for the balance of his shift plus 2 weeks on paper, with balance of shift plus 1 week served. He refused to sign it because it involved a 2-week suspension rather than the 1-week suspension he believed he should have received under the progressive discipline policy in the collective-bargaining agreement. In part, it read that during the April 26 meeting, he became "verbally belligerent, directed racially inappropriate comments to members of management, responding to their requests that you stop yelling by saying 'yes master' 'yes master,' and asked 'Do you want me to speak like this?' in a southern, country accent." It further stated that his actions and comments were "offensive, threatening and intimidating, and . . . the type of conduct that creates a hostile work environment for those in attendance." Robinson subsequently filed grievances on this discipline. (Tr. 58; Jt. Exhs. 2, 5, 7–10.)[18]

Credibility Findings

I credit testimony of Respondent's witnesses regarding Robinson's comments and behavior during this meeting. It was more consistent and straight forward. In summary, Nikolaenko, Stevens, Erwin, Degner, and Tutt testified that Robinson became loud, and then lowered his voice. He then repeatedly referred to Stevens as, "Yes, Master, Your Master Anthony," "Yes, sir, Master Anthony," in a manner reminiscent of a slave talking to his master. Erwin testified that Robinson asked "Is that what you want me to do, Master Anthony? Is that what you're telling me to do," and referenced "be a good Black man." (Tr. 203.) (Tr. 153, 191, 204, 233, 259.) Moreover, the General Counsel's witness, Walton, for the most part corroborated testimony that Robinson lowered his voice and spoke in a "mock servile" manner. As the General Counsel argues, some of the Respondent's witnesses testified as to their impression of Robinson's comments; however, they also consistently testified at to what he said and the manner in which he spoke. There was no evidence that these witnesses conspired to discredit Robinson or otherwise align their testimony against him.[19]

In contrast, Miller's testimony was vague, equivocal and inconsistent. Miller, who sat next to Robinson, conveniently did not recall what the disagreement between Robinson and Stevens was about. On the one hand, he denied that Robinson got loud during the meeting, and testified that he spoke in a "soft" voice and a "normal talking tone." However, on the other hand, he was able to recall that, "Chuckee went to like where he was sarcastic. I mean he wanted to be making a point, I'm not upset. I'm not going to show you that I'm upset, so he was sarcastic." In fact, this testimony supports a finding that Robinson's testimony that he called Stevens "Mister" in an effort to show respect is completely unbelievable. (Tr. 127–128.)

Therefore, I find that Robinson spoke in a subservient or slave-like vernacular while repeatedly addressing Stevens as "master."

D. October 6, 2017 Incident

On October 6, Robinson attended a weekly manpower meeting convened to discuss manpower changes and four new UL

[16] Robinson did so because Kulhanek had previously told him that he could visit him to vent about problems on the floor rather than getting upset and escalating the situations. (Tr. 50–53.)

[17] There is no evidence that he apologized to Stevens.

[18] Robinson did not dispute the substance of Tutt's version of his disciplinary interview.

[19] The General Counsel further argues that Tutt's testimony should be discredited because she did not tell the truth about Robinson's prior discipline being removed. While I believe that Tutt knew or should have known that Robinson's prior discipline had been removed based on Respondent's in-house counsel's emails, this does not diminish my credibility determinations about Robinson's behavior and comments during the April 25th meeting.

jobs that management wanted to implement at the facility. (Tr. 62–63.) Robinson and Ben Miller attended on behalf of the Union. Technical shift lead over the body shop, Tom Mcphee; Degner, Pudvan; and Stevens represented management. Stevens did not normally attend these manpower meetings, but other managers had asked him to be present due to the importance and urgency of the matter—an imminent shift change and their inability to finish the necessary manpower moves in the weeks leading to the meeting.[20] There was little dispute that this was the last day for the team to get the skilled trades manpower realigned to a two-shift, rather than three-shift production, and to get the bids out for the skilled trades members to get the jobs their seniority rights allowed.[21] Robinson and Miller sat on one side of the table next to each other, while Pudvan and Degner sat on the side opposite them. Mcphee sat at one end of the table. Stevens sat away from the table next to a wall behind Pudvan and Degner (and across the table and beyond from Robinson and Miller). (Tr. 60–62; GC Exh. 4.)

The Threat

After Mcphee began the meeting with a discussion of new "UL" electrician jobs in connection with a new automobile, Robinson asked about the duties of these new positions, and expressed the Union's need to have the job descriptions. He also wanted to discuss an open "pool" position that would cover workers out sick or on vacation. Robinson admitted that despite Mcphee telling him that he would get him the job duties for the new jobs, he continued to ask him about them. Initially, Robinson testified that he told Mcphee that, they "messed up on the Manpower moves," and that "[Stevens] was saying that we need to move forward. And I told him that we not gonna move forward because we need to send this up to the Shop Chairman . . . Dwayne Hawkins on these moves because we didn't have no clarification on what they supposed to be doing." Then, he testified that it was after he mentioned escalating the matter to Hawkins, that "[Stevens] said we're moving forward. And then I said we're gonna end up messing up the Manpower moves. The Manpower moves are going to be messed up, and all it's going to do is create chaos on the floor." Robinson denied that he raised his voice, and claimed that he spoke to everyone, and not just to Stevens.[22] (Tr. 62–65.)

Next, Robinson testified that Stevens asked if he had threatened him, and he responded that he had not, but that "[t]hese moves are going to be messed up whether you want to—you can take it however, you want, but I'm not threatening you. I said the Manpower moves are going to be messed up. It's going to create chaos on the floor." (Tr. 65). Robinson testified that Stevens said that he (Robinson) was intimidating him, and that he (Robinson) replied that, "This is the game that y'all keep playing. Every time that I get some move like y'all want to bring up that I'm threatening and intimidating you . . . That's the reason why the NLRB is going to be having you guys in a few weeks on trial about me threatening—always saying that I'm threatening and intimidating you."[23] (Id.) Robinson admitted that throughout the meeting, he repeatedly asked Stevens why he was there and told Stevens that he should not be there." He also testified that he told Stevens that he was intimidating him (Robinson) with his presence, and admitted that he did not like Stevens.

Miller insisted that he did not hear most of what Robinson said up to this point because of multiple conversations going on, including his with Degner. Nevertheless, he recalled that Stevens said, "something like is that a threat," and that "Chuckee kinda laughed and said I wouldn't take that as a threat." (Tr. 130.) Stevens further testified that he began to listen at that point, and heard "Chuckee say: No, that's not a threat. Your process is messed up. It's going to be chaos on the floor . . . Then we went back to the meeting." (Tr. 130–131.)

On the other hand, Stevens testified that after he insisted that they move on after Mcphee had answered Robinson's questions multiple times, Robinson looked at him and said, "I will mess you up." He responded by asking Robinson "[i]s that a threat?" Stevens stated that Robinson replied, "[y]ou can take that as a threat if you want to. It was feedback," as he (Robinson) pointed towards him. Stevens testified that he "immediately" sent an email off to labor "to let them know what had transpired." (Tr. 158–160.) The managers and Union representatives continued to discuss the manpower moves necessary for transitioning from one to two shifts. Stevens confirmed that Robinson asked why he (Stevens) was in the meeting, and the managers explained to him several times that he was there "to support us if there's any issues at that point and help keep us going here." (Tr. 160.)

Degner testified that at some point in the meeting, Stevens told Robinson that they were going to move forward in a "more professional manner," and Robinson said something to the effect of, "[t]he way you're going I'm gonna mess you up." He said that Stevens took offense and asked if he was threatening him. Degner added that Robinson responded that he could take it that way if he wanted to, or "something along those lines." (Tr. 229.)[24]

The Music Playing on Robinson's Phone

At some point, the alarm on Robinson's cell phone began to play music. There is dispute about the type of music or songs played, but no dispute that it was loud enough to be heard by everyone, and that it played for a while. Robinson and Miller testified that no one asked Robinson to turn the music off or down. However, Degner testified that he asked Robinson why he was playing the music, and to turn it off. Stevens also testified that Robinson was asked to turn it down. During this time, Robinson continued to tell Stevens he should not be in the meeting, and that he (Robinson) felt threatened and intimidated by his (Stevens') presence. Stevens insisted that he did not have to

[20] There is no evidence that Stevens attended the meeting to intentionally rile Robinson.

[21] In fact, Robinson was the only one who initially downplayed the importance of the meeting. Miller admitted that the moves "had to get done that day . . . In order for everybody to be where they needed to be, it needed to be done that day." (Tr. 133–134.)

[22] Robinson's testimony about the types of questions he repeatedly asked McPhee were not disputed.

[23] Robinson testified that he was referring to these proceedings. (Id.)

[24] Pudvan did not testify about the alleged threat, but confirmed that Robinson did not want Stevens in the meeting, and "was very aggressively trying to get [him] to leave" by asking him why he was there and telling him to leave, and otherwise disrupting the meeting. (Tr. 237.)

leave. (Tr. 66–68.) Once or twice when Stevens stepped out of the room to take a phone call or take care of other business, Robinson turned the music off. However, he turned the music back on as soon as Stevens returned to the meeting.

Robinson testified that his phone only played one song- country tune, "Friends in Low Places" by Garth Brooks. When asked how long it played, he testified that "[i]t kept playing. I don't know the approximate time, but it kept playing." He then said, with a sort of smirk, that he did not know how long, "but it was playing for a while," and that he "just let it sit there for a little bit, then I shut it off…meanwhile…Bob Pudvan was putting the Manpower moves in, and I was still trying to ask Anthony to leave, leave out of the conference area." (Tr. 66–67.) Robinson also testified that "[i]t wasn't loud. It's as loud as our phones would be. It wasn't loud." Robinson claimed that at some point, Stevens left the room, and the meeting continued with a discussion and disagreement about another issue. He said the music continued to play for about three more minutes. He and Miller left the meeting when they could not reach an agreement with management. (Tr. 68–69.)

However, Stevens, Pudvan, and Degner testified that the songs played by Robinson on his cell phone included those by the rap group Public Enemy, "Straight out of Compton," "Fuck the Police" and "Dope Man," and contained offensive lyrics and words such as the "N" word, "F—K the police" and other profanity. (Tr. 162–164; 227–229; 239–241.)

Stevens claimed the music was very loud, and consisted of "gangster rap type of music…[s]o it was very disruptive to the group." He testified that he stepped out of the conference room for a while, and when he returned "[t]he music is continuing to play with this gangster rap and shooting and Niggers and all sorts of inappropriate words . . ." He went in and out of the conference room a few times, for about "15, maybe 20 minutes," and the phone continued to play different songs. He ultimately had to leave this meeting for another. Regarding the lyrics, he testified that he heard them and the words, but did not recognize the names of the songs until Pudvan told him. (Tr. 161–163.)

Degner testified that the music emanating from Robinson's phone "was loud, and . . . Tom Mcphee and Ben Miller were actually trying to have a conversation to try and move the meeting forward. And it was just too loud. It just got very disruptive." He explained that he did not recognize the lyrics at first, but when he started listening to them, "it got very offensive at that point . . . I mean I heard things like "Fuck the police" and some references to killing and shooting and things of that nature. It kind of caught me a little bit off guard. And it's music that I wasn't familiar with at the time." When asked if any lyrics contained the "N" word, he responded, "I believe there were. I believe there were." (Tr. 227.) He also recalled Robinson turning the music off when Stevens left the room, but turning it back on when Stevens returned. He testified that this went on for about 20–30 minutes "off and on." (Tr. 227–228.) He maintained that he told Robinson that he needed to turn his music down because it was "disruptive and it's offensive." (Tr. 229.) Degner recalled that when Stevens left, the music stopped, and it was "calm for a little bit." He said at "some point Mr. Robinson just stood up and said: 'I'm not gonna do this anymore,'" and "I think he said something like: 'You can all kiss my mother fucking ass and left the room.'" Miller left, and the managers finished the manpower moves. (Tr. 230.)

Pudvan testified that Robinson told Stevens that he would not participate or allow the meeting to continue as long as he (Stevens) was there. He described how Robinson "[fidgeted] with his phone and started to play some music at a high volume level in the room," and how others in the room had to listen and "kind of yell over the music." Pudvan further testified that, "there were more than a handful of songs, but there were several that I personally recognized from N.W.A.," such as "Straight out of Compton," "F—the police" and "Dope Man." (Tr. 239.) Pudvan confirmed that Robinson turned his phone off on the few occasions that Stevens left the room, only to resume playing it as soon as he returned. He testified that Robinson played about 10–20 minutes worth of music in total, and that Robinson and Miller left the meeting about midway through, with Robinson telling them that he was "gonna write a whole bunch of grievances and y'all can kiss my MF'g ass." (Tr. 241.)

Miller testified that Robinson's phone went off, and "was loud, but [they] continued the meeting." He did not recall if a ring tone or music played, but recalled that it did not last as long as 15 to 20 minutes. (Tr. 131, 134.) Subsequently, when asked if "[t]he music used the 'N' word regularly," he responded that "I can't tell you whether it did or not." And, when asked if it used "MF" regularly," he responded that, "I cannot tell you what it said at all." Finally, when asked if it "[used] the 'F' word regularly," he said, "[n]ot that I'm aware of. I could not—I honestly [did] not pay attention to what music it was. I went on with the meeting. I was focused on the meeting and the work that had to get done." He denied that anyone asked Robinson to turn the music down or off. (Tr. 134–135.) Despite his own efforts to continue with the meeting, he recalled that after Robinson saw that management "was still moving forward he said: I'm not going to be involved in this. I'll present you with grievances,' and he got up and left. When he got up and left I packed my stuff up because I'm not going to be there by myself. I got up, and as I walked out I believe I told Tom Mcphee . . . '[d]on't fuck this up.'" (Tr. 132.)

Disciplinary Interview with Gallinger

Labor relations manager, Randy Gallinger, met with Robinson and Gay on October 13 for an investigative interview. Gallinger recounted how he doubted Robinson's version of events based on his investigation and Robinson's inconsistent explanations during the interview. Gallinger testified that Robinson wavered back and forth in his statements, including those referencing the songs played—"his answers changed back and forth to there were probably some other songs that played. No, no other songs played. I don't really know what other songs played. And then he became more and more upset as I tried to point out the inconsistencies in his answer." Although Robinson denied having played music with "objectionable lyrics," he asked Gallinger, "'[w]ell, what's wrong with those songs? Is it because it's Black music?' And then he got a little bit angrier." Robinson ultimately told Gallinger that he was going to "plead the Fifth" on

whether or not he played the N.W.A. songs.[25] (Tr. 285–287.)

Robinson admitted that he told Gallinger that curse words in the lyrics of N.W.A songs, like "Fuck the Police" were "acceptable because that's what we do at the auto plant. That's what's on the floor. People play that, and that's how we speak down there." However, he claimed that the "N" word was not acceptable and that he did not use it. (Tr. 73–74.) Robinson also testified that he asked Gallinger questions, such as whether or not Stevens called security because he felt threatened, and whether "there was a policy that you can't play music in a meeting?" (Tr. 74.)

On October 17, Tutt issued Robinson's suspension for the BOS plus 30 days for his conduct during the skilled trades manpower meeting when he threatened Stevens by telling him he was "going to mess [him] up." The notice further stated that he disrupted the meeting and prevented it from moving forward by refusing to participate with Stevens and by "loudly playing music on [his] phone that contained objectionable language and racially charged lyrics, despite being repeatedly asked to turn it down, violating [his] PARA. 19 obligations."[26] (Jt. Exhs. 6, 1(p. 19)). Robinson refused to sign the notice, and a copy was received by his representative, Gay. (Id.)

Credibility Findings

It is clear that management officials were frustrated by Robinson's tactics to disrupt the manpower meeting and stall the moves. It is also apparent that Robinson disrupted the meeting in part due to his disagreement with management's proposed changes, but mostly because of his disdain for Stevens and frustration with his presence at the meeting. First, while the management team wanted Stevens at this particular meeting to assist in moving the process forward to completion, there is no evidence to support Robinson's belief that the collective-bargaining agreement precluded him from being present. Next, I find Robinson's denial about telling Stevens he would "mess" him up, and his testimony about the songs he played unconvincing, inconsistent, and self-serving. Moreover, Robinson's demeanor during his testimony—smirking at times—belied his explanation of what he told Stevens and the music he played. Therefore, in the instances where Robinson's testimony differs from that of Respondent's witnesses, I credit the latter.

Robinson insisted that he never threatened Stevens, but merely told everyone in the meeting that the proposed manpower moves would be "messed up" and create "chaos" on the floor. I do not believe his version. Management witnesses consistently confirmed that he addressed Stevens directly, when he said that he would "mess" him up. Even Miller heard "Chuckee kinda [laugh]" and tell Stevens that he "wouldn't take that as a threat," before talking about how the changes would mess up and cause chaos on the floor. (Tr. 130–131.) However, Miller did not hear what Robinson said to prompt Stevens asking, "is that a threat?" Overall, Robinson presented disjointed, meandering testimony about what, when, how and why he commented about "messing up." Therefore, I credit the testimony of the management officials that Robinson told Stevens that he would "mess" him up, could take his comment however he wanted to take it. It is unbelievable that everyone misinterpreted what he said, except the person sitting next to him who did not hear what all was said. I also believe, however, Robinson's attempt to explain that he was talking about the manpower changes only occurred after he told Stevens that he would "mess" him up.

Robinson admitted that he intentionally disrupted the meeting by trying to get Stevens to leave and by playing loud music on his cell phone, but denied playing N.W.A. songs with offensive, profane lyrics or even having them on his phone. (Tr. 73.) He testified, however, that on the work floor, they used curse words, and that some people played music on the floor containing explicit lyrics.[27] (Tr. 74.) Robinson's response as to how long he played the music ("awhile") was vague, and he maintained that it was at a normal cell phone volume, while all other witnesses, including Miller, testified that it was loud. Robinson insisted that he played a country song, while the other witnesses, except Miller, heard rap songs with offensive lyrics. Miller, on the other hand, conveniently claimed not to have heard what type of music it was. I find it unbelievable that Miller, who admitted the music was loud, could not decipher whether it was a country or gangster rap song emanating from a cell phone in such close proximity to him. I find that his own vague, equivocal testimony was contrived to support that of Robinson. This is further evidence that the songs played were not of the country genre but more likely than not N.W.A. offerings containing objectionable lyrics. Thus, I credit the more consistent testimony of management officials about the types of lyrics that played on Robinson's phone during their manpower meeting. I also credit the mostly undisputed testimony that the music continued on and off whenever Stevens left and reentered the meeting room. Finally, I believe that Degner asked Robinson to turn the music off or down; it is unbelievable that they all sat through such loud music without doing so.

III. DISCUSSION AND ANALYSIS

I have for the most part credited management witnesses over Robinson regarding his comments during the three encounters at issue in this case. The General Counsel argues that since Robinson engaged in protected activity during those incidents, his conduct was protected by the Act. Respondent on the other hand argues that Robinson was never engaged in protected activity on the occasions for which he was suspended, or in the alternative, his comments and behavior cost him the protection of the Act.

A. Legal Standards

Under the Board's longstanding *Interboro* doctrine, "an individual employee's reasonable and honest invocation of a collective-bargaining right" is considered concerted activity. *Interboro Contractors*, 157 NLRB 1295, 1298 (1966); *Meyers Industries*, 281 NLRB 882, 884 (1986). This remains the case even if the

[25] I credit Gallinger's testimony regarding the interview; it is not inconsistent with Robinson's for the most part, and Gay did not testify.

[26] The interview reconvened on October 17 because Gay had to leave before it ended on October 13, and that is when Tutt presented him with the discipline. (Tr. 71, 76.)

[27] No one contradicted testimony that production employees regularly use profanity on the work floor.

employee turns out to be wrong. See *Omni Commercial Lighting, Inc.*, 364 NLRB No. 54, slip op. at 3 (2016) (citing *Interboro*, above, and *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984)). The key distinction between concerted action and individual action is that it "must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 497 (1984). There is no disagreement that when a union representative is negotiating with management or otherwise conducting union business on behalf of his constituents, he or she is engaged in protected, concerted activity.

Since it is undisputed that Respondent disciplined Robinson on three occasions solely for his conduct during his three meetings with management officials, the appropriate analysis is whether his conduct in those meetings was initially protected under the Act and, if so, whether he ultimately forfeited that protection. See *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1413, 1425 fn. 8 (2004). "When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford New York, LLC*, 344 NLRB 558, 558 (2005). To determine whether or not an employee loses such protection, the Board established a test balancing the following four factors: (1) the location of the discussion; (2) the subject matter of the discussion; (3) the nature of the employees' outburst; and (4) whether the outburst was provoked by the employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814 (1979). This framework allows the Board to balance employees' rights with the employer's interest in maintaining workplace order and discipline. See *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311 (2014); *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), enfd. in part 664 F.3d 286 (9th Cir. 2011), decision on remand 360 NLRB 972 (2014).

B. Respondent's Suspension of Robinson for His Protected Union Activity on April 11, 2017 Violated Section 8(a)(3) and (1) of the Act.

Respondent argues that "Robinson did not honestly and reasonably assert any issue with cross-training because he is not deemed to be engaged in concerted activity when arguing a position that is directly contrary to what his International Union has agreed to in their National Agreement." (R. Br.) I disagree, and find that Robinson's production floor meeting in the managers' office area on April 11 was protected concerted activity. He was clearly acting in his capacity as a union committeeperson when he requested to meet and met with Nikolaenko. It is undisputed that his meeting with Nikolaenko was prompted by one of the bargaining unit employees, Bob Burton, and Burton's complaint that Nikolaenko had refused to abide by what the Union believed to be an earlier verbal agreement for management to utilize overtime to cover bargaining unit team leaders during cross-training. (Tr. 24–25.) Respondent presented evidence that there was no mention of cross-training in the bargaining agreements with the Union. Further, Nikolaenko testified that overtime coverage on that day was unnecessary. However, Nikolaenko never denied that he and the Union had discussed and/or come to some kind of verbal agreement about overtime coverage for team leaders who cross-trained. In fact, it appears that they did one and/or the other, but disagreed on how and exactly when such coverage might apply. Nikolaenko believed it was his call to determine if overtime was necessary, and Robinson seemed to understand that it was a go whenever management assigned cross-training. Therefore, there is no evidence that Robinson did not honestly believe or understand that management had agreed in some way to provide overtime coverage for team leaders during cross-training. I find this to be the case, based on the evidence of record, even if Robinson misunderstood or turned out to be wrong. See *Omni Commercial Lighting, Inc.*, above.

1. The place of confrontation weighs in favor of protection

The first *Atlantic Steel* factor, the place of the discussion, favors protection. Although the confrontation on April 11 occurred on the shop floor, there is no evidence that it caused disruption to the Respondent's operation. In *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007). Although there were production areas operating in the vicinity and a break area, the machinery running was very loud, and there is no evidence that any of the production employees working on the machinery were in close enough proximity to the manager's office area to hear or observe the discussion between Robinson and Nikolaenko. (Tr. 27). The only witnesses to what occurred were management officials Erwin and Politte. Erwin and Politte testified that the loud voices and the intensity of the outburst drew their attention to Robinson and Nikolaenko, but what they heard only caused them to stop for a few moments. (Tr. 199, 217.) Further, as the General Counsel pointed out, Nikolaenko invited Robinson to meet in person to continue the radio discussion about the cross-training overtime in the area outside the manager's office. He did so knowing that Robinson was upset about what Burton had reported to him. Moreover, there is no evidence that Robinson's one-time, spontaneous outburst affected in any way Nikolaenko's ability to maintain discipline among the production employees in the workplace. See *Stanford Hotel*, 344 NLRB 558, 558 (2005) (location factor minimized the potential that outburst would affect supervisor's ability to maintain discipline and weighed in favor of protection "even though the outburst inadvertently was overheard by one employee").

2. The subject matter of the confrontation weighs in favor of protection

The subject matter of the disagreement between Nikolaenko and Robinson was about Nikolaenko's failure to assign overtime coverage for team leaders required to cross-train, and what I have determined to have been Robinson's sincere and honest belief that Nikolaenko had breached a verbal agreement with the Union. This issue was directly related to Robinson's protected concerted activity, and therefore weighs in favor of Robinson's receiving the Act's protection. See In Re *Felix Industries*, 339 NLRB 195, 196 (2003) (the Board held that the subject matter of the charging party's discussion is a collective-bargaining right, which weighs in favor of the charging party's protection). Thus, Respondent's argument that the subject matter raised by Robinson was not protected activity because it was not encompassed in any agreement is without merit.

3. The nature of Robinson's outburst weighs in favor of protection

I have credited testimony that Robinson told Nikolaenko that, "we're not going to do any fuckin' cross-training if you're going to be acting that way," and to shove it (referring to the cross-training initiative) up his "fuckin' ass." Respondent argues that the nature of Robinson's outburst is loud, profane and personal ad hominem, which makes him lose the protection of the Act. The General Counsel argues that in the course and context of the conversation, Robinson did not lose the Act's protection.

The Board has applied an objective standard to determine whether the conduct in question is threatening or so opprobrious as to lose the protection of the Act. See *Plaza Auto Center, Inc.*, above at 975. The Board has also acknowledged that employees are allowed some leeway for impulsive behavior when engaged in protected activity, since "protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumer Power Co.*, 282 NLRB 130, 131–132 (1986). In this same vein, an employee's behavior must be more than "disrespectful, rude, or defiant." *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. 953 F.2d 1384 (6th Cir. 1992). However, this allowance is "subject to the employer's right to maintain order and respect." *Tampa Tribune*, 351 NLRB 1324, 1324–1325 (2007), enf. denied *Media General Operations, Inc. v. NLRB*, 560 F.3d 181 (4th Cir. 2009).

The Board has also permitted Union representatives some latitude when in the midst of "zealously representing the interests of unit employees, and has found what might be considered offensive remarks in other settings to be permissible in the context of a grievance meeting or other similar setting." *Covanta Bristol, Inc.,* 356 NLRB 246, 254 (2010) (citing *Dreis & Krumpf Mfg.,* 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976)). See also *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976) (employee's profane statements made during the course of processing a grievance do not remove the employee from the Act's protection unless the overall conduct is so violent or obnoxious as to "render him wholly unfit for further service"). Thus, "[i]n assessing whether the employee's conduct removed the protections of the Act, the asserted impropriety 'cannot be considered in a vacuum' nor 'separated from what led up to it.'" *Meyer Tool, Inc.*, 366 NLRB No. 12, slip op. at 11 (2018), quoting *NLRB v. Thor Power Tool, Co.*, 351 F.2d 584, 586 (7th Cir. 1965). In other words, an employee's questionable behavior should be assessed in the context of the circumstance in which it occurred. In some cases, for example, the Board has found that curse words, including "the use of the word 'fuck' and its variants," "insufficient to remove otherwise protected activity from the purview of Section 7." *Pier Sixty, LLC*, 362 NLRB 505, 507 fn. 9 (2015).

In *Plaza Auto Center, Inc.*, above, on remand from the Court of Appeals for the Ninth Circuit, the Board followed the Court's instruction to "reapply the four-factor *Atlantic Steel* test for determining when an employee's outburst during protected activity costs the employee the protection of the Act." After doing so, the Board concluded that the employee's profane rant (in a raised voice calling manager a "fucking mother fucker," a "fucking crook," an "asshole," and "stupid,") did not ultimately cause him to lose the protection of the Act. The Board reached this conclusion even after determining that the employee's "obscene and denigrating remarks must be given considerable weight because the employee targeted the supervisor personally, uttered his obscene and insulting remarks during a face-to-face meeting with him and used profanity repeatedly." However, the Board majority concluded that their finding that the nature of the outburst weighed against protection did not preclude a finding that the employee lost the protection of the Act. *Plaza Auto Center, Inc.*, above at 977. See also, *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 27 fn. 1 (D.C. Cir. 2011) ("…[i]t is possible for an employee to have an outburst weight against him yet still retain [the Act's] protection because the other three [*Atlantic Steel*] factors weight heavily in his favor.")

In *Kiewit Power Constructors Co. v. NLRB*, above at 29, the Court of Appeals for the District of Columbia observed Board precedent of "using an objective standard" to determine whether conduct is threatening. The Court of Appeals found that testimony by the supervisor that he felt threatened or feared for his safety as a result of an employee's conduct "is not determinative." Id. at 28–29 & fn. 2. In *Kiewit*, 355 NLRB 708 (2010), enf. 652 F.3d 22, (D.C. Cir. 2011), employees, in protesting against enforcement of what they believed to be a bad policy that negatively impacted their safety, angrily told their supervisor that if they were laid off, "'it's going to get ugly and you better bring your boxing gloves.'" Id. The Board decided that these words were not "unambiguous or 'outright'. . . threats of physical violence." In doing so, the Board reasoned that "the employees' prediction that things could 'get ugly' reasonably could mean that the Respondent's continuation of the disciplinary enforcement of its [policy] would engender grievances or a labor dispute," and that the "additional remark that Watts had 'better bring [his] boxing gloves' is more likely to have been a figure of speech emphasizing employees' opposition to the [policy], rather than a literal invitation to engage in physical combat." Id. at 710.

Here, I find that the nature of Robinson's outburst, spontaneously made in the midst of his protected activity, weighs in favor of protection. It included face-to-face use of profanity. However, he did not put his finger in Nikolaenko's face or threaten him in any way. Nor is there evidence of Robinson posing a physical or violent threat to anyone. Nikolaenko testified that he felt threatened; Politte believed it looked like Robinson might punch Nikolaenko; and Erwin felt like someone, but apparently not him, should intervene. However, there is no evidence that either of them related their great fear of physical harm or threat from Robinson to Tutt. Nor did either Erwin or Politte attempt to intervene or call security. In fact, the only accusation set forth in the initial and amended notices of discipline was that Robinson used abusive language. Finally, it is clear that Robinson's remark that Nikolaenko could stick the cross-training "up his ass," was not a threat to actually do so, or a threat of violence, but a metaphor. See *Kiewit*, above; see also, *Leasco, Inc.,* 289 NLRB 549 fn. 1 (1988) ("I'm kicking your ass right now" determined to be a colloquialism, and not an actual threat); *Kay Fries, Inc.*, 265 NLRB 1077, 1089 (1982) (phrase "F—the $80; shove

the $80 up your f—ing ass" understood to mean "keep it" rather than an actual threat, and therefore did not lose the Act's protection); *Southwestern Bell Telephone Co.*, 649 F.2d 974, 975–977 (5th Cir. 1982) (union steward's repeated statements that he would see the supervisor "fry" found to be ambiguous). Further, Robinson did not target Nikolaenko personally, i.e., he did not call him a profane name such as in the cases above (e.g., f—king mother—ker, f—king crook, asshole). Moreover, Robinson reacted in protest to what he honestly believed was a breach of an agreement, as well as Nikolaenko's threat to report him to labor relations if he (Robinson) directed his unit members to stop cross-training. Thus, I find that the nature of Robinson's outburst on April 11 did not cost him the protection of the Act.

Respondent relies on cases in which employees lost the protection of the Act for similar conduct as Robinson's. However, I find that they are distinguishable, and that the cases cited above where the employees did not lose the protection of the Act are more applicable. Respondent cites *DaimlerChrysler Corp.*, 344 NLRB 1324, where the Board found the employee's profanity (called supervisor "asshole," and said "bullshit" before walking away and returning in an "intimidating" fashion and saying "fuck this shit" and he did not "have to put up with this bullshit"), involving more than a single spontaneous outburst, cost him protection because it occurred in front of other employees, thereby heavily impacting the employer's interest in maintaining discipline and order. That was not the case here, and moreover, in *DaimlerChrysler*, three of the *four Atlantic Steel* factors weighed against favor of protection. Respondent also relies upon *Trus Joist MacMillan*, 341 NLRB 369 (2004) (employee called supervisor a "lying bastard" and accused him of being a "prostitute" for the plant manager), in which the Board majority found the employee lost protection where only one *Atlantic Steel* factor favored protection. There is no evidence here, as in *Trus Joist MacMillan*, that the employer's adverse actions occurred several days prior to the employee's premeditated outburst intended to embarrass a manager in front of others, thereby undermining his future effectiveness. Here, Robinson's outburst was a spontaneous, one occasion outburst, which did not occur in front of production employees. Respondent also relies on *Tampa Tribune v. NLRB*, 560 F.3d 181 (4th Cir. 2009), where the Court of Appeals denied enforcement of 351 NLRB 1324, above, and determined that the respondent lawfully disciplined an employee for a single occurrence of calling his supervisor a "fucking idiot." However, the underlying Board majority in that case found that "use of a single profane and derogatory reference" was not sufficiently opprobrious for the employee to lose the Act's protection. See *Tampa Tribune*, 351 NLRB 1324, 1325.

4. Robinson's conduct was provoked by an unfair labor practice

The fourth *Atlantic Steel* factor slightly favors protection. Although there is no evidence that Nikolaenko's refusal to provide overtime coverage was in fact an unfair labor practice, it provoked Robinson's behavior in that Robinson held an honest belief that such refusal constituted an unfair labor practice and breach of an agreement.

Since I have determined that all of the Atlantic Steel factors weight in favor of protection, I find that Robinson did not lose that protection of the Act on April 11, 2017. Therefore, Respondent violated the Act when it suspended Robinson for his outburst in the midst of his protected activity on April 11.

C. Robinson's Conduct on April 25, 2017 Lost the Protection of the Act

All parties agree that the purpose of the 183 Meeting which Robinson attended on April 25, 2017, was for representatives of the Union and Management to meet and discuss subcontracting out work at the Fairfax Facility. (Tr. 39, 146, 190.) At the beginning of the meeting, Robinson asked management questions about having outside contractors come into the Fairfax Facility to perform work and how it would impact bargaining unit employees. He was also concerned and asked about his prior requests for information regarding the cost to the company of subcontracting out all work. (Tr. 46.) Robinson was clearly engaged in protected activity since the meeting was convened to talk about collective bargaining issues between management and the Union. I reject Respondent's argument that Robinson was never engaged in protected concerted activity because "he was engaged in a personal attack that is devoid of any purpose to enforce the parties' agreement, induce group action, or act on behalf of his constituent workers." (citing *Winston-Salem Journal v. NLRB*, 394 F.3d 207, 211 (4th Cir. 2005)). I have credited testimony that he addressed Stevens repeatedly as "Yes Master," and acted in a subservient manner. Consequently, the next question is whether or not Robinson's behavior during the meeting lost the protection of the Act (that he initially enjoyed) pursuant to the *Atlantic Steel* test.

1. The place of confrontation weighs in favor of protection

The place of discussion weighs in favor of protection. The asserted outburst took place in a closed-door meeting attended only by representatives of the Union and Management whose sole purpose was to discuss terms and conditions of employment within the context of collective bargaining, i.e., subcontracting out work and how it would affect unit members. Therefore, there was no disruption to the workplace, or interference with Respondent's ability to manage its production workers. *Datwyler Rubber & Plastic*, 350 NLRB at 670 (outburst occurred during an employee meeting, where employees were free to raise workplace issues and in a location that might not disrupt employee's work process); *Datwyler Rubber & Plastic*, above at 675 (loud voices would not cause a loss of protection when the meeting is only for specific people to attend).

2. The subject matter of discussion weighs in favor of protection.

The subject matter of discussion weighs in favor of protection. Robinson's conversation with others relates to "terms and conditions of employment," as previously discussed, which means the subject matter of his conversation did not cost him "the protection of the Act because it serves the Act's goal of protecting the exercise of Section 7 rights." *Plaza Auto Ctr., Inc.,* above at 978.

3. The nature of the outburst weighs against protection.

In context, I find in this particular instance, that the nature of the outburst weighs against protection. Robinson, in the midst

of this meeting, repeatedly addressed Stevens as "Master," using slave vernacular, and insinuating that Stevens wanted him (Robinson) to be subservient or treat him like a slave master. I find that he diverted from his union representational purpose and disagreement with management's subcontracting out of work, to intentionally engage in a more serious personal attack against Stevens for trying to get him to refrain from yelling at Tutt. There is no evidence that Stevens or other management officials' interaction incited such a response. It is true that the Board has permitted Union representatives leeway with certain outbursts when in the midst of "zealously representing the interests of unit employees," but I do not find that Robinson was in the midst of doing so when he drifted into his prolonged side tirade against Stevens. *Covanta Bristol, Inc.*, above at 254

In *Winston-Salem Journal*, 341 NLRB 124, 125–127 (2004), enfd. denied 394 F.3d 207 (4th Cir. 2005), a supervisor, at a crew meeting, told the employees that their teamwork needed improvement. The charging party, a union chairperson, interrupted him by saying that he did not treat all the employees equally (based on what he believed to be past unfavorable treatment), called him a racist, and accused the employer of maintaining a racist place to work. In its analysis, the Board found that the third factor weighed in the charging party's favor because, although he interrupted the supervisor and called him a racist, as "this conduct was not so inflammatory as to lose the protection of the Act." Id. Although the Court of Appeals disagreed with the Board, I find the Board's case is distinguishable. Robinson's comments arose from his personal animosity of Stevens, and unfounded belief that Stevens treated him or wanted him to submit to him like a slave. He was not representing that Stevens or Respondent had engaged in unfair treatment of his constituents.

Respondent argues that Robinson's behavior created a racially hostile environment, relying on cases where racially hostile outbursts lost the protection of the Act. His examples included *Avondale Industries*, 333 NLRB 622, 637 (2001) (an employee was lawfully discharged after calling a foreman a "Klansman"). In *Avondale Industries,* the administrative law judge, affirmed by the Board, noted that the employee's "unfounded assertion that [her supervisor] was a Klansman raised an issue of racial prejudice that could potentially embroil other African-American employees in her ongoing personal dispute." Id. Here, there were no non-union representative employees present whom he could have potentially embroiled in his issues with Stevens; however, his dispute and views were personal, without evidence that they were shared by his fellow union representatives in attendance. Moreover, Robinson did not like Stevens, and his demeanor towards him was a personal attack which had the effect, even from an objective view, of negatively impacting other meeting attendees such that he was unfit at that time to carry out his union duties. Thus, I find that this factor moderately weighs against protection.

4. Robinson's conduct was not provoked by an unfair labor practice

Robinson's outburst occurred because Stevens interrupted him to try to get him to calm down and refrain from yelling at Tutt. The General Counsel contends that "Robinson was upset about what he believed was a breach of the collective bargaining agreement and a potential unfair labor practice." Although Robinson was demanding general information on the spot, his initial information request was made only a couple of days prior to the meeting. Further, there is no allegation or evidence to support that Respondent engaged in an unfair labor practice by insisting that Robinson narrow his requests for information. Thus, Robinson's outburst was not provoked by an unfair labor practice.

Since two of the four factors, including the nature of the outburst, weigh against favor of protection, I find that in this instance, Robinson lost the protection of the Act. Consequently, I find that Respondent did not violate the Act when it issued Robinson discipline stemming from this conduct on April 25. This allegation is therefore dismissed.

D. Respondent Lawfully Suspended Robinson for Engaging in Conduct on October 6, 2017 that Lost the Protection of the Act

Respondent attended an October 17, 2017 "Manpower Meeting," which was a regularly scheduled meeting between Union and management representatives to discuss manpower moves. (Tr. 60, 129.) His attendance at the meeting and certain of the subsequent conversations during the meeting were protected concerted activity in furtherance of his duties as a committeeperson. As the meeting began, Robinson asked about the UL jobs—a new classification of jobs created by the Respondent which would directly impact bargaining unit work and manpower. Robinson disagreed with members of management about the UL jobs and he indicated that he was going to escalate the issues to the union chairman. Thus, Robinson engaged in protected activity during the meeting. However, I find below that he lost this protection during the course of the meeting.

1. The place of confrontation weighs in favor of protection

The October 6 manpower meeting occurred in the same conference room as the April 25 paragraph 183 meeting between management and the Union. (Tr. 156–157.) As previously stated, this type of closed-door meeting, held outside the confines of the production floor and without unit employees, should find favor of protection of the Act. *Datwyler Rubber & Plastics, Inc.*, above (favored protection where discussion took place away from customary work area); *Noble Metal Processing, Inc.,* 346 NLRB 795, 800 (2006) (favored protection where outburst occurred during meeting held away from work area causing no disruption to the work process).

2. The subject matter of discussion weighs in favor of protection

The skilled trades manpower meeting is a weekly meeting convened to discuss job openings and moving workers from shift to shift to cover needed spots in the plant. (Tr. 156.) The meeting on October 6 was particularly important because the team had not been able to finish the needed manpower moves in previous weeks and October 6 was the last opportunity to complete the moves before the plant moved from three shifts to two. (Tr. 157, 225, 237.) The subject matter of the manpower meeting is related to the CBA and Robinson's duties as union committeeperson. This is in favor of the protection. 360 NLRB at 978. However, what is questionable is whether or not Robinson's decision to threaten Stevens, or disrupt the meeting by playing disruptive, offensive music did.

3. The nature of the outburst weighs against favor of protection

I have credited testimony that Robinson told Stevens that he would "mess" him up. However, I do not find that this comment alone constituted a physical or violent threat towards Stevens. Steven's accusation of a physical threat is belied by everyone's demeanor at the table. Robinson's conduct while making this statement was not in any way physically menacing or aggressive. 360 NLRB at 976. In fact, Stevens was not sitting at the conference table with the others, but on the other side of it from Robinson against a wall. Although Stevens emailed labor relations immediately after, he did not leave the room or call security for this reason, nor did anyone at the table intervene. Moreover, I find that Robinson's statement is similar to that found not to have constituted a threat in *Kiewit*, 355 NLRB 708 ("it's going to get ugly and you better bring your boxing gloves" not "unambiguous or outright…threats of physical violence.") The absence of an actual physical threat weighs in favor of protection of the Act. *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. 953 F.2d 1384 (6th Cir. 1992). Therefore, I do not find that Robinson's statement alone was sufficient to favor loss of protection. However, in considering the entire meeting I must find that the nature of Robinson's overall behavior weighs heavily against protection of the Act.

I have also believed that Robinson intentionally played loud music on his cell phone, with offensive lyrics, in an attempt to disrupt the meeting for the sole purpose to get Stevens to leave. In evaluating this factor, the Board has considered whether the employer provoked the employee's outburst. See *Plaza Auto Center, Inc*., above at 979. Although Stevens attempted to get Robinson to stop asking the same questions and move along with the process, I do not find that Stevens' actions rose to a level where they reasonably provoked Robinson to begin playing loud, profane, and offensive music for over 15 minutes during a meeting in which he was acting on behalf of his constituents as Miller attempted to do. While the type of language in the songs may have been commonly used on the work floor, and Miller testified that he told managers not to "fuck" up the manpower moves before he left the meeting, there is no evidence that profane language was routinely used (or played) during the manpower or other meetings between management and the Union. In fact, there was uncontroverted testimony that other union officials never acted in this manner. Evidence of this is reflected in how Miller attempted to work with management through the music playing and Robinson's rants until Robinson decided to get up and leave. It is simply a stretch in this case to believe that Robinson's behavior related to his duties as committeeperson or his role in the manpower meeting. *See Carrier Corp.*, 331 NLRB 126 fn. 1 (2000) (ALJ determined that employee interrupting meeting and insisting on discussing unrelated topic was not engaged in concerted activity).

Therefore, I find that Robinson's comment to "mess" Stevens up, playing the offensive music, and using profanity on his way out of the meeting, when taken together, were sufficiently opprobrious to weigh against protection of the Act.

4. Robinson's conduct was not provoked by an unfair labor practice

The fourth factor of *Atlantic Steel* does not favor protection. The General Counsel has provided no evidence that Robinson's conduct on October 6, 2017, was provoked by an unfair labor practice on behalf of the Company. The General Counsel argues that "Robinson was concerned that the Respondent was potentially violating the current Collective Bargaining Agreement in how it was planning to move manpower in response to a new classification of job and became upset at what he believed was a breach of an agreement and a potential unfair labor practice." However, there is no evidence except Robinson's self-serving testimony that Respondent had committed an unfair labor practice.

In summary, two of the four *Atlantic Steel* factors weigh in favor of protection, but the nature of the outburst weighs heavily against protection, as well as the fourth factor. Therefore, I find that Respondent did not violate the Act when it suspended Robinson for his conduct during the October 6 manpower meeting. Consequently, this allegation is also dismissed.

E. The Wright Line Analysis is not Applicable

Respondent argues that the Board's *Wright Line*[28] mixed motive standard is applicable in this case since it suspended Robinson on three occasions for reasons unrelated to his protected activity. However, as I have found, Robinson's suspensions were issued for conduct related to his protected activity. Thus, I find that *Wright Line* is not applicable here. However, alternatively, I find that under Wright Line, I would reach the same conclusions regarding the allegations. Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's adverse action. If this prima facie case is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Mesker Door*, 357 NLRB 591, 592 fn. 5 (2011); *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004).

F. Respondent's Affirmative Defense That Deferral Is Warranted is Without Merit

I have considered all of Respondent's affirmative defenses set forth in its answer to the consolidated complaint. Included in those defenses, was Respondent's argument that the disputes contained in the complaint are preempted by the parties' collective-bargaining agreement, and should be deferred to the grievance and arbitration procedure. However, Respondent did not raise any arguments or support for this contention in its brief in an attempt to show that deferment is warranted under Board law. Therefore, I find this defense is without merit.

CONCLUSIONS OF LAW

1. By suspending Charging Party Charles Robinson for conduct while engaged in protected, concerted activity on April 11, 2017, the Respondent General Motors, LLC has engaged in

[28] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

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

2. By suspending Charging Party Charles Robinson for conduct while engaged in protected, concerted activity on April 11, 2017, the Respondent General Motors, LLC violated Section 8(a)(3) and (1) of the Act.

3. By suspending Charging Party Robinson for conduct on April 25 and October 6, 2017, Respondent did not violate the Act.

4. The complaint allegations are dismissed insofar as they allege violations of the Act not specifically found.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, Respondent shall make Charging Party Charles Robinson whole for any losses, earnings, and other benefits that he suffered as a result of the unlawful discipline imposed on him on August 24, 2017, or otherwise imposed on him for conduct on April 11, 2017. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Further, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the Charging Party Charles Robinson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, General Motors, LLC, Kansas City, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining or otherwise discriminating against any employee for engaging in conduct protected by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Charging Party Charles Robinson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline issued to Charging Party Charles Robinson on April 24, 2017, or otherwise in connection with conduct on April 11, 2017, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Fairfax Facility in Kansas City, Kansas copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 2017.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 18, 2018

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline, or otherwise discriminate against you, for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Charging Party Charles Robinson whole for any loss of earnings and other benefits resulting from his discipline issued on April 24, 2017, or otherwise imposed on him for protected conduct on April 11, 2017, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Charging Party Charles Robinson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline issued to Charging Party Charles Robinson on April 24, 2017.

WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

GENERAL MOTORS LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-197985 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.