No. _____

United States Supreme Court

CADILLAC OF NAPERVILLE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeal for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Court of Appeal improperly narrowed the First Amendment protection owed employers in a labor dispute by requiring objective factual support for an employer's personal speculation or opinion?

(2) Whether the Court of Appeal's opinion—which affirms the NLRB based on novel factual inferences not found in the record below—perpetuates substantial inconsistency and confusion in the NLRB's approach to employer speech?

(3) Whether the NLRB's practice of disregarding state criminal laws respecting admission of evidence improperly impedes the state's sovereignty under principles of federalism and comity?

CORPORATE DISCLOSURE STATEMENT

Cadillac of Naperville, Inc. ("CON") has no parent corporation and no person or entity owns 10% or more of its stock.

STATEMENT OF RELATED CASES

- *Cadillac of Naperville, Inc. v. National Labor Relations Board*, Nos. 19-1150/19-1167, U.S. Court of Appeals for the D.C. Circuit. Judgment entered September 17, 2021.

- *Cadillac of Naperville, Inc. and Automobile Mechanics Local 701, International Association of Machinists & Aerospace Workers, AFL-CIO*, No. 13-CA-207245, National Labor Relations Board. Decision and Order entered June 12, 2019.

- *Cadillac of Naperville, Inc. and Automobile Mechanics Local 701, International Association of Machinists & Aerospace Workers, AFL-CIO*, No. 13-CA-207245, JD-41-18, National Labor Relations Board, Division of Judges. Decision entered June 19, 2018.

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OPINIONS AND ORDERS BELOW

The Decision of the Administrative Law Judge issued on June 19, 2018, may be found at 2018 WL 3047010 (N.L.R.B. Div. of Judges June 19, 2018) and is reprinted as Appendix C hereto (138a-220a). The National Labor Relations Board's June 12, 2019 Decision and Order is reported at 368 NRLB No. 3 (N.L.R.B. 2019) and is attached as Appendix B (34a-137a). The United States Court of Appeals for the D.C. Circuit issued its decision on September 17, 2021. This decision is reported at 14 F.4th 703 (D.C. Cir. 2021), and reprinted as Appendix A (1a-33a) hereto. Finally, the D.C. Circuit issued an order denying rehearing *en banc* on November 22, 2021. That order is reprinted as Appendix D (221a-222a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the D.C. Circuit issued its decision on September 17, 2021, and denied rehearing *en banc* on November 22, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The National Labor Relations Act, 29 U.S.C. §§ 151 et seq. states in relevant part as follows:

> **(a) Unfair labor practices by employer**
>
> It shall be an unfair labor practice for an employer—
>
> > **(1)** to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
> >
> > * * *

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

29 U.S.C. § 158(a)(1), (c).

STATEMENT OF THE CASE

This case provides an opportunity to confront significant overreach by the NLRB on the First Amendment rights of employers. More than fifty years ago, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-18 (1969), this Court outlined the limited circumstances under which an employer's free speech rights may be curtailed during a labor dispute. This Court openly affirmed the premise that employers *must* be free to communicate their general views about unionism or other labor activities, requiring only that statements purporting to describe the "precise effects" of unionization be supported by "objective facts.

But the D.C. Circuit's decision below represents a substantial departure from *Gissel Packing*. The NLRB took a vague statement of pessimism by an employer—that things "would not

be the same" if a strike occurred—and transformed it into an unlawful threat of reprisal. It did so by admonishing the employer that this decidedly non-factual statement must nevertheless be supported by objective facts.

For its part, the Court of Appeal perpetuated this fiction, deriving novel factual inferences not found in the record below to support the NLRB's conclusion. This holding represents a growing encroachment by the NLRB on employers' First Amendment Rights that both Congress and this Court have taken great care to preserve.

The pertinent facts of this case are as follows: CON is an automobile dealership in Naperville, Illinois. *Cadillac of Naperville v. NLRB*, 14 F.4d 703, 710 (D.C. Cir. 2021); (2a). It is a member of the New Car Deal Committee ("NCDC"), a multiemployer bargaining unit including employees in 129 dealerships in the Chicago area. *Id.*; (2a-3a). The NCDC negotiates master collective-bargaining agreements with the Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO, which represents some 2,000 mechanics across the dealerships. *Id.*; (3a).

In May of 2017, the NCDC and the union began to negotiate a new collective-bargaining agreement. *Id.*; (3a). The union negotiators included CON mechanic John Bisbikis. *Id.*; (3a).

On June 29, Bisbikis approached Frank Laskaris, the owner and president of CON, to discuss shop-related issues. *Id.*; (3a). When that portion of the conversation ended, their discussion turned to ongoing labor negotiations. *Id.*; (3a). Laskaris told

Bisbikis that "things would not be the same" if the mechanics decided to strike. *Id.*; (3a). On August 1, after the collective-bargaining agreement expired, mechanics at the NCDC dealerships went on strike. *Id.*; (3a).

At a staff meeting in early October—after the strike ended and a new collective bargaining agreement was reached—Laskaris talked extensively about the strike and its aftermath. *Id.* at 711; (5a). One mechanic secretly made a recording of the meeting, which the NLRB later admitted into evidence. *Id.*; 6(a). The tape became the basis of several unfair labor practices alleged by the NLRB.

The union filed a complaint against CON. *Id.* at 712; (6a). After a hearing, the administrative law judge found CON had committed several unfair labor practices. *Cadillac of Naperville, Inc.*, 2018 WL 3047010 (N.L.R.B. Div. of Judges June 19, 2018); (207a-208a). Among them, the ALJ concluded Laskaris violated section 8(a)(1) of the NLRA by telling Bisbikis that "things would not be the same" if the mechanics went on strike. *Id.*; (207a).

The NLRB affirmed these findings. *Cadillac of Naperville, Inc.*, 368 N.L.R.B. No. 3, at *2-*4 (N.L.R.B. 2019); (38a-46a). CON subsequently sought review of the NLRB's decision in the D.C. Circuit. The Court of Appeal's jurisdiction was proper pursuant to 29 U.S.C. § 160(e) and (f). The court, however, affirmed the NLRB and denied CON's Petition for Rehearing En Banc.

REASONS TO GRANT THE WRIT

1. The Court of Appeal improperly narrowed the scope of protected employer speech under 29 U.S.C. § 158(c) and the First Amendment.

Nearly five weeks before collective bargaining efforts failed and a strike commenced, CON's owner, Frank Laskaris, had a conversation with mechanic and union negotiator, John Bisbikis. Bisbikis initiated the dialog to talk about "shop-related issues." *Naperville,* 14 F.4d at 710; (3a). After that discussion ended, Laskaris raised the issue of labor negotiations. *Id*.; (3a). He told Bisbikis that if the employees went on strike, "things would not be the same." *Id*.; (3a). The NLRB did not find this statement was delivered in an aggressive manner.

Yet the Court of Appeal concluded Laskaris's words were an unlawful threat and unfair labor practice under 29 U.S.C. § 158(a)(1). *Naperville*, 14 F.4d at 715-19 (16a-23a). This holding is error for two reasons. First, the Court of Appeal misread this Court's opinion in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-18 (1969) to impose a novel requirement that an employer's statement, even when it does not reference specific adverse economic consequences, must nevertheless be based on "objective fact." In doing so, the created an entirely new category of non-factual employer statements not entitled to critical First Amendment protection.

Second, the Court of Appeal improperly concluded Laskaris's statements constitute an unlawful "threat of reprisal." It did so despite the NLRB's own precedents finding more direct and offensive speech was protected by the First

Amendment. Moreover, the Court of Appeal relied on novel factual inferences to give context to Laskaris's words, thereby disregarded this Court's instruction in *SEC v. Chenery Corp.,* 318 U.S. 80, 87 (1943) that "an administrative order must be judged… upon [those grounds] which the record discloses that [the agency's] action was based." With the court's blessing, the NLRB twisted Laskaris's vaguely pessimistic forecast into a statement of certain doom, which the court then condemned as unsupported by fact. This holding renders the free speech guarantees of Section 8(c) and the First Amendment wholly illusive for employers opposing unionization efforts.

A. Gissel Packing does not require an employer's non-factual statement to be supported by "objective facts"

Section 8(c) guarantees that the expression "of any views, argument, or opinion" by an employer is neither an unfair labor practice, nor evidence of an unfair labor practice, "if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This provision was added to the Act for the express purpose of remedying the NLRB's historical overreach in restricting employer speech. *See Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 67 (2008). Indeed, this Court would later confirm that Section 8(c) guaranteed the First Amendment right of employers to engage in non-coercive speech about unionization. *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945) (citing *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941)).

But the enactment of Section 8(c) did more than "merely implement[] the First Amendment."

Brown, 554 U.S. 60, 67 (quoting *Gissel Packing*, 395 U.S. at 617). It also manifested "congressional intent to encourage free debate on issues dividing labor and management." *Id.* (quoting *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966)). "It is indicative of how important Congress deemed such 'free debate' that [it] amended the NLRA rather than leaving to the courts task of correcting the NLRB's decisions on a case-by-case basis." *Id.* This policy judgment demonstrates that "freewheeling use of the written and spoken word… has been expressly fostered by Congress and approved by the NLRB." *Id.* (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974)). These cases firmly underscore Congress's intent to jealously guard employers' First Amendment rights in labor cases.

The Courts of Appeal have historically heeded this call. In *Crown Cork & Seal Co. v. N.L.R.B.*, 36 F.3d 1130, 1134 (D.C. Cir. 1994), for instance, the D.C. Circuit read *Gissel Packing* to identify two types of statements the NLRB may penalize "without encroaching on the employer's First Amendment rights." First, the Board may condemn a "threat of reprisal." *Id.* A threat of reprisal is a high bar. It "is not merely a prediction that adverse consequences will develop[,] but a threat that they will be deliberately inflicted in return for an injury-*to return evil for evil*." *Id.* at 1138 (emphasis in original) (quoting *NLRB v. Golub Corp.*, 388 F.2d 921, 928 (2d Cir. 1967)). In other words, it is the speaker's motive that controls. *See id.*; *see also NLRB v. General Elec. Co.*, 418 F.2d 736, 761 (2d Cir. 1969) (noting the NLRA "depends heavily on evaluation of motive and intent").

Second, the NLRB may punish "at least some predictions of adverse economic consequences," but

only those which "suggest that the action will occur not because of the ordinary operations of a market economy [], but because the employer, for reasons of labor strategy, will seek to penalize concerted activity." *Id*. at 1134. By its own terms, this second category applies *only* where an employer has predicted particular economic damage as a result of union efforts. Accordingly, these statements must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control…." *Gissel Packing*, 395 U.S. at 618.

The court below substantially confused this framework. It should have considered only whether Laskaris's statement falls within the first category of restricted speech—whether it constitutes a "threat of reprisal." The second category was not in play. After all, Laskaris's assertion that "things would not be the same," has *no* economic component. Yet the court—like the NLRB before it—incorrectly evaluated Laskaris's statement under the second category, concluding it was unlawful because it did not "communicate any objective facts or predictions as to the effects of a potential strike." *Naperville*, 14 F.4d at 715-19 (16a-23a) (quotation marks omitted).

By requiring Laskaris's statement to contain "objective facts" in order to be lawful, the court effectively excluded statements that are not intended to convey facts from Section 8(c)'s protection. While it is certainly true that a factual statement predicting the "precise effects" of union activity must not be misleading, no such statement was made here. *See Gissel Packing*, 395 U.S. at 618. And it is well-settled that non-factual statements, such as speculation or opinions are indeed protected, and need not be based on objective fact. *Flamingo Hilton-*

Laughlin v. NLRB, 148 F.3d 1166, 1174 (D.C. Cir. 1998) ("concluding Section 8(c) protected a statement speculating about the potential duration of bargaining negotiations); *Thomas*, 323 U.S. at 537 (holding that the First Amendment rights of employers necessarily require not just the right to "merely describe facts," but to "persuade to action.") In fact, "§8(c) unambiguously protects '*any* views, argument, or opinion'—even those that the agency finds misguided, flimsy or daft." *Trinity Servs. Group, Inc. v. NLRB*, 998 F.3d 978, 981 (D.C. Cir. 2021) (emphasis in original) (quoting 29 U.S.C. § 158(c)).

Laskaris's statement, however "flimsy," should have been protected by the First Amendment. But the Court of Appeal instead imposed a new standard of precision on employers—requiring specific factual support for any statement referencing future events. This Court should grant this Petition to correct the Court of Appeal's misreading of *Gissel Packing*.

B. By finding Laskaris's words are not entitled to First Amendment Protection, the Court of Appeal perpetuated the NLRB's inconsistent rulings concerning employer speech.

The Court of Appeal also erred in another respect: it upheld the Board's holding despite the absence of substantial evidence to support it. The NLRB, in fact, cited **only two** reasons for its conclusion that Laskaris committed an unfair labor practice: (1) his statement was not based on "objective facts" under *Gissel Packing* and (2) it was made roughly one month before the strike commenced. *Naperville*, 368 NLRB No. 3 at *3 (41a-

42a). The NLRB offered no other facts or context to show Laskaris's words were the product of a retaliatory motive. *See id.*; (41a-42a).

But if this Court rejects the NLRB's reliance on *Gissel Packing*'s "adverse economic consequences" framework, all that remains is the bare assertion that Laskaris's statement occurred several weeks before a strike. *See id.* This alone is not substantial evidence of motive, and the NLRB found no other facts to show Laskaris's statement was an unlawful threat of reprisal.

Yet the Court of Appeal drew its own, novel factual inferences from the record to support the NLRB's conclusion. Specifically, the court noted Laskaris's statement was made "after [Bisbikis] pressed his objection to a new workplace policy that required workers to pay part of the cost of their uniforms." *Naperville*, 14 F.4d at 716 (17a). "Laskaris," the court held, "chose to link the potential strike and its consequences to the discussion of an unpopular new employer-imposed policy." *Id.*; (17a).

But the NLRB never found a "link" between the policy discussed at the June 29 meeting and Laskaris's subsequent statement. *See Naperville*, 368 NLRB at *3; (41a-42a). Nor did Bisbikis testify that any connection existed. Bisbikis, in fact, did not even identify the policy he and Laskaris discussed.[1] The court's contextualization, therefore disregards the express mandate of *Chenery*, which requires that "[t]he grounds upon which an administrative order

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[1] It was Laskaris who explained at trial that this allegedly "unpopular" policy required employees to pay about $2 each for their work shirts.

must be judged are those upon which the record discloses that its action was based." 318 U.S. at 87. Indeed, "[i]t is axiomatic that [appellate courts] may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review." *Williams Gas Processing-Gulf Coast Co. v. FERC*, 373 F.3d 1335, 1345 (D.C. Cir. 2004).

Without the court's novel inferences, there is no substantial evidence of retaliatory motive.[2] Indeed, dissenters on both the Board and Court of Appeal recognized the impossibility of establishing motive based only on Laskaris's words. Both Board Member Emanuel and Judge Katsas would have held Laskaris's statement was too vague to be threatening. *Naperville*, 368 NLRB No. 3 at *3 n.7; (42a); *Naperville*, 14 F.4d at 721; (27a). In fact, in dissent, Judge Katsas emphasized the Board's own precedents substantiating that statements like this one are not threatening.

In *Phoenix Glove*, for instance, the Board held a supervisor did not make an unlawful threat when saying "that the employees did not need a union and that they would be 'messing up' if they got one." *Naperville*, 14 F.4d. at 721; (29a); *Phoenix Glove Co.*, 268 NLRB 680, 680 n.3 (N.L.R.B. 1984). The Board reasoned this statement was "too vague and ambiguous" to constitute a threat. *Id*. Likewise, in *Ben Franklin*, a statement that the union "would just mess up the employees worse" was too vague to be threatening. *Ben Franklin Division of City Products, Corp.*, 251 NLRB 1512 (N.L.R.B. 1980).

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[2] NLRB findings must be supported by substantial evidence in order to be affirmed. *NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union No. 638, et al*, 429 U.S. 507, 531 (1977).

The Board's holdings in these prior cases, Judge Katsas rightly noted, should have controlled its decision here.

Courts of Appeal, too, have been resistant to find an unlawful threat when confronted with statements too vague to discern their meaning. The Second Circuit, for instance, declined to find unlawful threats where management made "several vague and general statements of pessimism about the future progress and growth of [the employer] if the Union should win the election." *NLRB v. S&H Grossinger's, Inc.*, 372 F.2d 26, 28 (2d Cir. 1967). These statements, the court observed, "seem to have been prophecies of a somewhat shadowy doom" rather than a legitimate threat of reprisal. *Id.* Laskaris's words are likewise too vague to ascribe them any particular meaning. Under these circumstances, his statement was entitled to Section 8(c)'s protections.

Further, neither the NLRB nor the Court of Appeal should have considered Laskaris's after-the-fact conduct to determine whether his June 29 statement was unlawful. Citing allegedly threatening statements made by Laskaris some 3-4 months after the June 29 statement was made, the Board held the employees surely understood the earlier statement as "a foreshadowing of worse to come." *Naperville*, 368 NLRB No. 3, at *3; (42a). This conclusion, however, impermissibly credits the employees with clairvoyance. As the dissent noted, "the lawfulness of any given statement turns on whether *it* has a 'reasonable tendency to coerce or to interfere with' protected activity." *Naperville*, 14 F.4d at 722; (31a) (emphasis in original); (quoting *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001)). Moreover, Section 8(c) was drafted

specifically to prevent "the Board's practice of inferring the existence of an unfair labor practice from a totally unrelated speech or opinion delivered by the employer." *Safeway Trails, Inc. v. NLRB*, 641 F.2d 930, 933 (D.C. Cir. 1979) (citing *General Electric Co.*, 418 F.2d at 760). In other words, the Act purposefully imposes "a rule of relevancy on the Board in evaluating the legality of statements by parties to a labor dispute." *Id*. By allowing the Board to rely on unrelated events occurring months into the future to prove the "threatening" nature of Laskaris's speech, the Court of Appeal disregarded the statute's express language and purpose.

Ultimately, Laskaris's vague expression of pessimism about a potential strike carried with it no inherent promise of employer-led retaliation. Instead, it merely conveyed Laskaris's opinion that a strike would not be beneficial, in an apparent attempt to persuade Bisbikis to see his point of view. But "[i]f the Board may take management statements that … assert a risk, twist them into claims of absolute certainty, and then condemn them on the ground that as certainties they are unsupported, the free speech right is a pure illusion." *Crown Cork*, 36 F.3d 1130 at 1140.

It is likely true that Laskaris "might have explained more precisely" what he meant when he expressed to Bisbikis that "things [would] not be the same" if a strike occurred. *U.S. Airways v. Nat'l Mediation Bd.*, 177 F.3d 985, 993-94 (D.C. Cir. 1999). "But if unions are free to use the rhetoric of Mark Antony while employers are limited to that of a Federal Reserve Board chairman, … the employer's speech is not free in any practical sense." *Id.* (quoting *Crown Cork*, 36 F.3d at 1140). Employers should not be held to an exacting standard of

rhetorical precision in order to claim the protections owed them under Section 8(c) and the First Amendment. Nor should an employer lose the rights guaranteed him by the Constitution and laws where the enforcing agency failed to produce substantial evidence that his speech was properly subject to restriction.

Requiring an employer to support his decidedly non-factual statements with objective facts is not only confusing, but empowers the NLRB to restrict employer speech in a manner inconsistent with the "freewheeling" and open debate intended by Congress and guaranteed by the First Amendment. This Court should therefore vacate the Court of Appeal's opinion and restore to Laskaris—and to all employers—the right to make open-ended, non-factual statements about the impact of union activity where there is no substantial evidence showing a threat of reprisal was made.

2. This Court should vacate the Court of Appeal's decision affirming the admission of illegally obtained evidence below.

On October 6, 2017, after the strikers returned to work at CON, Laskaris held a staff meeting. Unbeknownst to Laskaris, and without his permission, one of the mechanics secretly recorded the meeting. This recording was admitted into evidence at trial over CON's objection. Ultimately, the Court of Appeal affirmed three NLRA violations based on the content of the recording.

CON argued on appeal that the recording should not have been admitted into evidence, noting that recordings made without the consent of both parties is a criminal act under Illinois state law. *See*

Ill. St. Ch. 720 § 5/14-2. The Court of Appeal rejected CON's arguments. It noted the Federal Rules of Evidence make relevant evidence admissible "unless the United States Constitution, a federal statute, the Rules themselves, or other rules prescribed by the Supreme Court provide otherwise." *Naperville*, 14 F.4d at 713; (10a) (quotation marks omitted) (citing 29 U.S.C. § 160(b)). Reasoning that a violation of state law is not among the bases for exclusion of relevant evidence, the court concluded the ALJ properly admitted the recording. *See id*.

This analysis, however, is flawed. The right to have illegally obtained evidence excluded from judicial proceedings, even in the criminal context, does not find its genesis in the Rules of Evidence. Instead, it arises from the substantive rights of the affected party. *See Mapp v. Ohio*, 367 U.S. 643, 649 (1961). The court's examination of the Rules, therefore, does not fully resolve the issues raised by CON's objection to the NLRB's use of the recording.

Under controlling substantive law, the Illinois state legislature determined that conversations between two parties should not be recorded without the consent of both. Ill. St. Ch. 720 § 5/14-2. This law is plainly intended for the protection of the individual without whose consent the recording is made. Accordingly, Illinois courts strictly construe this prohibition, suppressing such recordings in criminal proceedings. *See, e.g., People v. Ceja*, 814 N.E.2d 171, 173 (Ill. Ct. App. 2004). The statute and the cases enforcing it demonstrate the state's vigorous commitment to preventing unlawful recordings.

The NLRB, however, routinely admits evidence, including recordings, obtained in contravention of state law. *Orange Cty. Publications*,

334 NLRB 350, 354 (N.L.R.B. 2001). The Court of Appeal, however, was not bound by erroneous NLRB precedents. *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001). Nor is this Court. Principles of comity and federalism suggest that state restrictions on illegally obtained evidence should apply equally in proceedings by a federal agency in the affected state. Holding otherwise offends the states' rights as sovereigns in their own jurisdictions to prevent the illegal recording of their citizens. *See Am. Lung Ass'n v Environmental Prot. Agency*, 985 F.3d 914, 968 (D.C. Cir. 2021) (explaining that federalism allows the States to retain substantial sovereign powers with which the federal government does not typically interfere). Indeed, criminal law is one of many areas of traditional state responsibility that the Board should not be free to invade. *Dombrowski v. Pfister*, 380 U.S. 479, 484 (1965) ("federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework"). By allowing admission of an illegally recorded conversation, the Board frustrates the State's attempts to end this practice.

Based on the interest this Court has in preserving the right of states to enforce criminal laws as their respective legislatures deem fit, it should grant CON's petition, reverse the Court of Appeal's holding, and find the recording was improperly admitted.

CONCLUSION

By granting CON's Petition for Writ of Certorari, this Court can clarify the reach of *Gissel Packing* and reaffirm the free speech rights of

employers during labors disputes. Specifically, non-factual statements or statements that are too vague to constitute definitive threats of reprisal should be entitled to First Amendment protection.

Further, this Petition presents an opportunity for the Court to end the NLRB's longtime practice of admitting evidence obtained in violation of state law. This Court should not countenance the agency's continued interference with the states' administration of their criminal laws.

For these reasons, CON respectfully requests that this Court grant its Petition.

Respectfully submitted, this the 22nd day of February, 2022.

CADILLAC OF NAPERVILLE, INC.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED NOVEMBER 20, 2020

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

November 20, 2020, Argued;
September 17, 2021, Decided

No. 19-1150 Consolidated with 19-1167

CADILLAC OF NAPERVILLE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before: Millett, Pillard, and Katsas, Circuit Judges.

OPINION

Per Curiam:

The service mechanics at Cadillac of Naperville went on strike in August 2017. The National Labor Relations Board found that the dealership responded to the strike unlawfully by discharging one mechanic for his union activity, threatening to retaliate against several mechanics, and refusing to bargain with the mechanics'

union. The dealership challenges these rulings, as well as two procedural rulings by the administrative law judge.

At the NLRB's request, we remand the discharge issue for the Board to apply its intervening decision changing the framework under which it assesses alleged retaliation in mixed-motive cases. We reject the dealership's other challenges.

I

A

Section 7 of the National Labor Relations Act gives employees the right to unionize, to bargain collectively, and to engage in concerted action for their "mutual aid or protection." 29 U.S.C. § 157. Section 8(a) of the Act safeguards those rights by prohibiting employers from engaging in a variety of unfair labor practices. Section 8(a)(1) makes it unlawful to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by section 7. *Id.* § 158(a)(1). Section 8(a)(3) prohibits employment discrimination to "discourage membership" in a union. *Id.* § 158(a)(3). Section 8(a)(5) makes it unlawful "to refuse to bargain collectively" with a union. *Id.* § 158(a)(5).

B

Cadillac of Naperville, Inc. (Naperville) is an auto dealership in Naperville, Illinois. The dealership is a member of the New Car Deal Committee (NCDC), a

multiemployer bargaining unit including employees in 129 dealerships in the Chicago area. The NCDC negotiates master collective-bargaining agreements with the Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO, which represents some 2,000 mechanics employed across the dealerships.

In May 2017, the NCDC and the union began to negotiate a new collective-bargaining agreement. The union negotiators included Naperville mechanic John Bisbikis as well as union representatives Sam Cicinelli and Kenneth Thomas.

On June 29, Bisbikis approached Frank Laskaris, the owner and president of Naperville, to discuss shop-related issues. In particular, Bisbikis asked Laskaris to rescind the dealership's new policy of charging workers for part of the cost of their uniforms. Laskaris rebuffed the request and turned the conversation to the "sputtering labor negotiations." *Cadillac of Naperville, Inc.*, 368 N.L.R.B. No. 3, slip op. at 8 (June 12, 2019). Laskaris then "warned" Bisbikis that "things would not be the same" if the mechanics decided to strike. *Id.* at 17; *see also id.* at 3, 8, 19-20. On August 1, after the collective-bargaining agreement expired, mechanics at the NCDC dealerships went on strike.

On August 9, Naperville informed six of its strikers, including Bisbikis, that they had been permanently replaced. The notices stated that the strikers would be placed on a preferential hiring list, but only if they

unconditionally applied to return to work. In response, the strikers escalated their demonstrations. Positioning themselves directly across the main entrance to the dealership, they blew horns, sought to engage customers, and yelled at non-striking employees. On one occasion, a striker named Patrick Towe impeded an elderly customer's test drive by walking in front of her vehicle.

On September 15, the NCDC and the union entered into a settlement that allowed many of the strikers to return to work. Two days later, the union's members ratified both the settlement and a successor collective-bargaining agreement.

On September 18, Bisbikis, Cicinelli, and Thomas met with Laskaris to discuss the strikers' recall. Laskaris stated that he did not want Bisbikis present because Bisbikis was a ringleader of the strike and Laskaris no longer wanted to employ him. On Cicinelli's advice, Bisbikis left the room. Later that day, Bisbikis, Cicinelli, and Thomas met again with Laskaris. In that meeting, Bisbikis called Laskaris a liar, Laskaris responded that Bisbikis should "get the f*** out" of the room, and Bisbikis replied by calling Laskaris a "stupid jack off" in Greek. *Naperville*, 368 N.L.R.B. No. 3, at 10. As Bisbikis left the room, Laskaris said, "[E]ven if I have to take you back, now I'm firing you for insubordination." *Id.* Laskaris did fire Bisbikis, assertedly for insubordination.

On September 20, Laskaris spoke with Towe, the mechanic who had obstructed the test-drive. Laskaris said he hoped that employees would refrain from such

conduct. He then said, "I don't want any of you here," and told Towe to look for another job because Towe would not be employed at Naperville for long. *Naperville*, 368 N.L.R.B. No. 3, at 12.

On September 21, Laskaris sought to restrict union access to Naperville premises. In a letter to the union, he stated that Cicinelli and Thomas were no longer welcome on the property because of their assertedly threatening conduct. And he required other union representatives to make appointments to see union members while they were at work.

On September 25, Laskaris held a staff meeting to complain about union leafletting outside the dealership even after the strike was over. He told employees that the leafleting was "taking money out of their pockets" and that if the dealership ran out of work, "all of the recalled employees would be laid off." *Naperville*, 368 N.L.R.B. No. 3, at 13.

On October 6, Laskaris held another staff meeting. For forty minutes, he expounded on the strike and its aftermath. At one point, Laskaris threatened to enforce company rules more strictly: "I suggest you read your little blue book that he waved in my face like a smug a**hole ... and if I follow that book your life will get harder .... There's so much stuff in that book that nobody enforces. Why? Because we don't want to be that kind of place." *Naperville*, 368 N.L.R.B. No. 3, at 15 (ellipses in original). At another point, Laskaris disparaged the grievance process in the collective-bargaining agreement: "Let me

tell you about the grievance process.... What I'm telling you is I don't give a s*** about grievances. Grieve all you want. It doesn't matter. They can't do s***.... I don't care on what you grieve, I don't care how much you complain, they're not going to tell me what to do." *Id.* Laskaris's summation was even more colorful:

> I can be the nicest guy in the world, you put me in a corner, I'm going to f***ing eat your face. That's who I am. I'll give you a kidney, Ronnie[,] but you f*** with me and my people, I'm going to eat your kidney out of your body and spit it at you. That's how nasty I can be. It's not in my nature to be a prick, but when I see s*** like that Pat, it's easy to be a prick to you; real easy. And they can't stop me from being a prick.

Id. at 16. One mechanic secretly made a recording of the tirade, which the NLRB later admitted into evidence.

On October 27, Laskaris spoke with Brian Higgins, a mechanic who had been permanently replaced during the strike. When Higgins expressed an interest in returning to work, Laskaris said that he did not want Higgins or any of the permanently replaced employees at the dealership and that if Higgins did return, "it would not be long before he was gone." *Naperville*, 368 N.L.R.B. No. 3, at 16.

C

The union filed a complaint against Naperville. After a hearing, an administrative law judge found that Naperville had committed several unfair labor practices. First, the

ALJ found that Laskaris violated section 8(a)(1) of the NLRA by making threats to employees. The threats included telling Bisbikis that "things would not be the same" if the mechanics went on strike, advising Towe to look for another job, announcing that recalled employees would be laid off if work ran out, warning of stricter enforcement of company rules, describing grievances as futile, saying that he would eat an employee's kidney, and implying that Higgins would quickly be fired if he returned to work. *Naperville*, 368 N.L.R.B. No. 3, at 16-19. Second, the ALJ found that Naperville violated sections 8(a)(1) and 8(a)(3) by firing Bisbikis in retaliation for his union activity. *Id.* at 19-21. Finally, the ALJ found that Naperville violated sections 8(a)(1) and 8(a)(5) by restricting the union's access to its members. *Id.* at 22.

The NLRB affirmed these findings but gave different reasoning as to the firing of Bisbikis. The ALJ had assessed the firing under *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980). Under that decision, the agency bears the initial burden of proving that union activity was a "motivating factor" in an adverse action against an employee; if the agency meets this burden, the employer must prove that it "would have taken the same action in the absence of the unlawful motive." *Novato Healthcare Ctr. v. NLRB*, 916 F.3d 1095, 1101, 439 U.S. App. D.C. 454 (D.C. Cir. 2019). In contrast, the Board assessed the discharge under *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979). That decision identifies four factors for determining whether an employee has forfeited NLRA protection through "opprobrious conduct": "(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.

Naperville sought review of the Board's decision, and the Board filed a cross-application for enforcement. After briefing had concluded, the Board asked us to remand the discharge issue for reconsideration in light of its intervening decision in *General Motors, LLC*, 369 N.L.R.B. No. 127 (July 21, 2020). That decision held that *Wright Line*, not *Atlantic Steel*, provides the appropriate framework for analyzing adverse actions that might reflect either protected activity or misconduct by the employee. *Id.*, slip op. at 1-2.

We have jurisdiction over the petition for review under 29 U.S.C. § 160(f) and over the cross-application for enforcement under 29 U.S.C. § 160(e).

II

Naperville first challenges two evidentiary rulings made by the ALJ. We review such rulings only for abuse of discretion, and we require prejudice to set them aside. *See Napleton 1050, Inc. v. NLRB*, 976 F.3d 30, 39, 449 U.S. App. D.C. 429 (D.C. Cir. 2020).

A

Naperville contends that the ALJ did not give it adequate access to witness affidavits at the administrative hearing. The Board's regulations permit respondents to

use and examine witness affidavits "for the purpose of cross-examination." 29 C.F.R. § 102.118(e)(1). Naperville asked to retain a witness's affidavit for a short time after his cross-examination, but the ALJ required it to return the affidavit immediately.

Right or wrong, the ALJ's decision was not prejudicial. Whether an error is prejudicial depends on the "closeness of the case, the centrality of the issue in question, and the effectiveness of any steps taken to mitigate the effects of the error." *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 386, 427 U.S. App. D.C. 283 (D.C. Cir. 2017) (quoting *Huthnance v. District of Columbia*, 722 F.3d 371, 381, 406 U.S. App. D.C. 110 (D.C. Cir. 2013)). Here, although Naperville bore the burden of showing prejudice, *see Desert Hosp. v. NLRB*, 91 F.3d 187, 190, 319 U.S. App. D.C. 383 (D.C. Cir. 1996), it made no attempt to do so. Its briefs did not explain how retaining the affidavit after the cross-examination might have improved its prospects at the hearing. And when asked about prejudice at oral argument, Naperville argued only that showing it was unnecessary. We thus reject Naperville's challenge to the ruling on the witness affidavit.

B

Naperville challenges the Board's admission of the recording of the October 6 meeting. Naperville contends that the recording was made in violation of Illinois law, which prohibits recording a "private conversation" without the consent of all parties, 720 Ill. Comp. Stat. 5/14-2(a)(2).

The NLRA provides that Board proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." 29 U.S.C. § 160(b). Thus, the NLRB must follow the Federal Rules of Evidence unless doing so would be impracticable. *See McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002, 1007, 356 U.S. App. D.C. 417 (D.C. Cir. 2003). Under Rule 402, "[r]elevant evidence is admissible" unless the United States Constitution, a federal statute, the Rules themselves, or "other rules prescribed by the Supreme Court" provide otherwise. Fed. R. Evid. 402. The recording—which contains several statements by Laskaris alleged to be threatening or coercive—is plainly relevant to the unfair-labor-practice claims at issue. Naperville neither disputes the relevance of the recording nor contends that any other Federal Rule requires its exclusion. Nor does Naperville contend that following Rule 402 was impracticable. The ALJ thus properly admitted the recording.

Naperville's objections are unpersuasive. First, the dealership argues that admitting the tape frustrated Illinois' public policy of discouraging secret recordings. But as explained above, the NLRA makes clear that state policy does not dictate the admissibility of evidence in Board proceedings. Next, Naperville objects that admitting the recording contravened *Weiss v. United States*, 308 U.S. 321, 60 S. Ct. 269, 84 L. Ed. 298 (1939), which requires the suppression of items intercepted in violation of the Communication Act of 1934. *Id.* at 331. But that federal statute expressly made such communications inadmissible in court. *Id.* at 326; *see also Nardone v.*

United States, 302 U.S. 379, 380-82, 58 S. Ct. 275, 82 L. Ed. 314 (1937). Naperville does not contend that any similar federal statute or rule applies here. Finally, Naperville argues that admitting unlawful recordings will prejudice employers. But it provides no reason to think that employees are more likely to record their employers than *vice versa*. And in any event, the governing rules provide no textual basis for accommodating Naperville's naked policy argument. The ALJ permissibly admitted the recording.[1]

III

We turn to the substance of the Board's decision. Our review is "deferential," *Comau, Inc. v. NLRB*, 671 F.3d 1232, 1236, 399 U.S. App. D.C. 399 (D.C. Cir. 2012) (cleaned up), but not a "rubber stamp," *Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 484, 447 U.S. App. D.C. 164 (D.C. Cir. 2020). Although we "accord considerable deference" to the Board's policy judgments, *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250, 400 U.S. App. D.C. 297 (D.C. Cir. 2012), we must set aside a decision that rests on an error of law, is unsupported by substantial evidence, or "departs from established precedent without a reasoned explanation," *Comau*, 671 F.3d at 1236 (cleaned up).

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1. Because we resolve this issue under the Federal Rules of Evidence, we need not address the Board's alternative argument that the recording was not of a "private conversation" covered by the Illinois law. *See Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1266, 310 U.S. App. D.C. 409 (D.C. Cir. 1995).

Appendix A

A

Section 8(a)(1) of the NLRA makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of" their right to bargain collectively. 29 U.S.C. § 158(a)(1). This section "forbids coercive statements that threaten retaliation against employees" for protected union activity. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124, 349 U.S. App. D.C. 37 (D.C. Cir. 2001). Section 8(c), however, cabins section 8(a)(1). It provides that expressing "any views, argument, or opinion" is neither an unfair labor practice nor evidence of an unfair labor practice, as long as the views contain "no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). We assess whether statements violate section 8(a)(1) under "the totality of the circumstances," with an eye to whether "the statement has a reasonable tendency to coerce or to interfere with" section 7 rights. *Tasty Baking*, 254 F.3d at 124.

We begin with the several statements on which the panel is unanimous, then we address the one statement on which we are divided.

1

We unanimously conclude that the challenged statements made by Laskaris in September and October of 2017 threatened retaliation for protected activity and thus constituted unfair labor practices.

Appendix A

a

The Board found that Laskaris violated section 8(a)(1) on September 20, by telling Towe that he did not want any former strikers at the dealership and that Towe should look for a new job. The Board reasoned that the statement threatened to discharge Towe for his union activity. *Naperville*, 368 N.L.R.B. No. 3, at 1 n.2. We agree.

Naperville argues that Laskaris threatened to fire Towe not because of his union activity but because of his misconduct during the strike, which included obstructing a test-drive. This argument overlooks Laskaris's comment regarding the other strikers. Moreover, the ALJ found that the "overarching theme" of Laskaris's criticism was Towe's union activity, not the one specific instance of misconduct. *Naperville*, 368 N.L.R.B. No. 3, at 17. And that finding, in turn, rested on the ALJ's decision to credit Towe's testimony about the conversation, *id.* at 12 n.24, which we accept because it was not "patently insupportable," *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1246, 307 U.S. App. D.C. 376 (D.C. Cir. 1994) (quoting *NLRB v. Creative Food*, 852 F.2d 1295, 1297, 271 U.S. App. D.C. 328 (D.C. Cir. 1988)).

b

The Board found that Laskaris violated section 8(a)(1) on September 25, by telling the recalled mechanics that union leafletting was harming the dealership financially and that he would fire them if the dealership ran out of work. The Board reasoned that Laskaris targeted only

former strikers, as opposed to the dealership's employees in general, thereby singling them out for a threat of adverse treatment based on protected activity. *Naperville*, 368 N.L.R.B. No. 3, at 3.

Naperville's responses do not persuade. First, it argues that section 8(c) protected its criticism of the leafletting. But the Board found an unfair labor practice based on a threat to fire the recalled mechanics, not because Laskaris criticized the leafletting. Naperville also would construe the comments as a truism governing all employees generally—no work means no jobs. But Laskaris made the comments in a staff meeting involving only the former strikers, and the Board reasonably construed the comments as directed against them specifically.

c

As to the October 6 philippic, the Board found that three statements crossed the line—the threat to make the mechanics' lives "harder" by ramping up enforcement of company rules, denigration of the grievance process as futile, and the rhetorical threat to eat the kidney of any employee who "f***[ed] with" him. *Naperville*, 368 N.L.R.B. No. 3, at 3-4. In the context of a speech harshly critical of recent union activity, the threat to increase enforcement of company rules would reasonably be understood as threatening retaliation because of that activity. *See, e.g.*, *Miller Indus. Towing Equip., Inc.*, 342 N.L.R.B. 1074, 1074 (2004). Moreover, because "filing and prosecution of employee grievances is a fundamental,

day-to-day part of collective bargaining," *Laredo Packing Co.*, 254 N.L.R.B. 1, 4 (1981) (quoting *Crown Cent. Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir. 1970)), it is an unfair labor practice to say that a "contractual grievance procedure" is "futile," *M.D. Miller Trucking & Topsoil, Inc.*, 361 N.L.R.B. 1225, 1225 (2014), which is what Laskaris did here. Naperville objects that section 8(c) allows employers to criticize the substance of individual grievances. But the Board faulted Laskaris for making clear that he would refuse to honor all grievance determinations, not for addressing the merits of any individual one. Finally, while the Board and the ALJ split on whether Laskaris's kidney comment reflected a threat of violence, the Board was clearly correct that, at a minimum, it would "reasonably tend to coerce employees in the exercise of their Section 7 rights." *Naperville*, 368 N.L.R.B. No. 3, at 4.

d

The Board found that Laskaris violated section 8(a)(1) on October 27, by telling Higgins that he did not want to employ any of the former strikers and that, if Higgins returned, "it would not be long before he was gone." *Naperville*, 368 N.L.R.B. No. 3, at 16; *see id.* at 1 n.2. Naperville attempts to cast the statement about Higgins as a lawful prediction about his commitment to the dealership. But that overlooks the context of the remark, which followed immediately after Laskaris's comment that he did not want to take back any of the striking mechanics. The Board thus had ample ground for concluding that Laskaris's comment was a threat of reprisal for Higgins' union activities.

The Board also found that Laskaris violated section 8(a)(1) by "warning" Bisbikis that "things would not be the same" if the employees went on strike. *Naperville*, 368 N.L.R.B. No. 3, at 1, 3; *see id.* at 8 (ALJ decision). The Board agreed with the ALJ's conclusion that, under the facts of this case, "the statement cannot be viewed as anything but a threat that a strike would produce only negative consequences for the unit." *Id.* at 3 (brackets omitted). Substantial evidence supports the Board's finding that Laskaris's statement was an unlawful threat.

On June 29, just a month before the union contract was set to expire, Bisbikis came into Laskaris's office seeking the rescission of a new policy requiring employees to pay for a portion of their uniforms' cost. *Naperville*, 368 N.L.R.B. No. 3, at 8. Laskaris rebuffed Bisbikis's demand. Turning the conversation to the company's ongoing labor negotiations with the union, Laskaris then told Bisbikis that "things would not be the same" if the mechanics chose to strike. *Id.*; *see also id.* at 3, 19-20.

The Board reasonably concluded on this record that Laskaris's statement was a threat rather than a mere prediction about the consequences of union activity. While an employer may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union," and even predict "the precise effects he believes unionization will have on his company[,]" this does not give employers *carte blanche* to make threats against union activity under

the guise of innocent prognostication. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969). Instead, the employer's comments must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences[,]" and those consequences must be ones that are "beyond [the employer's] control[.]" *Id.*; *see also United Food & Com. Workers Union Loc. 204 v. NLRB*, 506 F.3d 1078, 1081, 378 U.S. App. D.C. 325 (D.C. Cir. 2007) (Employer predictions of adverse consequences must "rest on objective facts outside the employer's control[.]"); *General Elec. Co. v. NLRB*, 117 F.3d 627, 632, 326 U.S. App. D.C. 73 (D.C. Cir. 1997) ("We ask whether [the employer] based its predictions about the effect of unionization on objective facts about consequences beyond its control or whether its predictions were unrelated to economic necessity, thus amounting to [unlawful] threats of reprisal[.]") (citations omitted)).

Substantial evidence supported the Board's decision that Laskaris's words did not refer to adverse circumstances "outside the employer's control[,]" *United Food*, 506 F.3d at 1081, but instead implied that the dealership would make things worse for the mechanics after the strike. The record shows that Laskaris made the remark, without any qualification, after a union activist pressed his objection to a new workplace policy that required workers to pay part of the cost of their uniforms. Laskaris, in other words, chose to link the potential strike and its consequences to the discussion of an unpopular new employer-imposed policy. *Naperville*, 368 N.L.R.B. No. 3, at 8; J.A. 143. By linking his authority over the new uniform policy

and the economic cost it imposed on employees with the adverse consequences that would come after a strike, Laskaris crossed the line from the innocent expression of a viewpoint to a threat. Or so the Board reasonably concluded. *Cf. United Food*, 506 F.3d at 1084 ("[I]t is the Board's duty, not ours, to focus on the question: What did the speaker intend and the listener understand?") (internal quotation marks and citations omitted)).

After all, the content and context of Laskaris's comment must be read in light of "the economic dependence of the employees on their employers"—especially when, as here, labor negotiations are underway. *Gissel Packing*, 395 U.S. at 617. Those circumstances made Bisbikis attuned to the "intended implications of the [employer] that might be more readily dismissed by a more disinterested ear." *Id.* Keep in mind that "the line between prediction and threat is a thin one," especially in the midst of difficult labor negotiations, "and in the field of labor relations that line is to be determined by context and the expertise of the Board." *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178, 260 U.S. App. D.C. 374 (D.C. Cir. 1987).

Given that record, Naperville and the dissenting opinion err in insisting that Laskaris's comment was too vague for the Board to find it a threat. *See* Pet. Br. 34-36; Dissenting Op. at 1-5. In support, the dissenting opinion offers a list of statements deemed non-threatening, without any explanation of their surrounding context. Dissenting Op. at 2. To be sure, considered in a factual vacuum, the claim that "things would not be the same" post-strike might not necessarily be an unlawful threat.

But here the law, like nature, abhors a vacuum. Contrary to the dissenting opinion's approach, there is no list of acceptable and unacceptable statements. Labor law does not categorize statements as permissible or impermissible based just on which words were used. Instead, words draw their meaning from context, and that case-specific context lends strong support to the Board's decision here. Specifically, Laskaris's comment about things changing arose within a tense conversation between the employer and a union activist over a disputed new policy that Laskaris's dealership had imposed, that Laskaris controlled, that economically burdened the workers, and that Laskaris insisted on continuing, all while labor negotiations were ongoing. *See* J.A. 197-199. And it was Laskaris who connected the discussion over an unpopular employer-set working condition with ongoing labor negotiations and the threat of a strike. In light of the contentiousness of the dispute over an employment policy entirely within the employer's control and the course in which Laskaris took the discussion, the Board reasonably concluded that Laskaris was not predicting that a strike would improve conditions. Instead, by connecting the strike and a disfavored new policy that the dealership itself had imposed, the Board found as a matter of fact that Laskaris was implying that the employer could make conditions worse still. That hardly qualifies as "bland[,]" Dissenting Op. at 5.

The dissenting opinion says that the fact that Laskaris, rather than Bisbikis, testified to the content and unpopularity of the new uniform policy makes this context less revealing. Dissenting Op. at 4-5. If

anything, Laskaris's testimony that the new policy was "big scuttlebutt" among the employees who "were all squawking" about it buttresses the Board's conclusions. J.A. 197-198.

The dissenting opinion then brushes off the notion that paying roughly $2 per work shirt could be a source of relevant upset. Dissenting Op. at 5. Suffice it to say that the workers whose paycheck got smaller time and again could reasonably look at the issue through a different economic lens.

In other words, on this record, the Board's finding that Laskaris's statement amounted to a threat and not just a prediction of economic consequences beyond his control passes muster under our "highly deferential" and "tightly cabined" standard of review. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73, 80, 417 U.S. App. D.C. 331 (D.C. Cir. 2015); *see, e.g., Ebenezer Rail Car Servs., Inc.*, 333 N.L.R.B. 167, 167 n.2 (2001) (holding that supervisor's statement to an employee that he would "regret this all year" was an unlawful threat when uttered "immediately after the announcement of the union election victory," given "the context and timing of [the] statement"). The only question before us, after all, is whether the Board's ruling "rest[s] upon reasonable inferences[.]" *Tasty Baking*, 254 F.3d at 125. The Board's decision here does, and so we cannot overturn it "simply because other reasonable inferences may also be drawn." *Id.*

The Board's decision also comports with its own precedent. In *Valmet, Inc.* the Board held that an employer

violated the law when he told an employee that, if a union were formed, they could no longer have one-on-one conversations, and then added "[r]emember that I hired you." 367 N.L.R.B. No. 84, slip op. at 2 n.7 (Feb. 4, 2019). In the Board's words, the employer's warning that "things would change if the [u]nion came in," combined with his assertion of employment authority, constituted a threat. *Id.* So too here the Board found a threat when Laskaris combined an assertion of authority—his rejection of employees' request to rescind a newly adopted policy that hit them in their wallets—with a warning that things would change if the employees chose to strike. *Naperville*, 368 N.L.R.B. No. 3, at 3.

In so holding, we must decline the credit the dissenting opinion ascribes to us for the Board's reasoning. Dissenting Op. at 4-6. It was the Board's idea (correctly) to accord significance to the timing and setting of Laskaris's statement as a response to the conversation "Bisbikis initiated * * * about employee concerns." *Naperville*, 368 N.L.R.B. No. 3, at 3. The Board and the ALJ both found that Laskaris's comment "did not communicate any objective facts or predictions as to the effects of a potential strike," and under the circumstances could only be viewed as a threat. *Id.* (internal quotation marks omitted); *see also id.* (citing *Valmet, Inc.*, 367 N.L.R.B. No. 84, slip op. at 2 n.7). The ALJ, whose findings the Board here adopted, repeatedly noted the context for Laskaris's comment in explaining its conclusion that the statement was unlawful. *Id.* at 8, 17, 19-20 ("At this meeting, Laskaris rejected Bisbikis' proposal [to rescind the new uniform policy] and

warned him that if the mechanics went on strike, 'things wouldn't be the same.'").[2]

The dissenting opinion also argues that, because the Board's decision places an instance of speech beyond the protection of the First Amendment, constitutional avoidance counsels in favor of setting aside the NLRB's decision regarding Laskaris's "things would not be the same" statement. Dissenting Op. at 5-6. That is incorrect for two reasons.

First, Naperville has never argued—to the administrative law judge, to the Board, or to this court—that finding Laskaris's statement to be an unfair labor practice implicates the First Amendment in any way. At a minimum, constitutional avoidance disfavors judges raising constitutional questions that the parties have not. Doubly so under the National Labor Relations Act that statutorily precludes us "from considering an objection that has not been urged before the Board, 'unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances[,]'" which are not present here. *Detroit Edison Co. v. NLRB*, 440 U.S. 301,

2. The dissenting opinion adjures us to "make an independent examination of the whole record" in this case. Dissenting Op. at 5 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011)). So the dissenting opinion inconsistently faults us for being both too independent in our consideration of the whole record and not independent enough. *Compare* Dissenting Op. at 4, 5-6 *with* Dissenting Op. at 5. Our care to analyze whether the whole record substantiates the Board's decision cannot be both wrong and right.

311 n.10, 99 S. Ct. 1123, 59 L. Ed. 2d 333 (1979) (quoting 29 U.S.C. § 160(e)); *see also Sims v. Apfel*, 530 U.S. 103, 108, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000); *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 963, 377 U.S. App. D.C. 4 (D.C. Cir. 2007); *cf. Polynesian Cultural Ctr., Inc. v. NLRB*, 582 F.2d 467, 473 (9th Cir. 1978) (holding that raising First Amendment issue on judicial appeal was "too late" under 29 U.S.C. § 160(e)).

Second, under long-settled Supreme Court precedent, when an employer's prediction that negative consequences will arise from union activity contains the "implication" that the employer may of its own accord contribute to those consequences, the statement constitutes "a threat of retaliation * * * and as such [is] without the protection of the First Amendment." *Gissel Packing*, 395 U.S. at 618. That is this case.

B

Section 8(a)(3) of the NLRA makes it an unfair labor practice to discriminate in employment to "discourage membership" in a union. 29 U.S.C. § 158(a)(3). Employers violate this provision if they take "an adverse employment action in order to discourage union activity." *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 104, 357 U.S. App. D.C. 261 (D.C. Cir. 2003). But the Board has held that an employee can lose section 8(a)(3)'s protection by confronting the employer in a sufficiently opprobrious manner. *See Kiewit Power Constr. Co. v. NLRB*, 652 F.3d 22, 26, 397 U.S. App. D.C. 290 (D.C. Cir. 2011). Here, the Board found that Naperville violated section 8(a)(3)

by firing Bisbikis. *Naperville*, 368 N.L.R.B. No. 3, at 2. Naperville counters that Bisbikis lost the protection of the NLRA by calling Laskaris a "stupid jack off" after Laskaris cursed at him in the confrontation immediately preceding his termination.

After briefing was complete, the NLRB asked us to remand on this issue for reconsideration in light of its intervening decision in *General Motors*. There, the Board held that mixed-motive terminations should be assessed under *Wright Line* rather than *General Motors*, 369 N.L.R.B. No. 127, slip op. at 1-2, and that this change should apply "retroactively to all pending cases," *id.* at 10.

We have "broad discretion to grant or deny an agency's motion to remand." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436, 438 U.S. App. D.C. 230 (D.C. Cir. 2018). An agency may obtain a remand without confessing error, so long as it genuinely intends "to reconsider, re-review or modify" its original decision. *Limnia, Inc. v. Dep't of Energy*, 857 F.3d 379, 387, 429 U.S. App. D.C. 118 (D.C. Cir. 2017). We consider whether the agency has provided a reasoned explanation for a remand, *see Clean Wis. v. EPA*, 964 F.3d 1145, 1175-76, 448 U.S. App. D.C. 101 (D.C. Cir. 2020), whether its motion is "frivolous or made in bad faith," *Util. Solid Waste*, 901 F.3d at 436, and whether granting the motion would "unduly prejudice the non-moving party," *id.*

Here, the Board has offered a reasonable ground for remand—so that it may apply *Wright Line* in the first instance. In *General Motors*, the Board explained its view

that *Wright Line* should govern cases like this one.[3] In this case, the key question under *Wright Line* is whether Laskaris would have fired Bisbikis in the absence of his union activity. *See Novato Healthcare*, 916 F.3d at 1100-01. Because the Board did not address that question below, we remand for it to do so.

Other considerations also favor a remand. Naperville does not contend that the Board is acting in bad faith. Further, there is little reason to think that a remand would unduly prejudice Naperville. To the contrary, a remand would give the dealership an opportunity to argue why its discharge of Bisbikis was lawful, and to do so under a legal standard that the Board views as more favorable to employers. *See Gen. Motors*, 369 N.L.R.B. No. 127, at 5. A remand is also unlikely to burden Naperville with substantial litigation costs, as an ALJ has already found a violation under *Wright Line*, and Naperville has already briefed its opposition to that finding before the Board. *See Naperville*, 368 N.L.R.B. No. 3, at 19; Brief in Support of Exceptions at 11-13 (No. 13-CA-207245) (N.L.R.B. Aug. 31, 2018).

We thus remand for reconsideration on the question whether Naperville unlawfully discharged Bisbikis. In doing so, we take no position on whether the ALJ properly applied *Wright Line* or whether Naperville adequately preserved its objections before the Board.

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3. *General Motors* reasoned that *Atlantic Steel* had produced inconsistent results and prevented employers from addressing genuinely abusive conduct, 369 N.L.R.B. No. 127, slip op. at 4-6 (July 21, 2020), and that the benefits of *Wright Line* warrant applying it retroactively, *id.* at 10-11.

C

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer to "refuse to bargain collectively" with a union. 29 U.S.C. § 158(a)(5). Collective bargaining means conferring "in good faith with respect to wages, hours, and other terms and conditions of employment." *Id.* § 158(d). One mandatory subject of bargaining is union access to employees during work hours. *Ernst Home Ctrs., Inc.*, 308 N.L.R.B 848, 865 (1992). Employers cannot unilaterally change employment terms on such mandatory subjects without first "bargaining to impasse." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991).

Here, Naperville did just that. The successor collective-bargaining agreement, which applied to Naperville at all relevant times, granted the union access to the dealership to adjust complaints individually or collectively. Before the strike, Thomas had visited the dealership about once every six weeks. Soon after the strike, Naperville barred both Thomas and Cicinelli from its premises and required other union representatives to request access before visiting the dealership. By restricting the mechanics' ability to communicate with the union, Naperville changed their terms and conditions of employment on a mandatory subject of bargaining. And it did so unilaterally, without any effort to bargain with the Union.

Naperville seeks to defend its conduct under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945). Although that case recognized conditions

in which an employer could ban union solicitation during working hours, *id.* at 803 & n.10, it never suggested that an employer could institute such a ban in the face of an operative bargaining agreement. We thus decline to set aside the Board's finding that Naperville violated sections 8(a)(1) and 8(a)(5).[4]

IV

We remand the unlawful discharge claim for reconsideration, deny the petition for review in all other respects, and grant the Board's cross-application for enforcement in all other respects.

So ordered.

Katsas, Circuit Judge, concurring in part and dissenting in part:

The National Labor Relations Board held that Frank Laskaris, the owner and president of Cadillac of Naperville, violated federal law by telling an employee that "things would not be the same" if Naperville employees went on strike. *Cadillac of Naperville, Inc.*, 368 N.L.R.B. No. 3, slip op. at 3 (June 12, 2019). The Board further ordered Laskaris and the dealership to cease and desist from making similar statements in the future. *Id.* at 4. In my view, Laskaris's statement was protected speech as opposed to an unlawful threat of retaliation.

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4. Under our precedent, conduct that violates section 8(a)(5) also violates section 8(a)(1). *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 n.6, 381 U.S. App. D.C. 37 (D.C. Cir. 2008).

Appendix A

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the Act. 29 U.S.C. § 158(a)(1). But section 8(c) qualifies section 8(a)(1) with regard to speech. It states that that the expression "of any views, argument, or opinion" is neither an unfair labor practice, nor even evidence of an unfair labor practice, "if such expression contains no threat of reprisal or force or promise of benefit." *Id.* § 158(c). Section 8(c) "protects speech by both unions and employers" and thus "'implements the First Amendment.'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 67, 128 S. Ct. 2408, 171 L. Ed. 2d 264 (2008) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969)). Moreover, section 8(c) serves "to encourage free debate on issues dividing labor and management," *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966), and "favor[s] uninhibited, robust, and wide-open debate in labor disputes," *Letter Carriers v. Austin*, 418 U.S. 264, 273, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974).

Section 8(c) protects statements to the effect that union activity will harm employees by decreasing an employer's competitiveness. In *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 308 U.S. App. D.C. 326 (D.C. Cir. 1994), we explained that an employer may "say how the company is likely to respond to a changed economic environment," so long as its statements "imply no punitive or retaliatory purpose." *Id.* at 1138. For example, section 8(c) protects speech "seeking to impugn" a union's "record on job security." *Id.* at 1133, 1140. It protects this statement: "We are against the Union because we know

they can wreck the Company and reduce the number of jobs." *Id.* at 1144 (quoting *Laborers' Dist. Council of Ga. v. NLRB*, 501 F.2d 868, 872 n.11, 163 U.S. App. D.C. 308 (D.C. Cir. 1974)). It protects this statement: "Unions do not work in restaurants .... If the Union exists at [the restaurant] Shenanigans, Shenanigans will fail. That is it in a nutshell." *Id.* at 1145 (quoting *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1364 (7th Cir. 1983)). It also protects this one: "Please, don't let this outside union force you and your Company into a knock-down and drag-out fight!" *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1174, 331 U.S. App. D.C. 312 (D.C. Cir. 1998) (cleaned up). And this one: "A vote for the union would put us back to the bargaining table which is a long and expensive process, and who knows, we might wind [up] in another strike." *Id.* (cleaned up). Laskaris's unelaborated remark that "things would not be the same" after a strike is akin to these remarks, but notably tamer.

The Board cited its precedents, though not ours, on the line between protected speech and unprotected threats of retaliation. *Naperville*, 368 N.L.R.B. No. 3, at 3. Yet even the Board has held that statements like Laskaris's are "too vague and ambiguous" to constitute an unlawful threat. *Phoenix Glove Co.*, 268 N.L.R.B. 680, 680 n.3 (1984). For example, in *Phoenix Glove*, the Board held that a supervisor could permissibly say "that the employees did not need a union and that they would be 'messing up' if they got one." *Id.* Similarly, in *Ben Franklin Division of City Products Corp.*, 251 N.L.R.B. 1512 (1980), an employer stated that a union "'would just mess up the employees worse,'" and the Board concluded that the statement was "entirely too vague and ambiguous" to constitute an unfair labor practice. *Id.* at 1519. In contrast, the cases cited by

the Board here involve facially threatening language. *See Valmet, Inc.*, 367 N.L.R.B. No. 84, slip op. at 2 n.7 (Feb. 4, 2019) ("Remember that I hired you."); *Colonial Parking*, 363 N.L.R.B. No. 90, slip op. at 4 (Jan. 5, 2016) ("Up until now you and we were like family members, living in peace, in good terms. From now on, we are not going to continue the sentiment of family-ship."); *Ozburn-Hessey Logistics, LLC*, 357 N.L.R.B. 1456, 1490 (2011) (employer "told an employee that he did not want the employee to work" in the department "because of the employee's union activities" and "threatened her with an unspecified reprisal" if she disclosed the conversation); *F.W. Woolworth Co.*, 310 N.L.R.B. 1197, 1200 (1993) ("if they think that I'm a bitch now, wait").

The Board further reasoned that Laskaris's statement was unlawful because it did not "communicate any objective facts" about the likely effects of a strike. *Naperville*, 368 N.L.R.B. No. 3, at 3. This reasoning overreads a statement in *Gissel Packing* that when an employer predicts the "precise effects" of union activity, the prediction must rest on "objective fact." 395 U.S. at 618. A "precise" assertion of fact, if unsupported, could perhaps be unfairly misleading. But that concern does not cover the kind of open-ended language at issue here. We have thus held that section 8(c) protects "speculat[ion]" about the possible negative outcomes of unionization. *Flamingo Hilton-Laughlin*, 148 F.3d at 1174. Moreover, *Gissel Packing* itself stressed that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." 395 U.S. at 617. And because section 8(c) ensures "free debate on issues dividing labor and management," *Linn*, 383 U.S. at 62, we cannot leave unions "free to use the rhetoric of Mark

Antony" while limiting employers "to that of a Federal Reserve Board chairman," *Crown Cork & Seal Co.*, 36 F.3d at 1140.

Finally, the Board reasoned that because Laskaris made retaliatory threats three to four months after the statement at issue, the mechanics likely understood the earlier statement as "a foreshadowing of worse to come." *Naperville*, 368 N.L.R.B. No. 3, at 3. But the lawfulness of any given statement turns on whether *it* has a "reasonable tendency to coerce or to interfere with" protected activity. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124, 349 U.S. App. D.C. 37 (D.C. Cir. 2001). Here, there was no reasonable connection between the first statement and later ones, in time or subject matter. Laskaris's June 2017 statement that "things would not be the same" did not reasonably foreshadow, say, his October 2017 threat to eat the kidney of a former striker. So the later statements cannot fairly be used to retroactively recharacterize the first one.

The administrative law judge reasoned that Laskaris's statement occurred "just before a strike." *Naperville*, 368 N.L.R.B. No. 3, at 17. That is a bit of an exaggeration; Laskaris made the statement on June 29, and the strike began on August 1. But in any event, the timing of the statement reveals nothing about whether it was an unlawful threat of retaliation. And because section 8(c) protects "wide-open debate in labor *disputes*," *Letter Carriers*, 418 U.S. at 273 (emphasis added), we cannot temper its application precisely when the disputes are becoming most acute.

My colleagues rest on a different theory. They contend that Laskaris's statement was threatening

because it "arose within a tense conversation" about an "unpopular" policy that "burdened the workers"—namely, the requirement that employees "pay a portion of uniform costs." *Ante* at 15-16. Neither the Board nor the ALJ mentioned this consideration in their respective legal analyses. *See Naperville*, 368 N.L.R.B. No. 3, at 3 (Board); *id.* at 17 (ALJ). Nor did John Bisbikis, the employee to whom Laskaris spoke, even identify what the policy was, much less connect it to any actual or perceived threat. J.A. 143 ("I initiated the meeting to discuss some issues that I was having in the shop, and after we talked about those issues, he started the conversation by saying that if we went on strike, things wouldn't be the same."). The policy itself was mentioned only by Laskaris, and it involved a requirement that employees pay half the wholesale cost of their work T-shirts, which was "about $2 per shirt." *Id.* at 197-98. In my judgment, that contextual consideration does not transform Laskaris's bland and ambiguous "things would not be the same" statement into a threat.

Deference cannot salvage the Board's decision. It is "firmly established" that the First Amendment, which section 8(c) implements, protects an "employer's free speech right to communicate his views to his employees." *Gissel Packing*, 395 U.S. at 617. Appellate courts must "make an independent examination of the whole record" in determining the scope of free speech protections. *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (cleaned up); *see, e.g.*, *Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 108, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990) (plurality opinion); *id.* at 111-17 (Marshall, J., concurring in the judgment); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 508, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). Moreover, statutes must be interpreted

to avoid serious constitutional questions—a rule often applied to determine the interplay between the NLRA and the First Amendment. *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-78, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740-43, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499-507, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979). So if it were a close question whether "things would not be the same" was an unlawful threat despite its vagueness, ambiguity, and anodyne tone, I would resolve the question in favor of speech rather than against it. Finally, even if deference were otherwise appropriate, as my colleagues argue, we could not uphold the Board's decision on a rationale different from the ones given by the agency itself. *SEC v. Chenery Corp.*, 318 U.S. 80, 95, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

For these reasons, I would set aside the NLRB's determination that Laskaris committed an unfair labor practice in telling an employee that "things would not be the same" in the event of a strike. I agree with my colleagues that Laskaris's later statements were unprotected threats and that Naperville's other arguments lack merit. I therefore join the *per curiam* opinion except for Part III.A.2, from which I respectfully dissent.

APPENDIX B — OPINION OF THE NATIONAL LABOR RELATIONS BOARD, DATED JUNE 12, 2019

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

Case 13-CA-207245

CADILLAC OF NAPERVILLE, INC

AND

AUTOMOBILE MECHANICS LOCAL 701, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO.

June 12, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

On June 19, 2018, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel also filed limited exceptions with supporting argument.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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,[1] findings,[2] and conclusions only

1. During the hearing, the judge made two evidentiary rulings: (1) admitting the recording, made surreptitiously in violation of Illinois state law, of the Respondent's October 6, 2017 meeting; and (2) denying the Respondent's request to possess witness statements after cross-examination, to which the Respondent objected and now excepts. The Respondent requests that we (1) overturn Board precedent and ignore the recording, and (2) remand the case for further cross-examination and allow the Respondent to maintain the witness statements after cross-examination.

Sec. 102.35 of the Board's Rules and Regulations provides, in pertinent part, that a judge should "[r]egulate the course of the hearing" and "[t]ake any other necessary action" authorized by the Board's Rules. Thus, the Board accords judges significant discretion in controlling the hearing and directing the creation of the record. See *Parts Depot, Inc.*, 348 NLRB 152, 152 fn. 6 (2006), enfd. 260 Fed.Appx. 607 (4th Cir. 2008). Further, it is well established that the Board will affirm a judge's evidentiary ruling unless that ruling constitutes an abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008).

We deny both requests as the judge's rulings were not an abuse of discretion. The rulings were consistent with Board precedent and neither unreasonable nor an interference with the Respondent's case. See *Orange County Publications*, 334 NLRB 350, 354 (2001) ("The Board has found such tape recordings of employer meetings with employees to be admissible as evidence, even when the surreptitious recording violates State law.") (citations omitted), enfd. 27 Fed.Appx. 64 (2d Cir. 2001); *Wal-Mart Stores, Inc.*, 339 NLRB 64, 64 (2003) ("[T]he plain meaning of Sec. 102.118(b) of the Board's Rules and Regulations limits the purpose of disclosure [of witness statements] to cross-examination.").

2. We adopt the judge's findings that the Respondent violated Sec. 8(a)(1) when it threatened employee Patrick Towe with discharge on September 20, 2017, and expressed doubt about employee Brian

to the extent consistent with this Decision and Order.[3]

At issue here are alleged violations in connection with an economic strike by the Respondent's auto mechanics. As explained below, in addition to the earlier mentioned judge's findings that the Board is adopting, we also adopt the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by terminating employee and Union Steward John Bisbikis for his union activity, but we revise the judge's rationale. Additionally, we agree with the judge, for the reasons stated in his decision and those set forth below,

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Higgins' employment longevity on October 27, 2017. We also adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) when it unilaterally prohibited union representatives' access to unit employees on the Respondent's premises, enacted new attendance policies, and removed free gloves and free drinking water.

There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to reinstate five strikers for 2 months after their unconditional offer to return to work or to the judge's dismissal of the allegation that the Respondent moved a unit employee to less agreeable nonunit work following the strike.

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

3. We have amended the judge's remedy consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings and substitute a new notice to conform to the Order as modified.

that the Respondent violated Section 8(a)(1) by making threatening or coercive statements in a conversation with Bisbikis before the strike and at two employee meetings after the strike, but we reverse the judge's findings that certain other statements were unlawful.

I. BACKGROUND FACTS

The Respondent is an auto dealership in Naperville, Illinois, and has been a member of the New Car Dealer Committee (NCDC), a multiemployer bargaining entity, since 2002. The Respondent recognizes the Automobile Mechanics Local 701, International Association of Machinists & Aerospace Workers, AFL-CIO (the Union) as the exclusive bargaining agent of its 12 mechanics.

On May 6, 2017,[4] the Union and the NCDC began negotiations for a successor contract as the existing collective-bargaining agreement was set to expire on July 31. The Union's negotiating team included Business Agents Sam Cicinelli and Kenneth Thomas, and employee and Union Steward John Bisbikis. On August 1, after the parties failed to reach a new agreement, unit employees went on strike. The Respondent laid off several nonunit employees during the strike.

4. All dates are in 2017 unless otherwise noted.

On August 9, the Respondent sent letters to six strikers, including Bisbikis, advising them that they were being permanently replaced and would be placed on a preferential hiring list provided they made an unconditional offer to return to work. In response, the strikers positioned themselves across the street from the dealership's main entrance, blew horns, used a loudspeaker, sought to engage customers, yelled at nonstriking employees, and interfered with a customer attempting to take a vehicle for a test drive.

On September 15, the NCDC and the Union entered into a strike settlement agreement. On September 17, employees ratified the settlement agreement and the 2017-2021 successor collective-bargaining agreement. Following discussions on September 18, discussed infra, seven of the striking employees received recall letters from the Respondent later that day. The seven recalled employees returned to work on September 20.

II. THE 8(A)(3) DISCHARGE

On September 18, Cicinelli, Thomas, and Bisbikis met with the Respondent's Owner and President, Frank Laskaris, in his office. The purpose of the meeting was to discuss the return-to-work process for the strikers.[5] During the meeting, Laskaris and Bisbikis engaged in a back-and-forth that culminated in Laskaris telling Bisbikis to "get the fuck out before I throw you out." As he

5. Laskaris and Bisbikis also discussed the permanently replaced employees and grievances filed by unit employees.

was leaving the office, Bisbikis called Laskaris a "stupid jack off" in Greek. Laskaris responded that he was firing Bisbikis for insubordination. Later that day, Laskaris sent Bisbikis a "notice of termination for insubordinate conduct and inappropriate language." The notice referenced Bisbikis' conversation in Laskaris' office and noted that it was a "direct violation of [the Respondent's] Standards of Conduct" and a "terminable action."

In finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Bisbikis, the judge applied the test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982), which is appropriate when the alleged violation turns on the employer's motive in taking an adverse action against an employee. However, where, as here, an employer defends a discharge based on employee misconduct that is part of the res gestae of the employee's union or protected concerted activity, and that occurred during a workplace confrontation, the employer's motive is not at issue, and the test set forth in *Atlantic Steel*, 245 NLRB 814 (1979), applies.[6] See *Postal Service*, 360 NLRB 677, 682, 360 NLRB No. 74 (2014). Under that test, the question is whether the conduct at issue was so egregious as to lose the Act's protection. See *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 fn. 2 (2018), enfd. by summary order 763 Fed. Appx. 5, 2019 WL 949082 (2d Cir. 2019). In making this determination, the Board considers four factors: (1)

6. While the judge eventually applied *Atlantic Steel*, he did so *after* applying *Wright Line*. The only appropriate test in this situation is that set forth in *Atlantic Steel*.

the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice. See *Atlantic Steel*, supra at 816.

We find that all four *Atlantic Steel* factors weigh in favor of protection. As the judge noted, the incident occurred in Laskaris' office and was not witnessed by any other employees. Bisbikis, in his capacity as shop steward, was discussing the return-to-work process, the permanent replacement of striking employees (including Bisbikis), and other grievances filed by employees. The outburst was brief--a single name-calling incident--and not a sustained course of action. See *Kiewit Power Constructors, Co.*, 355 NLRB 708, 710 (2010) (finding that a single, brief verbal outburst weighed in favor of protection), enfd. 652 F.3d 22, 397 U.S. App. D.C. 290 (D.C. Cir. 2011). Additionally, the outburst was not accompanied by any threats or menacing behavior. See, e.g., *Staffing Network Holdings, LLC*, 362 NLRB 67, 67 fn. 1, 75, 362 NLRB No. 12 (2015) (adopting the judge's finding that the nature of the outburst weighed in favor of protection where, among other things, the employee was not hostile and neither raised her voice nor made threats), enfd. 815 F.3d 296 (7th Cir. 2016). Moreover, Laskaris himself used vulgar language in the workplace, including during that very meeting. See generally *Corrections Corp. of America*, 347 NLRB 632, 636 (2006) (finding that an employee did not lose the Act's protection by cursing where profanity was commonly used by employees and supervisors and was used in the room where the employee's conduct occurred). Lastly, we find that Laskaris provoked Bisbikis when he

denied Bisbikis' account of an earlier conversation the two of them had engaged in about terms and conditions of employment, used profanity while dismissing Bisbikis from the meeting, and threatened to remove Bisbikis by force. See *Network Dynamics Cabling*, 351 NLRB 1423, 1429 (2007) (finding that an employee's outburst during protected conduct was provoked by certain comments made by a supervisor where, although the comments were not alleged as unfair labor practices, the comments clearly sought to interfere with the employee's protected right to assist organizational activity).

In light of the above, we agree with the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) when it discharged Bisbikis.

III. THE 8(A)(1) THREATS

June 29

On June 29, Bisbikis initiated a conversation with Laskaris about employee concerns. Laskaris responded that "things would not be the same" if employees went on strike. The judge found that Laskaris' statement was unlawful as it did not "communicate any objective facts or predictions as to the effects of a potential strike," and that "the statement cannot be viewed as anything but a threat that a strike would produce only negative consequences for the [u]nit." We agree with the judge's finding. Laskaris' statement that "things would not be the same" is similar to other statements the Board has found unlawful. See, e.g., *Colonial Parking*, 363 NLRB No. 90,

slip op. at 7 (2016) (finding that, despite the close and good relationship the employer had with employees in the past, a supervisor's warning that employees' terms and conditions of employment would change for the worse because of their protected activity constituted an unspecified threat of future reprisals); *Valmet, Inc.*, 367 NLRB No. 84, slip op. at 2 fn. 7 (2019) (finding an employer's direction to an employee to "[r]emember that I hired you" unlawful). Moreover, although not necessary to finding the violation, this statement was not an isolated occurrence. It was followed on subsequent occasions by multiple additional violations of the Act, all committed by Laskaris. This context further supports finding that Laskaris' remark that "things would not be the same" if employees went on strike would be perceived by employees as threatening--a foreshadowing of worse to come.[7]

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7. See, e.g., *Aldworth Co.*, 338 NLRB 137, 141-142 (2002) (statement that union supporters had "one foot out the door" could reasonably be interpreted by other employees as a warning threat because the remarks were in fact followed by retaliatory discipline against those union supporters), enfd. 363 F.3d 437, 361 U.S. App. D.C. 1 (D.C. Cir. 2004); *Aircraft Plating Co.*, 213 NLRB 664, 664-665 (1974) (subsequent unlawful changes in work rules by the manager served as verification of the manager's threats that employees would lose benefits because of their union sympathies, and an employee was unlawfully discharged for her union activity).

Member Emanuel disagrees with his colleagues and would find the statement lawful. The judge conceded that the statement was "vague," but nevertheless found it unlawful, relying primarily on the timing of the statement (about 1 month before the strike). In Member Emanuel's view, the statement is too vague to constitute a threat of reprisals, and neither the timing alone nor the Respondent's subsequent conduct is sufficient to render it coercive. See *Valmet*,

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September 25

On September 25, only a few days after the strikers returned to work, Laskaris conducted a staff meeting, attended solely by the recalled mechanics, in which he expressed his frustration over the Union's leafleting outside the dealership. During the meeting, Laskaris stated that the leafleting was taking money out of their pockets and that if the Respondent ran out of work, it would lay off all the recalled employees. The judge found that Laskaris' statement, which "cast union activity as inimical to [u]nit members' employment security," was a threat and not a lawful, fact-based prediction of economic consequences beyond the employer's control.

We agree. Laskaris singled out the recalled strikers, rather than employees in general, as those who would suffer the impact of any economic consequences. By targeting employees who engaged in protected activity, Laskaris went beyond the mere prediction of economic consequences beyond his control. Accordingly, we find the statement unlawful.[8]

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supra, slip op. at 2 fn. 7 (Member Emanuel, dissenting). In contrast, the statement in *Colonial Parking*, supra, made it clear that the employer would treat employees less favorably in the future.

8. Member Emanuel disagrees with his colleagues and would find that this statement was a lawful prediction as to the precise effects Laskaris believed leafleting would have on the Respondent. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969). In drawing this conclusion, Member Emanuel emphasizes that only the recalled striking employees attended the meeting. Therefore, the Respondent's reference to them in predicting

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October 6

On October 6, Laskaris met with mechanics to discuss his approach to labor relations going forward. During his 40-minute speech, Laskaris made several statements that the judge found unlawful. First, Laskaris informed employees that there would be stricter enforcement of company rules--stating that, if he chose to enforce the rules as written, things would be much harder for them. Second, he stated that he did not "give a shit about grievances. Grieve all you want. It doesn't matter. They can't do shit," and that he did not care about grievances. Third, he stated, "if I were you, I would have changed my [union] membership a week before the strike." Fourth, he referenced nonunit employees who were laid off during the strike and asked the recalled strikers to consider how the laid-off employees felt. Lastly, he stated that he "can be the nicest guy in the world" and would "give you a kidney," but "you fuck with me and my people, I'm going to eat your kidney out of your body and spit it at you."

We agree with the judge that the Respondent violated Section 8(a)(1) when it threatened employees with stricter enforcement of rules and suggested that filing grievances was futile.[9] We further agree with the

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the adverse effects of union leafletting was because they were the only employees in attendance.

9. Member Emanuel disagrees with his colleagues that Laskaris' statements about grievances were unlawful. He finds the statements too vague to constitute a threat of futility. Rather, Laskaris appeared to be simply expressing frustration with the filing of grievances that, in Laskaris's view, lacked merit.

judge that the "eat your kidney" statement was unlawful, although, contrary to the judge, we do not find that it constituted a threat of physical violence. Instead, we find that, given the circumstances (a 40-minute rant filled with multiple unlawful statements), the statement, as the judge alternatively found, would reasonably tend to coerce employees in the exercise of their Section 7 rights. See *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, slip op. at 1 fn. 6 (2016) (reversing the judge and finding that an employer's statement that it would "shoot the union," even if not interpreted as a specific threat of violence, would reasonably tend to coerce employees in the exercise of their Sec. 7 rights).

We reverse the judge's finding that the Respondent violated Section 8(a)(1) when, at the October 6 meeting, Laskaris told employees, "if I were you, I would have changed my [union] membership a week before the strike." We find that Laskaris' suggestion that employees should have "changed" their union membership was an opinion, as evidenced by the "if I were you" phrasing, permitted by Section 8(c).[10] Additionally, the General Counsel failed to present any evidence demonstrating that Laskaris went further than stating his opinion by, for example, assisting employees in withdrawing their union support.[11] We also

10. Sec. 8(c) gives employers the right to express their views about unionization or a particular union as long as those communications do not threaten reprisals or promise benefits. *NLRB v. Gissel*, supra.

11. Member McFerran disagrees with her colleagues and would adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by encouraging unit members to resign from or become only

reverse the judge's finding that the Respondent violated Section 8(a)(1) when Laskaris told the recalled employees that nonunit employees had lost their jobs over unit employees' decision to strike. We find that, in asking the recalled employees to consider laid-off nonunit employees, Laskaris' statement was merely a truthful recitation of what occurred during the strike.

IV. AMENDED REMEDY

In light of the General Counsel's request during the hearing for make-whole relief for the five late-recalled strikers, we shall modify the Order to require the Respondent to make unit employees and former unit employees whole for any loss of earnings or other benefits they suffered as a result of Respondent's unlawful failure and refusal to reinstate them from and after September 18, 2017, the date the strikers made their unconditional offer to return to work, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987),

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financial-core members of the Union. In her view, Laskaris went beyond simply stating his opinion about the Union; he improperly warned unit employees to withdraw or minimize their memberships. Thus, in the context of the multiple unlawful threats and statements running throughout Laskaris' speech on October 6, employees would reasonably have understood Laskaris to be going beyond expressing an opinion and instead sending a message that employees would regret a choice not to follow his suggestion. See *NLRB v. E.I. DuPont de Nemours*, 750 F.2d 524, 528 (6th Cir. 1984) ("the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees").

compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

ORDER

The Respondent, Cadillac of Naperville, Inc., Naperville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(b) Telling permanently replaced employees that the Respondent does not want them to return to work and that if they return to work it would not be long before they were gone.

(c) Telling recalled striking employees that they would not be employed by the Respondent very long and should find another job because they engaged in strike or other union activities.

(d) Telling recalled striking employees that, if the Respondent ran out of work, it would lay them off first because they engaged in strike or other union activities.

(e) Telling employees that it would more strictly enforce company rules because of employees' union activities or support.

(f) Telling employees that it would be futile to file grievances.

(g) Telling employees that it would eat the kidneys of employees because of their union activities or support.

(h) Enacting attendance policies and removing free work gloves and drinking water because employees engage in strike or other union activity, without first notifying the Union and giving it an opportunity to bargain over such changes.

(i) Prohibiting union representatives' access to unit employees without first notifying the Union and giving it an opportunity to bargain over such changes.

(j) Unilaterally changing the terms and conditions of employment of unit employees by implementing an attendance policy and charging employees for the cost of work gloves and drinking water.

(k) Discharging employees because they supported the Union.

(l) Failing or refusing to immediately reinstate economic strikers upon their unconditional offer to return to work without a legitimate and substantial business justification.

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

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

(a) Within 14 days from the date of this Order, offer John Bisbikis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

(b) Make Bisbikis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Bisbikis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

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

(e) Notify all employees that written attendance policies issued on and after September 18, 2017, and policies issued on or after September 25, 2017, charging employees for the cost of work gloves and drinking water have been rescinded.

(f) Before implementing any changes to policies regarding attendance, work gloves, drinking water or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All of Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

(g) Make each striker whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful failure to reinstate them upon their unconditional offer to return to work, in the manner set forth in the amended remedy section of this decision.

(h) 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.

(i) Within 14 days after service by the Region, post at its facility in Naperville, Illinois, copies of the attached

notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 13, 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 29, 2017.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 13 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.

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12. 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."

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

Dated, Washington, D.C. June 12, 2019

John F. Ring
Chairman
Lauren McFerran
Member
William J. Emanuel
Member

Appendix B

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

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that your terms and conditions of employment will change if you go on strike.

WE WILL NOT tell you, if you go on strike and subsequently return to work, that we do not want you to return to work and that, if you do return to work, it would not be long before you were gone.

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WE WILL NOT tell you that you will not be employed by us very long and should find another job if you engage in strike or other union activities.

WE WILL NOT tell you that, if we run out of work, we will lay you off first because you engage in strike or other union activities.

WE WILL NOT tell you that we will more strictly enforce company rules because of your union activities or support.

WE WILL NOT tell you that it would be futile for you to file grievances.

WE WILL NOT tell you that we will eat your kidneys because of your union activities or support.

WE WILL NOT prohibit union representatives' access to you without first notifying the Union and giving it an opportunity to bargain over such a change.

WE WILL NOT enact attendance policies and charge you for work gloves and drinking water because you engage in strike or other union activity without first notifying the Union and giving it an opportunity to bargain over such changes.

WE WILL NOT discharge you if you support a union or engage in union activities.

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WE WILL NOT fail and refuse to immediately reinstate economic strikers upon their unconditional offer to return to work without a legitimate and substantial business justification.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer employee John Bisbikis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

WE WILL make Bisbikis whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Bisbikis for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the

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

WE WILL rescind written attendance policies issued on and after September 18, 2017, and policies issued on or after September 25, 2017, charging employees for the cost of work gloves and drinking water.

WE WILL, before implementing any changes to policies regarding attendance, work gloves, drinking water or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All of Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

WE WILL make whole with interest such employees as would have been reinstated sooner but for our unlawful refusal to reinstate them as soon as possible after September 18, 2017, for wages and benefits lost on account of our failure to reinstate them to their positions as soon as possible after September 18, 2017.

CADILLAC OF NAPERVILLE, INC.

The Board's decision can be found at www.nlrb.gov/case/13-CA-207245 or by using the QR code below.

Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Appendix B

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge.

This case was tried in Chicago, Illinois on March 20-21, 2018. The complaint alleges that Cadillac of Naperville, Inc. (the Company or Respondent) engaged in numerous violations of the National Labor Relations Act (the Act)[1] relating to a 7-1/2 week strike by its service mechanics during the summer of 2017.[2] Specifically, the Company is alleged to have violated Section 8(a)(1) of the Act by: threatening employees before and after the strike with discharge and other reprisal; informing employees that it would be futile for them to bring complaints to the Union; and encouraging or soliciting employees to resign their membership or become core members in the Union. The Company also allegedly violated Section 8(a)(3) and (1) of the Act by discharging employee and union steward John Bisbikis in retaliation for his union and protected concerted activities. Finally, the Company allegedly violated Section 8(a)(5) and (1) of the Act by implementing new policies relating to employee attendance, grievance procedures, free water and work gloves without affording notice to the Union and an opportunity to bargain over the change.

1. 29 U.S.C. §§ 151-169.

2. All dates refer to 2017 unless otherwise indicated.

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

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, is engaged in the sale and service of new and pre-owned automobiles at its facility in Naperville, Illinois, where it annually derives gross revenues in excess of $ 50,000, and purchases and receives goods and materials valued in excess of $ 5000 directly from points outside the State of Illinois. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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3. The Company excepted to my ruling that witness affidavits needed to be returned to the General Counsel after cross-examination pursuant to *Jenks v. United States*, 353 U.S. 657, 662, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, 75 Ohio Law Abs. 465 (1957). Relying on the Board's decision in *Wal-Mart Stores, Inc.*, 339 NLRB 64, fn. 3 (2003), the Company argued that it was entitled to retain witness affidavits until the close of the hearing. As I ruled at the time, that the Board's holding in that decision, as well as Sec. 102.118 of the Board's Rules and Regulations, is not inconsistent with my practice of permitting renewed access to witness affidavits upon request in connection with the cross-examination of other witnesses. (Tr. 104-108.)

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II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company, an auto dealership, has been individually owned and operated by Frank Laskaris since 1996. He serves as president. John Francek is vice president of operations. The Company's operations consist of the sales, service, parts and administrative departments. Mark Klodzinski, as service manager, supervises the service and parts department employees.[4] The discriminatee, John Bisbikis, was employed 15 years by the Company as a journeyman mechanic. He was never disciplined prior to his termination. Bisbikis served as a union steward for over 10 years. Prior to June, Bisbikis had a good relationship with Laskaris, who often referred to him as a leader of the mechanics.

B. The Expired Contract

The New Car Dealer Committee (the NCDC) is a multi-employer bargaining committee composed of 129 car dealers who assigned their rights to it to negotiate and administer master agreements with the Union representing 1,949 employees. The Company has been an employer-member of the NCDC since it was formed in 2002. At all times since August 1, 2013, the Company has recognized the Union as the exclusive collective-bargaining representative of its approximately 12

4. The Company admits that Laskaris, Francek and Klodzinski are supervisors within the meaning of Section 2(11) and agents within the meaning of Sec. 2(13) of the Act.

mechanics. The mechanics comprise a bargaining unit (the unit) appropriate for the purposes of collective bargaining as described in the 2013-2017 contract between the NCDC, on behalf of the Company and other car dealers (the Expired Contract):

The Employer recognizes the Union as the exclusive bargaining agent for all of its Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

Article 2 of the Expired Contract delineated the unit employees' duties and responsibilities as follows: journeyman technicians perform electrical, mechanical and other technical repair work; body shop technicians perform painting and reconditioning work; semi-skilled body shop technicians perform sanding, masking, buffing, polishing, shop clean-up, disassemble damaged vehicles and deliver parts to body shop technicians; semi-skilled technicians prepare new vehicles for delivery, minor inspections, repairs and maintenance services and used vehicle reconditioning; apprentices perform the work of, and are supervised by, journeyman technicians and journeyman technicians and journeyman body shop technicians; and lube rack and part-time express team technicians perform miscellaneous tasks such as minor maintenance work, snow plowing and removal, transporting vehicles, cleaning and organizing shop equipment and delivering parts.

Notwithstanding the aforementioned classifications, article 4 of the Expired Contract provided the Company flexibility in certain situations:

Temporary Work. If business is slack, the Employer may assign an employee work other than that which the employee is regularly classified where such work would not be hazardous to the employee due to lack of experience and training. The employee shall receive their applicable rate. This assignment shall not infringe on the jurisdiction of another Union. Money earned under these circumstances shall be considered a part of the employee's regular flat earnings.

Article 5 provides unit employees with an hourly rate of pay times 40 hours worked each week, plus pay for additional work performed within their specific classifications.[5] In addition, mechanics were often able to earn significantly more than the flat rate based on the "book time" for particular tasks. However, book time compensation was not applicable to work performed outside of a unit employee's specific duties. For example, lube rack and part-time express team technicians were responsible for cleaning vehicles. If a journeyman mechanic or apprentice performed such work, however, the time would be counted towards his base rate of pay, but would not be compensable as additional pay.

Unit employees are required to acquire the tools necessary to perform their work. They were also responsible to provide tool boxes to secure their tools. That arrangement is impliedly confirmed at article 14, which requires the Company to insure employees' personal

5. Notwithstanding the pay rate formula stated in the contract, unit employees are guaranteed pay for 35 hours if present at the dealership for at least 40 hours. (Tr. 162-163.)

tools, requires employees to provide the Company with an inventory of their personal tools, authorizes the Company to inspect employee tool boxes, and requires employees to remove their tools within 2 weeks of termination.[6]

C. The Strike

On May 6, the Union and the NCDC began negotiations for a successor contract, which was due to expire on July 31. The members of the Union's negotiation team included Union representatives Sam Cicinelli and Kenneth Thomas, and Bisbikis.

On June 29, with negotiations dragging on, Bisbikis approached Laskaris in the latter's office to discuss several shop-related issues, including the Company's newly imposed requirement that employees pay part of the cost of their uniform shirts. Laskaris rejected Bisbikis' appeal regarding the shirts and redirected the discussion towards the sputtering labor negotiations, warning that if the mechanics decided to strike, "things wouldn't be the same."[7]

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6. The cited provisions remained essentially the same in the Successor Contract. (Jt. Exh. 1-2.)

7. I credit Bisbikis' detailed version of this conversation in contrast with Laskaris' steadfast denial ("I wasn't thinking about a strike") after conceding that, "a few weeks before it happened," he "thought there was a small chance" for a strike. (Tr. 116-117, 139, 205-208.)

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The parties were unable to negotiate a new contract by the July 31 deadline and, on August 1, the Company's unit employees walked out and set up camp across the street from the dealership. On August 4, the Company sent the striking employees letters setting forth several changes to their terms and conditions of employment:

> To all Service Technicians,
>
> It is very unfortunate that you have chosen to strike. In serving the best interest of the stability of Cadillac of Naperville, its employees and their families, as well as our loyal and trusting customers, you are hereby put on notice of the following:
>
> We will no longer be paying for your health insurance. You will be responsible for the premiums in their entirety.
>
> We have placed ads for replacement technicians. You will be notified once you have been replaced. At that time should you make an unconditional offer to return to work, you will be placed on a preferential hiring list should an opening occur.
>
> Cadillac of Naperville will no longer be responsible for your belongings when you are not working. All tools, tool boxes, and personal belongings must be removed from our property by Saturday, August 5, 2017 by 5:30 p.m.

> Please make immediate arrangements to have your tools and personal belongings removed from our property by contacting your immediate supervisor at (630) 355-2700 to arrange an appointment. They will assist you in returning any special tools or Cadillac of Naperville property, as well as assist in an expedient and peaceful transfer of your belongings.
>
> Sincerely,
>
> Cadillac of Naperville, Inc.[8]

As instructed, unit employees removed their equipment and tool boxes during business hours by August 5 and transported them on trailers to a commercial storage facility. Empty toolboxes weighed at least 550 pounds; when full, they weighed several thousand pounds.

On August 9, the Company sent the following form letters to 6 of the 13 striking employees - Bisbikis, Louis Mendralla, Michael Wilson, Kenneth Scott, Brian Higgins and Mathew Gibbs notifying them that they were being replaced:

This letter is to advise you that you have been permanently replaced as of today August 9, 2017. You will be placed on a preferential hiring list provided you make an unconditional application for a return to work. In the

8. Jt. Exh. 4.

event you have a tool box or any personal belongings that you have left behind, please call your supervisor to make arrangements to pick them up.[9]

The Company was one of only three dealerships that replaced employees during the strike. Francek hired three replacement workers based on employment advertisements[10] or personal familiarity: Hector Plaza (Aug. 7), Edward Silva, Jr. (Sep. 1) and Scott Anderson (Sep. 2). Another employee, Michael Vitacco, was hired on the day that the strike ended (September 15). They were all retained as mechanics after September 15. In addition, three nonunit employees were transferred from other departments to fill-in for the striking mechanics: service advisors Jay Montalvo and Jake Johnson (both on August 7), and salesmen George Laskaris (Aug. 21). Montalvo and Johnson returned to their jobs as service advisors after the strike, while George Laskaris remained as a mechanic.[11]

Initially, the striking employees picketed across the side street from the dealership on Ogden Avenue. After

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9. The letter sent to Gibbs was not included with the other five letters in Jt. Exh. 5. However, the subsequent recall letter indicates that he received the same notification.

10. There was no evidence of the advertisements or the terms of employment of the replacement workers, specifically, whether they were hired on a temporary, permanent or other basis.

11. I credited the reliability of GC Exh. 6, a company business record, over that of GC Exh. 5, which appeared to be a chart compiled for litigation.

the termination letters went out on August 9, the strikers became more vocal and repositioned themselves across the street from the main entrance. They blew horns, utilized a loud speaker to excoriate the Company, sought to engage customers, and yelled at nonstriking employees. On one occasion, striking mechanic Patrick Towe interfered with an elderly customer attempting to take a test drive. On several occasions, the Company called the police to intercede.[12] However, the Company never filed police reports or unfair labor practice charges.

D. Strike Settlement Agreement

About 35 dealerships entered into interim agreements after several weeks into the strike. On Friday, September 15, the NCDC, on behalf of the remaining member companies, entered into a strike settlement agreement (the settlement agreement), contingent upon ratification by the union membership. The Union's membership ratified the settlement agreement, as well as the 2017-2021 collective-bargaining agreement (the Successor Contract), on Sunday, September 17.

The settlement agreement addressed the return-to-work procedures for all unit employees at the 129 dealer-members as follows:

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12. I credited the undisputed testimony of Laskaris and Francek that the police was called at unspecified times. However, the incidents were brought under control once police arrived and no police reports were filed. (Tr. 210-213, 224, 229-230, 282, 310-312.)

2. *Return to Work:* The return-to-work process will be determined by each individual dealer. Employees will be reinstated per the terms of the Successor Contract, but may be placed on layoff depending on the business needs of the Employer. Replacement employees, if retained, shall be credited with seniority as set forth in the Successor Contract and will be placed on layoff status until higher seniority employees within the same classification are recalled.

4. *Mutual Non-Retaliation*: Both parties, on behalf of their respective members, hereby covenant and agree to use their best efforts and take any action deemed necessary to ensure an orderly and peaceful return to work by striking employees, to ensure no retaliation of any kind towards any employee or NCDC member dealer, and to maintain order in the workplace once striking employees have returned to work. NCDC and the Union agree, on behalf of themselves and each of their respective members, that there will be no retaliation against any employee based upon conduct that is protected by law, and that there will be no retaliation against any NCDC member dealer or the Union based on actions taken or statements made during negotiations or the ensuing labor dispute.[13]

13. Jt. Exh. 2-3.

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The Successor Contract set forth the seniority, layoff, and recall provisions at article 3, which states, in pertinent parts:

> Section 2. Layoff and Recall. Part-time Express Team Technicians will be laid off before any other bargaining unit employee. In a decrease or increase in the number of Journeyman Technicians, apprentices, semi-skilled technicians, or lube rack technicians, when two employees are capable of doing the job, the one with the least product line seniority shall be laid offered first and recalled in reverse order, provided the employer has submitted a current product line seniority list to the Union via certified mail. The Employer shall be permitted to recall or hire up to three (3) Lube Rack Technicians notwithstanding the layoff status of any Journeymen. A Lube Rack Technician hired or recalled while a Journeyman is on layoff status may not be promoted while that Journeyman retains recall rights. The Employer shall notify the employee of a layoff no later than the end of the employee's last scheduled workday of the calendar week, not the Employer's pay week.
>
> Section 6. Reporting After Recall. The Employer shall give notice of recall to the employee. An employee who fails, without reasonable excuse, to report for work within three (3) working days

of notice of recall shall be considered as having resigned from employment.[14]

E. Employees Attempt to Return to Work on September 18

(1) Laskaris rebuffs employees' efforts to return during business hours

On September 18, the day following the Union membership's ratification of the Successor Contract, the unit employees congregated in their customary location across the street from the dealership at about 7 a.m. Cicinelli and Thomas, anticipating a contentious return-to-work process due to the replacement letters received by the five-unit members and concern over the logistical difficulties in returning the returning mechanics' tools and tool boxes, were also present. In fact, Cicinelli arrived with preprepared grievance forms, which he had the returning employees sign.

A few minutes later, Cicinelli, Thomas, and Bisbikis walked across the street to the dealership in order to negotiate a date and process for the employees' return to work. They entered Laskaris' office. Francek was also present. Almost immediately, Laskaris said that he

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14. The Company relies on this provision as the basis for Laskaris' belief that he had three days to recall the strikers. The testimony of Laskaris and Francek, however, with both professing ignorance as to the content of the settlement agreement or alluding to conflicting advice from attorneys, did little to clarify the Company's responsibilities under this provision. (Tr. 218-219, 268-270, 306-308.)

did not want Bisbikis present. Cicinelli responded that Bisbikis was a necessary participant because he was the steward and needed to be in the loop. Laskaris said that he did not care, insisting that Bisbikis was the ringleader and at fault for the strike, and he did not want him as an employee. Bisbikis asked Cicinelli what he should do. The latter suggested Bisbikis leave so he and Thomas could resolve issues preventing the employees from returning that day. Bisbikis complied and returned to join the other unit members across the street.

During the meeting that ensued, Cicinelli insisted that Laskaris was obligated to reinstate the replaced employees pursuant to the settlement agreement. Laskaris replied that he needed time to figure out whether to recall the permanently replaced employees because he had not seen the contract and was getting inconclusive legal advice. He added that he did not want any of the strikers back and asked, "can't you find them all jobs?" Cicinelli said that he probably could find them other employment, but the employees wanted reinstatement. At one point, Cicinelli referred to the replacement workers as "scabs," causing Laskaris to admonish Cicinelli because they were "good family men" and note that the Union was obliged to represent them as well. Cicinelli said he did not care but concurred with the notion that the Union would be responsible to represent them if they were retained and became union members. As Cicinelli left to update the employees, Laskaris proposed that in return for the employees not returning he would give them $1000 or $2000 each to find a job elsewhere. Cicinelli said it was

his responsibility to run any offer by the employees but considered it a futile effort.[15]

Cicinelli and Thomas left Laskaris' office and communicated his offer to the returning employees. After the employees rejected the offer, Cicinelli and Thomas returned to Laskaris' office along with Bisbikis. Once again, Laskaris asked why Bisbikis was there. Cicinelli responded that Bisbikis was there to speak on behalf of the unit employees. Bisbikis then began to explain that the striking employees were personally offended after receiving permanent replacement letters. He asked Laskaris why he issued the letters, and if they issued because he and the other mechanics did not get along with Francek, which the latter denied. Bisbikis added that he had been there for 15 years and excoriated Laskaris for his treatment of Bisbikis and the other strikers. Laskaris said he did not want to hear it and asked why Bisbikis would want to return. Bisbikis replied that he had been there for 15 years and considered it his home. Francek interjected by questioning the strikers' loyalty because they harassed customers and other employees during the strike. Bisbikis denied that allegation. Francek then engaged Bisbikis in a side conversation questioning the latter's recent extended

15. Testimony regarding the first meeting was fairly consistent. Laskaris' testimony regarding his alleged confusion over how to implement the settlement agreement and whether he was required to displace the replacement workers was not credible. He had no interest in ever reading the settlement agreement and shifted explanations between contradictory legal advice and testimony evincing a clear intent to deny reinstatement under any circumstances. (Tr. 38-41, 125-127, 220-226, 270.)

absence and Bisbikis replying that he was still disabled when he returned to work.[16] Laskaris reiterated that he did not want any of the strikers to return, especially the "seven" who received permanent replacement letters. Cicinelli said that the Union was aware of only five such letters and asked Francek to provide copies of the other two letters. As the conversation continued, there was disagreement over how many people were issued replacement letters, and to resolve that disagreement, Francek left the room to retrieve copies of the letters.

With Francek gone, Bisbikis brought up his June 29 conversation with Laskaris about several employee concerns. Laskaris denied ever having such a discussion and Bisbikis accused him of lying. Laskaris cursed at Bisbikis, telling him to "get the fuck out before I get you the fuck out." Bisbikis replied by calling Laskaris a "stupid jack off" in Greek as he left the office. Laskaris asked Bisbikis "what did you just say." Bisbikis looked at Laskaris and asked what he was talking about? I didn't say a word." Cicinelli smirked, looked at Thomas and said "I didn't hear him say anything. Did you?" Laskaris replied, "[n]ow even if I have to take you back, now I'm firing you for insubordination.[17]

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16. Bisbikis was on short-term disability for a herniated disc in his back from December to May.

17. I credit the testimony of Laskaris, a fluent Greek speaker, that Bisbikis called him a "stupid jack off" in Greek. Bisbikis did not deny the statement at the time and the cavalier manner in which Cicinelli and Thomas, neither of whom speak nor understand Greek, denied hearing Bisbikis say anything manifested an evasiveness that undermined their credibility regarding this incident. At the time,

Cicinelli responded that the Union would have to file another grievance regarding Bisbikis' termination and then asked Bisbikis to leave the room. He then asked Laskaris to clarify his position regarding the recall status of the remaining strikers. Laskaris reconsidered and agreed to allow the remaining employees who did not receive replacement letters to bring back their tools. Cicinelli suggested that some had trailers and could begin returning their tools in the afternoon. Laskaris rejected that arrangement on the ground that it would be too disruptive, insisting that it was not the Company's responsibility to transport the employees' tools to the dealership before they reported for work. The meeting ended with Laskaris giving Cicinelli and Thomas a list of guys who were not permanently replaced and the plan for the return-to-work schedule. He also agreed to open the shop two hours early on Tuesday at 5:30 a.m. and needed them to be in their stalls by 7:30 a.m. ready to go. Cicinelli insisted it would be a problem getting the tools out of storage before 9 a.m. and Laskaris replied, "It's noon. My understanding is 701 has a truck. 701 has a union hall for this purpose. Why don't you go get their tools, put them on the truck, take them down to the hall. Not my issue. Now I need you to get away from the front door and go." After Cicinelli and Thomas left, Francek followed up with telephone calls to each of the returning mechanics. He spoke with some and left messages for

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however, Bisbikis was standing by the door and not, as Laskaris suggested, moving toward him in a threatening manner. (Tr. 42-48, 125-133, 142, 144, 167-173, 184-187, 221-234, 258, 273.) In addition, Laskaris made no mention of threatening behavior on Bisbikis' part in the termination letter that followed.

others. Some said they would be ready to start work at 7:30 a.m. One employee said he could not continue the call without union representation.

(2) The Union attempts to recruit the replacement workers

Shortly thereafter, Laskaris walked into the shop and found Thomas speaking to the five replacement mechanics. Laskaris intervened and said, 'Ken, this is not the time. Guys get back to work. Ken, I'll set up a private conference room for you before or after work any time you want and you can sit and talk to them all you want, but you're not going to stop them from working." Thomas left and rejoined the group across the street.[18]

(3) The Company formally terminates Bisbikis

Later that morning, Laskaris sent Bisbikis a "notice of termination for insubordinate conduct and inappropriate language:"

> Your insubordinate behavior occurred during a conversation in my office on Monday, September 18, 2017 at or around 9:05 a.m. during a during a business meeting where you spoke to me in [G]reek and called me a [stupid jack off] . . . When confronted and told you can't speak to me that way, there was no apology nor denial

18. I base this finding on Laskaris' credible and undisputed testimony. (Tr. 251-252.)

> of you actions, instead you very sarcastically to Sam Cicinelli "I guess that means I should leave now."

This offensive and insubordinate behavior is a direct violation of Cadillac of Naperville's Standards of Conduct. In order to assure orderly operations and provide the best possible work environment, we expect employees to follow rules of conduct that will protect the interests and safety of all personnel.

This violation of conduct is a terminable action. We ask that you immediately refrain from entering our property. Should you have any personal items, please reach out to your supervisor to make any and all arrangements regarding your personal item pick up.[19]

(4) The Company recalls seven employees

Later that afternoon, Veronica Coy, the Company's controller, emailed "all currently employed technicians returning from work stoppage" regarding the return-to-work arrangement and copied Cicinelli and Thomas:

> *Return to Work Procedures:* Under the terms of the new contract, each individual dealer may

19. Laskaris testified, as the letter states, that Bisbikis' conduct violated the Company's Standards of Conduct." He also testified that those standards were reflected in a "book" which was not produced. (Tr. 259-260, 276-277; Jt. Exh. 6.) In the absence of documentary evidence to support that assertion, there is insufficient evidence to conclude that Bisbikis violated any written standards.

determine how many employees to recall and when. Please make note that after review of our work requirements we have determined that the following employed employees will need to return to work AND in their assigned work stall ready for work on September 19, 2017 at 7:30 a.m.

THE FOLLOWING EMPLOYEES HAVE BEEN RECALLED:

ZIOCCHI, MICHAEL D

GONZALEZ, RONALD J

MICHOLSON, CHARLES E

SCHULTE, RYAN D

TOWE, PATRICK

AGUIREE-PORTILLO, ANTONIO

SCOTT, JERICHO

We have made arrangements to have the dealership open 5:30 a.m. until 7:30 a.m. on September 19, 2017 in order to bring TOOL boxes and Tool carts in. Please note that ONLY TOOL boxes and Tool carts will be allowed to be returned to the stalls as we have a redesigned shop and usage will be at full capacity.

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Please also note the Cadillac of Naperville Attendance Policy

ATTENDANCE AND PUNCTUALITY

As an employee you are expected to be regular in attendance and to be punctual. Any tardiness or absence causes problems for your fellow employees and your supervisor. When you are absent, your work load must be performed by others, just as you must assume the work load of others who are absent. In order to limit problems caused by absence or tardiness of employees, we have adopted the following policy that applies to absences not previously approved by the Company.

If you are unable to report for work on any particular day, you must call and speak to (not text message or email) your supervisor at least one hour before the time you are scheduled to begin working for that day. Absent extenuating circumstances, you must call in on any day you are scheduled to work and will not report to work.

Excessive absenteeism or tardiness may result in disciplinary action up to and including termination of employment. If you believe the absence is legally protected, please see the

company's Disability Accommodation Policy for more information. Each situation of absenteeism or tardiness will be evaluated on a case-by-case basis. Even one unexcused absence or tardiness may be considered excessive, depending on the circumstance.[20]

F. Recalled Employees Attempt to Report to Work on September 19

At 7 a.m. on September 19, the employees met at their usual location across the street from the dealership. A short while later, Cicinelli and Thomas marched across the lot with the recalled mechanics to the service area as vehicles were coming through the service entrance. They were met there by Laskaris and Francek. Laskaris asked what they were doing. Cicinelli said that he wanted to discuss the logistics for the employees' return since the storage facility did not open until 9:30 a.m. Laskaris replied that it was not his problem and if the employees were not in their stalls with their tools ready to go at 7:30 a.m., he would issue them warning letters because they were technically late.[21]

Laskaris proceeded to escort the group into the new car delivery area. As they passed customers in parked vehicles waiting to enter, Cicinelli said to a customer that "these are the real technicians. Your scabs are in there." Francek interjected, reassured the customer that the

20. Jt. Exh. 7.

21. Laskaris did not, in fact, issue written warnings to employees for lateness on September 19.

real mechanics were working and the dealership would take care of him, adding that the individuals walking in "can't do shit."[22]

Once in the room, Laskaris told the employees, "This is my facility. You're going to listen to me. I don't give a fuck who tells you; listen to me. If I tell you to jump, you ask me how high. This is my--you play by my rules." Cicinelli interjected, "as long as you adhere to the terms outlined." Laskaris responded, "I know what that is. I don't need to be reminded of that." Cicinelli agreed with that comment. Laskaris told the employees to bring their tools after 5 or 5:30 p.m. that day and Cicinelli replied that he would be filing another grievance for back pay for that day because Laskaris continued to make it impossible for the employees to bring the tools back since the storage facility closed at 5 p.m. Laskaris then told Cicinelli to have the unit employees bring them home. Cicinelli said that they did not all have trailers to transport their tool boxes and/or have room to fit them in their garages. Nor did they have the option of leaving them outside their homes since they were expensive. Laskaris said that was not his problem. He said for them to bring them in the next morning and Cicinelli replied that the storage facility did not open until 9:30 a.m. Cicinelli noted Laskaris' inconsistency in permitting employees to remove the tools

22. The testimony of Laskaris, Francek and Cicinelli confirmed the interaction of Cicinelli and Francek with the customer. In addition, Francek failed to refute Cicinelli's testimony that the former told the customer that the strikers "can't do shit," while Francek's testimony that Cicinelli referred to the mechanics on duty as "scabs" was also undisputed. (Tr. 72-73, 240-241, 295.)

on a Saturday, but now insisting it would be disruptive to bring them while the facility was open for business. He called it overly restrictive. Laskaris reminded Cicinelli that he told employees the previous day about being ready when reporting to work and that some confirmed they would be ready to go. They went through several more exchanges in which Laskaris said he was not going to do it Cicinelli's way and the latter insisting that he needed to comply with the contract. Laskaris finally relented, stating that he would run his shop in a manner consistent with the contract, and agreed to let the employees bring back their tools after 4:30 p.m. that day.[23]

G. Employees Finally Return to Work on September 20

The seven reinstated employees returned to work on September 20. Later that morning, Laskaris pulled aside apprentice mechanic Patrick Towe showed him a video recording of someone walking across the entrance to the dealership. It was Towe carrying a sign and walking slowly on the stripe line in the middle of the street in front of the driveway. Towe's shenanigans enabled him to block a customer who was waiting to take a test drive. She was forced to drive very slowly behind Towe as he walked across the parking lot entrance. The customer began to accelerate as Towe had advanced to a point where he was

23. The testimony by Cicinelli, Laskaris, Francek and Towe regarding their interaction was fairly consistent. However, given Laskaris' penchant for colorful discourse with his employees, I credit Cicinelli's version of Laskaris' vulgar-filled remarks that day. (Tr. 51-55 80-81, 240-242, 294-297.)

nearly out of her way. However, Towe suddenly pirouetted and walked back towards the vehicle, causing the customer to slam her breaks.

Laskaris asked if that was him on the video recording and Towe said, "I don't think so." Laskaris was not swayed, pointed out that the prankster was wearing his sweatshirt, and comment on his harassment of a future service shop customer. He concluded with a remark that he hoped that Towe would refrain from similar conduct. Laskaris then said "I don't want any of you here." After further remarks, Laskaris said, "Well, if this is your home, you wouldn't be doing this" and he told Towe to look for another job because he wouldn't be there very long. Towe said okay and Laskaris dismissed him back to work.[24]

H. The Company Restricts Union Officials Access to Employees

Prior to the strike, Thomas customarily visited unit employees at the dealership approximately once every 6 weeks.[25] Laskaris, upset after the events of September 18 and 19, contacted an attorney and, on September 21, Laskaris and Francek sent a letter to the Union limiting its previously unfettered access to employees on its premises:

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24. The video was not a surveillance video generated by the Company and Laskaris was evasive as to its source. (Tr. 243-245.) In any event, I credit Towe's testimony regarding this conversation, which was not denied by Laskaris. (Tr. 82-84, 245.) Towe was laid off on December 2, 2017.

25. The existence of this custom and practice prior to the strike was undisputed. (Tr. 57-58, 252.)

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This letter will serve as notice to Sam Cicinelli, Ken Thomas, and Mechanics Local 701. As a result of the intimidating and threatening behavior of union president Sam Cicinelli and B.A. Ken Thomas on Monday and Tuesday 9/18 & 9/19 towards myself, our employees, and shockingly even worse our customers. Neither Cicinelli nor Thomas will be welcome in our dealership or on property. If they choose to ignore our request they will kindly be asked to leave the property immediately. Proper authorizes will be notified to have them removed if necessary.

As a result of the actions and behavior of Local #701 representatives mentioned above and complaints received from 4 employees who felt they were being "intimidated and bullied" by B.A. Ken Thomas on Tuesday the 19th. Local #701 representatives will need to make an appointment and request access to our facility and/or our employees while they are at work. An agreed upon time must be scheduled with myself or our V.P. John Francek. Failure to make such arrangements and respect our fair request will result in representatives from Local #701 being asked to leave the property immediately and return at an agreed upon scheduled time.

In closing let me be very clear. I personally will no longer be threatened or tolerate acts of intimidation by local #701 representatives in

> my own place of business. Nor will I tolerate such behavior towards my employees or our customers. Such behavior will be met with swift legal action going forward. I appreciate your cooperation in advance.[26]

Union access to the facility is governed by Article 8, Section 2 of in both the Expired Contract and the Successor Contract: "A Union representative shall be permitted access to the Employer's premises for the purpose of adjusting complaints individually or collectively."[27]

I. The September 25th Staff Meeting

On September 25, Laskaris called a staff meeting where he threatened employees with layoff. Laskaris called the meeting to express his frustration over the Union's decision to leaflet outside the dealership post the strike. During the meeting, Laskaris told the employees that the Union's leafleting was taking money out of their pockets and that if they ran out of work, all of the recalled employees would be laid off.[28]

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26. Laskaris' assertion that employees complained about the conduct of Cicinelli and Thomas was neither credible nor corroborated. To the contrary, Laskaris' testimony indicated his annoyance at the fact that the union representatives were soliciting the replacement workers while they were on the job and he injected himself to break up the conversation. (Tr. 261-262, 275; Jt. Exh. 8.)

27. Jt. Exh. 2 at 44.

28. Laskaris did not dispute Gonzalez' credible and undisputed testimony regarding this incident. (Tr. 158.) Francek confirmed

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J. Changes to Company Rules and Practices

(1) Free water

During the term of the 2013-2017 agreement, the Company provided unit employees with free gloves and bottled water in the Parts Department. Mechanics are required as part of their job to wear gloves and were provided with free gloves as needed. Prior to the strike, the Company also provided employees with a water fountain, as well as free bottled water and Gatorade during the summer months. The water fountain broke prior to the strike, however, and the Company provided bottled water.

During the first week upon returning to work, the Company no longer provided free water bottles and removed the water fountain. They were told to remove their refrigerators and the refrigerator in the break room was removed.[29] The following day, the changes were posted in a sign on the wall.[30]

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making remarks about the leafleting and its connection to potential layoffs if work did not pick up, but did not dispute Gonzalez' testimony. (Tr. 297-298.)

29. Laskaris was vague as to whether the water fountain broke--"not to my knowledge"--and testified that prior to the strike free bottled water was provided in the employee lounge refrigerator with a cup next to it for contributions that the Company matched for charity. (Tr. 249-251, 260-261.) Francek testified that the Company confirmed that the Company cleaned out old items. He also referred to a technician's refrigerator causing an electrical short, but did not address the banning of refrigerators. (Tr. 300-301.)

30. GC Exh. 4.

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(2) Attendance policy

Prior to the strike, the Company did not have a formal attendance policy. It was left up to the service manager's discretion as to how they wanted to handle call-offs or calling in late. In some instances, the service manager simply required mechanics to either leave a voicemail message or text message him if they were going to be late.[31] In its September 18 recall letter to seven employees, the Company inserted an attendance policy at the end of the email. About 2-3 weeks after employees returned to work, the Company revised that policy. It stated in pertinent part:

> . . . Technicians should contact their Department Manager to report an absence at least (1) hour prior to their starting time, and lateness at least a (1/2) hour prior to their starting time so that arrangements can be made.
>
> If any technician is absent from work for three working days without informing his or her Department Manager, it will be assumed that the employee resigned and employment will be terminated as of the last day worked by the employee. Warning letters will be issued for each day of "No Call No Show" with copies being sent to the Member and the Union.
>
> . . . The following describes the disciplinary actions that may result from Unexcused Absence, Tardiness and or Early Leave.

31. Towe and Bisbikis credibly testified that there was no written attendance policy prior to the strike. (Tr. 85, 134-135.).

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- Unexcused absence applies to non-scheduled days off and/or non-negotiated days off.

- Tardiness applies to returning from lunch and/or break periods as well as the beginning of the workday (including not calling in the proper time for an absence.)

- Early leave applies to leaving before your scheduled workday ends.

Technicians are expected to be punched in and prepared to work no more than (5) mins past their regular start time and they be considered on time. When an employee is late beyond five (5) minutes, along with any subsequent time thereafter, they are considered tardy and shall be reprimanded or a written warning issued. Punching in and then leaving to park car, get breakfast, or other tasks are prohibited.

1st offense: Verbal reprimand (written notice for technician's personal file and Union to document the communication occurred)

2nd offense: Written warning notice (copy to employee's personnel file, employee and Union)

3rd Offense: Final written warning notice (copy to employee's personnel file, employee and Union)

> *4th Offense:* Subject to termination after management review
>
> Unexcused Absence/Tardiness/Early Leave warnings will be separate warnings to Discipline and Training warning letters except in the case of "No Call/No Show" warnings. All unexcused Absence/Tardiness/Early Leave warning shall be held for 1 year from the date of issue.
>
> Fulltime technicians are allowed a maximum of 2 excused sick days per calendar year after first 90 days of employment. Excessive absences will be subject to discipline.[32]

Upon learning of the new policy, the Union filed a grievance.

(3) Car Washing

Prior to the strike, the Company employed porters to clean, wash gas and move cars, as well as the facilities. Mechanics were not asked to wash cars. Upon returning from the strike, however, business was slow and, on at least one occasion, Towe was temporarily tasked with washing cars. The Company implemented that temporary change without notifying the Union.[33]

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32. Jt. Exh. 9.

33. Towe was the only witness to testify that he was directed by Towe was asked by Klodzinski to wash cars on an unspecified date. (Tr. 86-87, 102.) Gonzalez explained that washing cars

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K The October 6th Meeting

At approximately 11:00 a.m. on October 6, Klodzinski instructed the mechanics to cease work so they could have a meeting. The service managers, service advisors, parts department, John, Frank and Mark were all present. In a meeting that lasted approximately 40 minutes, Laskaris revisited the contentious events of the past several months and his labor relations approach going forward. He told the mechanics that they could take notes and tell the Union the same thing to their face.[34] Laskaris' comments were secretly recorded by Towe:[35]

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potentially reduced mechanics' earnings potential since it was not compensable as book time. He did not, however, confirm that he was actually assigned to wash cars at any time. (Tr. 163-164.) Nor do I credit Cicinelli's testimony that the Company never bargained over an attendance policy is undisputed. However, I do not credit his uncorroborated hearsay testimony that strikers told him that they photographed unit employees washing cars. (Tr. 59-61)

34. Laskaris testified that he needed to address the group because he was "getting grievances over the most frivolous, stupid things in my eyes." (Tr. 245-246, 275.)

35. The Company did not object to the authenticity and accuracy of the recording but objected to its admission on the ground that Illinois is a dual party consent state and Towe did not receive Laskaris' permission to record the meeting. As I explained at hearing, tape recordings are typically admitted in Board proceedings, even if made without the knowledge or consent of a party to the conversation, and even if the taping violates state law. *Times Herald Record*, 334 NLRB 350, 354 (2001), enfd. 27 Fed.Appx. 64 (2d Cir. 2001); *Williamhouse of California, Inc.*, 317 NLRB 699 fn. 1 (1995), and *Wellstream Corp.*, 313 NLRB 698, 711 (1994).

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I want to make something really clear. I'm going to draw you an analogy. Chuck, you own a house? You invite us all into your home, give us an opportunity to sleep, eat, share holidays, earn a little living, happy times, also you come home one day, and we're standing on your front lawn, fucking with your neighbors, fucking with your kids, trying to keep you from putting bread on the table, going on Facebook saying how much of an asshole you are, how shitty your food is and how fucked up your house is. But once I get what I want, which is ... out of my control, nothing to do with the contract, you got to open your house and take all of these people back in, sing kumbaya and let all of these people back in . . . I have a hard time with that . . . I think you guys were misled, severely misled, let me give you an example. You show up on Monday to come back to work and he assembles you across the street and we're going to walk on the lot for hours of meetings and your guy who you see every four years who doesn't give a shit about you, is in my office telling me how the fuck I'm going to run my store. . . He's telling me how the shit is going to go down in my house. . . . I put my name up there so I could walk around with a big dick, no, this is our place. . .

So I tell him these okay these guys are coming back. Here's the return to work policy. I'm going to open up the doors two hours early, get your tools and be ready to get to work at 7:30, not

disrupting a day's work. He makes sure he lets you guys know, fuck that, we're not going to do that, we're going to do it our way . . . He starts whining we can't get our tools today . . . . So he assembles you and walks you across the parking lot . . . and you guys come walking up like West Side Story right in the front door and are going to cause a scene with the union guy who is not going to know your fucking name in a couple of months . . . "We'll go show him, we'll go fuck with him." Good idea guys. . . . So what I do? I tell you guys, "we're opening at 5:30. Bring your tools and be ready to go," didn't I? "Any questions?" Nope. Everybody leaves. Mark gets on the telephone with Johnny and calls every one of you guys. Spoke to most of you. What were you told? [An attendee says "between 5:30 and 7:30"] . . . and they said "no problem, I'll be there ready to go . . . Somewhere between Monday and Tuesday you guys get misled by some guy who really doesn't give a shit about you. Somehow he talks you into not bringing in your tools in. "We'll just say the rental place isn't open, storage place isn't open." He didn't say, you know what guys, you're my union guys, I'll send the union truck over to pick them up right now and I'll park that truck at union hall" . . . Did he do that for you guys, because I would have done that for you. He didn't. He said "meet me across the street, we'll go fuck with him again." You know he cost you guys a days' pay. He probably told you "that he'll have to

pay you on Tuesday." No. "You said you'd be in your stall ready to go. You had plenty of notice. You weren't in your stall ready to go so I'm not paying you". . . "Let's fuck with the guy more" and the result is, Mike, you don't get another day's pay . . . I could have been a prick and said "we'll try it again tomorrow at 5:30." I should of, but I didn't. I said, fine, we'll try it again tonight after work . . . Then I said let's bring it in tomorrow morning and Sam said "no, the rental place isn't open." I have a question for you guys. You're supposed to be in your stalls ready to go on Tuesday. You said you'd be ready to go. If your family depended on breathing on Wednesday based on the money you made on Tuesday, would those tools have been here. Chuck? You would found a way to get the tools here. So let's stop the bull shit, the rental places, it's all posturing bull shit.

Why am I telling you? You can grieve whatever you want. Let me tell you about the grievance process. You put it in writing and you complain to someone here, me or management and you let the union know. That's the process. Otherwise the grievance doesn't mean shit. He can walk up on the lot and hand me whatever he wants. . . What I'm telling you is I don't give a shit about grievances. Grieve all you want. It doesn't matter. They can't do shit. . . "They're not giving us free water . . . [or] gloves anymore." . . . Grieve all you want. . . . Bull shit.

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I don't care about grievances, grieve all you want. . . Keep putting you name on it. You look stupid saying they don't give me free water. Until this happened, you were happy working here. Grieved about water, go ask Jean who makes 20% of what you make where she gets her water, she'll tell you she gets it from her house. Be a man, grieve something important, like wages. . .

You don't know how many times I mortgaged my house to make sure you got a paycheck. . . . You didn't stand there and tell the Toyota guys, "fuck with your own owner and fuck with your own customers and leave ours alone." None of you did that. Instead, you call them over and say "you blow the horn let's get him to do it" . . . You wonder why I'm pissed. . . . It's not right, I'm here to tell you I don't care, I don't care on what you grieve, I don't care how much you complain, they're not going to tell me what to do. I suggest you read your little blue book that he waved in my face like a smug asshole . . . and if I follow that book your life harder will get harder . . . . There's so much stuff in that book that nobody enforces. Why? Because we don't want to be that kind of place. You're going to grieve gloves, guys? Good luck. . . . Why are you putting your name on that, guys? Step away from all this and go ask I'm a man first and I have a family. Why am I signing a piece of paper crying about gloves? If it's so bad

go somewhere else. It's okay. You guys need to understand . . . I'm the nicest guy in the world, fuck with me and I'm going to fight harder. . . . I couldn't sit back during this thing and go "ah, it will end someday, no problem, here's your paycheck . . . Mark." . . . Why don't you call the parts guy . . . ask Jim later after eating shit for all these months, running parts for you guys, . . . while you're making $ 1,500, $ 2,000, $ 2,500 per week and he's making a fraction of that, ask him how he felt being laid off while with no paycheck you guys are playing darts outside, blowing horns, making sounds, fucking dancing. . . . Ask some of these people . . . [the sales] and parts people . . . what it feels like to throw water in front of his car, videotape him instead of letting him sell cars, and then going on Facebook and saying that he's going to run me over. . . You guys should instead be angry at Johnny and Sam . . .

Every 701 member has an option. . . You could be a financial core member . . . you get everything everybody else gets. You're a member like everybody else. All your benefits are protected. You trade one thing. You never have to strike. . . . But you give up your vote on the contract but you never have to strike. . . . But before you strike ever again educate yourself. Because if I were you, I would have changed my membership a week before the strike. . . . "I'm going to go to work and get a paycheck

while those guys throw play darts, lift weights and make assholes out of themselves". . . . By the way, your [union representative] he came in and had a meeting with a couple of guys to sign them up and they said tell me what I'm signing, he goes never mind, just sign, he bullies them. Then they said tell me about financial core. . . . There's no such thing. He lies to them. Now he's calling them scabs. . .

The same person who is on Facebook saying what a horrible place to work this is . . . why do you want to be here? . . . [Shows a videotape of Towe stepping in front of an elderly customer seeking to test drive a vehicle] . . .

If they're gang raping a woman and you stood by are you about as guilty as them? . . . Keep filing shit . . . I would look for a job if I were some of you, maybe all of you. . . . I wouldn't want to be where I'm not wanted. . . . While you're playing darts, Pat . . . are you kidding me? . . . You guys shit on our house. . . . I look out the window and I saw some of you guys.. . . We were in a labor dispute. I couldn't talk to you guys. But you could have picked up the phone and called Mark, or called me or called John. You could as a group . . . walked in with your leader Johnny who led you down a shitty path and . . . could have walked in before the strike and said "what are our options" and educated yourselves. At that point I didn't know what our options were. . . .

Appendix B

There's a contract. We're going to follow it. But I'm not putting up with any more bullshit ... There's more videos of behavior ... that will make your stomach turn. . . . I expected a little more loyalty towards the 70 families here . . . Refer to these guys as scabs and see what happens . . .

This shop is going to be run the way I want it to get run, not the way Sam's going to tell you . . . Gloves, water? You can't do shit about gloves or water. . . . Pick a fight that's worth fighting, guys. Stop it. Or just keep it up. Call him today. Tell him that I threatened your guys to all look for jobs. . . . Know what the penalty is? . . . Okay, I won't do that anymore. . . So they have you thinking they have some power over us. That's shit. . . .

I own this place. . . . If you think for a minute Chuck that I have to keep you here long term, you're wrong. It doesn't matter . . . I have 701 guys here who want to work, who are hungry and happy and respect coworkers jobs, so next time they face a horrible decision they'll know what they're walking into instead of obstructing customers and dealers who are trying to sell cars. . . . Johnny, stay the fuck off of Facebook and stop trashing the dealership. . . . and harassing people. . . .

Appendix B

Watching a guy like Matt who came here as an apprentice and made $ 120,000 last year. That's gratifying to me. And then watching him go outside and act like a complete asshole, pissing on his fucking $ 10,000 a month. How smart is that? And not having a guy like Ronny and Mike and Chuck saying "Matt, fucking don't do that, chill, you want to do that, go back there and sit under a tree. That would have been good advice. . . . Nobody can tell you to act like an asshole, nobody can tell you to obstruct our business, obstruct our building to make a living. . . .

What you don't even know now they cost you a day's pay by giving you bad advice that day. . . . Some of you said I'll be there with my tools ready to go. Someone talked you out of it. So you start work on Wednesday instead of Tuesday. Cost you a day's pay. Right? He can fight for it. Right? Good luck. I can hear the judge now: "Let me get this right, Chuck, you're a grown man, been doing this a long time, you said you'd be there on time, it was 12 o'clock on Monday, you couldn't rent a truck and get your tools to work by Tuesday morning like you said you could?" He's not going to believe you. He's not going to be able to pay you. . . . That's your friend Sam, giving you good advice. . . .

And then they negotiated a contract. You know the first one you vote on wasn't what you were

offered. I was dumfounded. I thought that could be illegal. We could have offered you $ 50 an hour. . . . They didn't put the real numbers in front of you until they were ready to settle the strike. I tell you what, Sam did a great job against a real legal team, but he didn't do you guys any favors because the first contract offer was an unprecedented deal because everybody wanted to move on and keep going. Nobody wanted a strike. . . . That's not what's put in front of you. . . . I don't even know what you were offered because I stayed out of it. I didn't go to one meeting . . . . My point is, you guys get manipulated. Don't be manipulated by anybody, don't be manipulated by me, the union, anybody, look out for yourself, be smart. . . . The first thing they put in front of you was not even close to what you were offered. It was three times the historical rates that you guys got and it was voted down. Why? Because they lie to you. . . . You voted on some bullshit they put in front of you because they wanted a down vote to muscle. In the end you ended up with the same fucking deal but you sat out on the curb for six too long for $ 300 a week. How's that feel? And you pissed a lot of people off. How's that feel, Mike? . . .

[The union] keeps preoccupying our time with bullshit; I'll keep you guys busy with bullshit. . . . Keep shitting on your house with stupid bullshit over water. . . . [and that you used

to have] a chest on the wall, now I want it back. Really, who are you guys to anything? . . . You don't have a right to demand shit. They can write anything they want on those pieces. . . . .I'll buy you guys your own pads of grievances for Christmas if you want. . . .

Keep it up and we can play this game all day because I'm not backing down. I'm not going to be bullied by Sam. He's not going to put his fucking finger in my face. . . . You guys put me on [the news]. . . I'm an asshole. . . . My kid is going to Google that shit someday. I deserve that? . . .

14 guys acted badly, misguided, misled . . . Easy decision for me. So go home every night and tell yourself, "What a cock sucker he is." It's OK. I can live with it. I can be the nicest guy in the world, you put me in a corner, I'm going to fucking eat your face. That's who I am. I'll give you a kidney, Ronnie but you fuck with me and my people, I'm going to eat your kidney out of your body and spit it at you. That's how nasty I can be. It's not in my nature to be a prick, but when I see shit like that Pat, it's easy to be a prick to you; real easy. And they can't stop me from being a prick. So you should ask yourself a question, do you want to work for a prick? Think about it. You got anything you want to say? . . . Let's go back to work.

Appendix B

L. The October 27 Threat

Brian Higgins, a journeyman service technician, has been employed by the Company for about 2 years. He was not one of the unit employees not recalled on September 18. On October 27, Laskaris called Higgins to inform him that he was finally being recalled to work and if he was still interested. Higgins responded affirmatively. Laskaris, however, replied that he did not want Higgins or any of the remaining permanently replaced employees to return to work. He also warned that if Higgins returned to work it would not be long before he was gone.[36]

M. The November 17th Recall Letters

On November 17, the Company offered recall to Higgins, Wilson, Scott, Gibbs and Mendralla from their status as "a permanently replaced employee in accordance with the recently ratified collective bargaining agreement between the NCDC and Local 701:"

> We expect you that you will return to work on Monday November 20, 2017. If, however, you are unable to report on Monday, November 20, 2017, as outlined in the Standard Automotive Agreement strike settlement agreement regarding recall, you will have three (3) working days to report after notice of recall. If you have reasonable excuse for being unable

36. Laskaris did not dispute Higgins' credible testimony regarding this conversation. (Tr. 149-150.)

> to report during this time period, please communicate that excuse within the three working day period to Jeremy Moritz . . . [his] assistant (Brittany Chadek) can be reached at . . . For these purposes, a communication from a union official (including Mr. Cicinelli) or the Union's attorney . . . regarding your intended return is sufficient.
>
> If you fail to report or do not provide a reasonable excuse within the three-day period, you will be considered as having resigned from employment. Waiving your recall at this time will be permanent and will result in loss of all future recall rights as well as a break in seniority with [the Company], in accordance with the current collective bargaining agreement.
>
> We are looking forward to having you return as a valued member of our organization and look forward to hearing from you soon.[37]

LEGAL ANALYSIS

I THE 8(A)(1) THREATS

Under Section 8(a)(1) of the Act, an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title". 29 U.S.C. § 158. The Supreme Court described the

37. Jt. Exh. 10.

balance between those employee rights and an employer's free speech rights as codified by Section 8(c) in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969):

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company.

Between June 29 and October 6, the Company made numerous threats and coercive statements that lacked the objective character necessary to invoke the protection of Section 8(c).

A. June 29

During a conversation initiated by Bisbikis on June 29 regarding employee concerns, Laskaris warned him that "things would not be the same" if unit employees went on strike. The statement violated Section 8(a)(1). It did not communicate any objective facts or predictions as to the effects of a potential strike. Although vague, the statement's timing is significant as it occurred just before a strike was about to begin at the dealership. See *United Aircraft Corp.*, 192 NLRB 382, 383 (1971) (Employer violated the Act with statement two days before a pending strike that "[a] lot of people are going to get hurt and

a lot of people won't be coming back"). On its face, the statement cannot be viewed as anything but a threat that a strike would produce only negative consequences for the unit. *Communications Workers Local 9509*, 303 NLRB 264, 272 (1991) (employer's thinly veiled threats to an employee with respect to their union activities was unlawful); *APA Transport Corp.*, 285 NLRB 928, 931 (1987) (same); *Waterbed World*, 286 NLRB 425, 427 (1987) (same).

C. September 20

On September 20, Towe was interrogated by Laskaris about his alleged picket line misconduct, culminating with the dire prediction by Laskaris that Towe would not be at the Company very long and should find another job. The overarching theme of the conversation was not Towe's shenanigans on a particular day, but rather, Laskaris' disapproval of Towe's overall participation in the strike. Laskaris did not assert, and there is no other evidence in the record indicating otherwise, that the statement was made in jest. See *Electri-Flex Co.*, 238 NLRB 713, 716 (1978) (finding an 8(a)(1) violation where employer offered discredited testimony that the threat of discharge was a joke); cf. *Baker Machinery Co.*, 184 NLRB 358, 361 (1970) (rejecting a Section 8(a)(1) claim where foreman joked that an employee's days were numbered). Under the circumstances, Laskaris' statement of doubt as to Towe's continued employment was a threat of discharge in response to protected union activity in violation of Section 8(a)(1). *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995) (coercive threats may be implied rather than

stated expressly); *National By-Products, Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991) (same).

C. September 25

On or about September 25, Laskaris held a staff meeting with Gonzalez and other employees to address union leafleting at the dealership. At that meeting, in conjunction with his complaint about continued union leafleting in front of the dealership, Laskaris remarked that he would lay off all of the recalled employees if he ran out of work.

Pursuant to *Gissel*, the question is whether Laskaris' statements constituted an unlawful threat of retaliation in response to protected activity or a lawful, fact-based prediction of economic consequences beyond the employer's control. 395 U.S. 575, at 618-619, 89 S. Ct. 1918, 23 L. Ed. 2d 547. In this case, the Company provided no evidence that leafleting was causing such substantial economic harm as to justify the termination of a large number of employees. See *Massachusetts Coastal Seafoods*, 293 NLRB 496, 510-512 (1989) (statement by company official is an unlawful threat, not a lawful prediction, when the official gave no facts or figures to support prediction of economic effects); cf. In Re *Tvi, Inc.*, 337 NLRB 1039 (2002) (finding that supervisor made a lawful prediction of potential layoffs where company was not profitable and the statement was carefully phrased). Laskaris could have made his views about the dealership's economic condition known without threatening to terminate employees but decided to engage in the type of "brinksmanship" that

the Supreme Court has observed often leads employers to "'overstep and tumble (over) the brink." *Gissel*, 395 U.S. at 620, quoting *Wausau Steel Corp. v. NLRB*, 377 F.2d 369, 372 (7th Cir. 1967). Instead, he took the opportunity to once again cast union activity as inimical to unit members' employment security in violation of Section 8(a)(1).

D. October 6

The complaint alleges that on October 6, Laskaris convened a meeting on the shop floor with all of the mechanics working that day. During the meeting, Laskaris threatened employees with stricter enforcement of company rules, informed them that it would be futile to file grievances, encouraged employees to resign their membership in the union or become core members of the union, coerced employees by telling them that past employees had lost their jobs over their decision to strike, and threatened employees with physical violence. Towe recorded the meeting in full, and the Company objected to the admission of the recording based on Illinois state law, but did not dispute the substance of the recording. The recording was received in evidence consistent with Board precedent. See fn. 35, supra.

An employer violates Section 8(a)(1) of the Act by threatening that it will more strictly enforce rules or policy because of employees' protected activity. *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1074 (2004) (employer unlawfully threatened stricter rule enforcement and restrictions on protected activities in non-work areas in response to unionization); *Mid-Mountain Foods, Inc.*, 332 NLRB 229, 237-38 (2000),

enfd. 269 F.3d 1075, 348 U.S. App. D.C. 75 (D.C. Cir. 2001) (supervisor unlawfully warned employees that the company would draft strict work rules that would be "followed to the letter"); *Long-Airdox Co.*, 277 NLRB 1157 (1985) (employer unlawfully threatened employees with plant closure and told them it would more strictly enforce plant rules).

During the meeting, Laskaris informed the employees that if he chose to enforce the rules as they were written, things would be much harder for them:

> I suggest you read your little blue book that he waved in my face like a smug asshole . . . and if I follow that book your life harder will get harder . . . . There's so much stuff in that book that nobody enforces. Why? Because we don't want to be that kind of place.

Laskaris' statement falls squarely in the *Long-Airdox Co.* line of cases as an unabashed threat of greater enforcement in response to union activity. The crux of the meeting was that there would be negative consequences for engaging in union activities. Moreover, Laskaris' statement of greater enforcement was clearly motivated by general animus towards the protected union actions that occurred at the dealership.

Laskaris' statement regarding the futility of filing grievances was premised on his aversion to letting the union tell him how to run his business. The Board has found violations of Section 8(a)(1) where an employer

"conveyed the impression that the contractual grievance procedure was futile." *Prudential Insurance Co. of America*, 317 NLRB 357 (1995) (supervisor unlawfully informed employee that filing grievances would "lead to a bad situation" and "it didn't matter what happened during the grievance procedure"); *Laredo Packing Co.*, 254 NLRB 1 (1981) (personnel director unlawfully explained to an employee why the grievance he filed lacked merit and threatened discharge if he did not withdraw it). Laskaris made his views regarding the futility of filing grievances and the low merit of past grievances abundantly clear:

> What I'm telling you is I don't give a shit about grievances. Grieve all you want. It doesn't matter. They can't do shit. . . "They're not giving us free water . . . [or] gloves anymore." . . . Grieve all you want. . . . Bull shit. I don't care about grievances, grieve all you want. . . Keep putting you name on it. You look stupid saying they don't give me free water. Until this happened, you were happy working here. Grieved about water, go ask Jean who makes 20% of what you make where she gets her water, she'll tell you she gets it from her house. Be a man, grieve something important, like wages. . . You wonder why I'm pissed . . . It's not right, I'm here to tell you I don't care, I don't care on what you grieve, I don't care how much you complain, they're not going to tell me what to do.

In unequivocal fashion, Laskaris stated that he had no patience for past grievances, nor would he entertain any

grievances that did not comport with his idea of a "real grievance." These comments crossed the line of protected employer speech under Section 8(c) and, thus, violated Section 8(a)(1).

Laskaris continued the meeting by making a pitch for why the employees should resign from the Union or become financial core members:

> Every 701 member has an option. . . You could be a financial core member . . . you get everything everybody else gets. You're a member like everybody else. All your benefits are protected. You trade one thing. You never have to strike. . . . but you give up your vote on the contract but you never have to strike . .. but before you strike ever again educate yourself. Because if I were you, I would have changed my membership a week before the strike. . . . I'm going to go to work and get a paycheck while those guys throw play darts, lift weights and make assholes out of themselves. . . . By the way, your [union representative] he came in and had a meeting with a couple of guys to sign them up and they said tell me what I'm signing, he goes never mind, just sign, he bullies them. Then they said tell me about financial core. . . . There's no such thing. He lies to them. Now he's calling them scabs. . .

Pursuant to *Gissel*, an employer is free to communicate to his employees any of his general views about unionism or

any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." Laskaris' remarks displayed clear animus toward the union and its representatives, and overzealously encouraged the unit to consider his proposal for withdrawing union membership. *Adair Standish Corp. v. NLRB.*, 912 F.2d 854, 860 (6th Cir.), judgment entered, 914 F.2d 255 (6th Cir. 1990) (supervisor violated Section 8(a)(1) when he "took it upon himself" to "let the employees know that [he] had forms to fill out to revoke their authorization cards"); *Peabody Coal Co. v. NLRB*, 725 F.2d 357, 364 (6th Cir. 1984) (finding a Section 8(a)(1) violation where the employer "offered both the method and the means to withdraw from the union" and encouraged consideration of this option"). It is noteworthy that Laskaris openly displayed animus toward the Union and engaged in other Section 8(a)(1) violations before and after these remarks. *NLRB v. E.I. DuPont de Nemours*, 750 F.2d 524, 528 (6th Cir. 1984) ("the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees"). Given the overtly hostile context of the October 6 staff meeting, Laskaris' encouragement of union members to resign from the union or become financial core members violated Section 8(a)(1).

Laskaris also blamed unit employees for the loss of nonunit employees' jobs because they chose to strike. He admonished the strikers for disrupting the work of nonunit employees and asked the strikers how they felt about the parts and sales department employees who were laid off because of the strike. Considering the total context in

which these statements occurred, Laskaris deliberately played on the sympathies of the unit employees to coerce them from exercising their Section 7 rights again in the future. *NLRB v. E.I. DuPont de Nemours*, 750 F.2d at 528. Accordingly, all statements placing responsibility on unit employees for the loss of nonunit jobs violated Section 8(a)(1) of the Act.

As the meeting wound down, Laskaris ratcheted the impact of his coercive remarks with anatomically colorful remarks that reasonably threatened physical harm if unit employees continued to engage in future union activity:

> 14 guys acted badly, so go home every night and say what a cock sucker he is, I'm Ok with it, put me in a corner, I'll eat your face, I'll give you a kidney, but you fuck with me and my people, Ronnie, I'm going to eat your kidney out of your body and spit it out. That's how nasty I can be. And they can't stop me from being a prick. Ask if you want to work for a prick. Anything you want to say?

Laskaris made this statement during a heated speech aimed at returning strikers and other employees, and it was not unreasonable for the employees present to be shocked by Laskaris' comments. See *Jax Mold & Machine, Inc.*, 255 NLRB 942, 946-947 (1981) (supervisor's statement made in anger that he would shoot union supporters constituted an unlawful threat), enfd. 683 F.2d 418 (11th Cir. 1982); cf. *Strauss & Son, Inc.*, 200 NLRB 812, 822 (1972) (no violation where employees would not have

believed the employer when he said he wished he could load certain employees into a truck, put some dynamite into it, and blow them all up). Laskaris' remark was not made in jest but was an act of verbal intimidation that conveyed to the employees in attendance that union activities were not to be repeated. Even if Laskaris' statements were not construed as legitimate threats to cause bodily harm, they would reasonably tend to coerce employees in the exercise of their Section 7 rights. *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, slip op. at fn. 6 (2016). For the foregoing reasons, Laskaris' threats violated Section 8(a)(1).

E. October 27

Higgins received a telephone call from Laskaris regarding his recall. During the call, Laskaris told Higgins that he did not want Higgins or any of the remaining permanently replaced employees to return to work. He then warned Higgins that if he returned to work it would not be long before he was gone.

Laskaris' statements were overtly coercive in trying to convince Higgins that returning to the Company would not be in his best interest. The expression of doubt as to Higgins' longevity with the Company violated Section 8(a)(1). See *Concepts & Designs, Inc.*, 318 NLRB at 954.

II. ALLEGED ADVERSE ACTIONS

The complaint alleges that Laskaris terminated Bisbikis' employment because he engaged in concerted union activities and to dissuade others from engaging

in such activities. The Company contends that Bisbikis' discharge resulted from his use of vulgar language and, thus, insubordinate conduct, toward Laskaris. Other alleged acts of retribution include the institution of a new attendance policy, the removal of free gloves and water, the implementation of restrictions on Union access to Company facilities, the Company's tasking of unit mechanics with washing cars, Laskaris' dismissal of unit employees without pay on September 18, and the Company's four month delay in recalling five permanently replaced employees.

In determining whether Bisbikis and unit employees were subjected to adverse employer action because they engaged in protected or union activity, the appropriate test is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982), approved at *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983). The General Counsel must initially show the employee's protected activity was a motivating factor in the decision to terminate. See *Coastal Sunbelt Produce, Inc. & Mayra L. Gagastume*, 362 NLRB 997, 997, 362 NLRB No. 126(2015) ("Under *Wright Line*, the General Counsel has the initial burden to show that protected conduct was a motivating factor in the employer's decision"). Establishing unlawful motivation requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit,*

Inc., 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009) (unlawful motivation found where the employee became active in union activity, the employer was aware that he was leading employee meetings, and the employer singled out the employee for testing).

If the General Counsel prevails, the burden shifts to the Company to prove that it would have terminated Bisbikis regardless of his protected concerted activity. 251 NLRB at 1089; *Manno Electric*, 321 NLRB 278, 281 (1996) (employer's affirmative defenses failed to establish that it would have transferred the workers to new job sites regardless of their union activities). An employer may not offer pretextual reasons for discharging an employee. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007) (finding that employer's reliance on a minor infraction and a claim of insubordination were pretexts for discharging an employee); *Golden State Foods Corp.*, 340 NLRB 382 (2003) (noting that there is no need to perform the second part of the *Wright-Line* test if the reasons for discharge are merely pretextual.)

B. Bisbikis and Unit Employees Engaged in Concerted Protected Activity

Protected concerted activity is defined as activity which is "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 (1983) (*Meyers I*), cert. denied 474 U.S. 948, 106 S. Ct. 313, 88 L. Ed. 2d 294 (1985), supplemented 281 NLRB 882 (1986) (*Meyers II*), cert denied. 487 U.S. 1205, 108 S. Ct. 2847, 101

L. Ed. 2d 884 (1988). In *Meyers II*, the Board broadened the scope of the definition to include "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. 281 NLRB at 887.

It is undisputed that Bisbikis and unit employees engaged in protected concerted and union activity and the Company had knowledge of this activity. Bisbikis prominently engaged in union activity as the union steward at the Company. On June 29, he went to Laskaris' office to discuss the costs of uniform shirts and the pending strike. Bisbikis and unit employees organized and participated in the 7-1/2 week strike that followed the failure of the union and NCDC to reach a new collective-bargaining agreement. On September 18, after the strike concluded, Bisbikis and Union Representatives Cicinelli and Thomas met with Laskaris and Francek on behalf of the unit so that they could discuss a return-to-work plan and communicate grievances.

B. The Discharge was Motivated by Animus

Common indicators of animus are a showing of "suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employee." *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

Bisbikis worked at the Company for 15 years, and by all accounts had an amicable relationship with management throughout his tenure. His relationship with Laskaris began to deteriorate, however, when he met with Laskaris on June 29 to discuss shop issues, particularly the new requirement that employees would be required to cover the cost of their uniform shirts. At this meeting, Laskaris rejected Bisbikis' proposal and warned him that if the mechanics went on strike, "things wouldn't be the same." This threat constituted an 8(a)(1) violation which is also compelling evidence of animus. See In Re *Sunrise Health Care Corp.*, 334 NLRB 903 (2001) (veiled threat of more onerous working conditions was both an 8(a)(1) violation and evidence of animus); In Re *Casino Ready Mix, Inc.*, 335 NLRB 463, 465 (2001) (unlawful threat to move the Company or replace the drivers with owner-operators to avoid unionization was sufficient to establish animus).

Moreover, during the strike, Bisbikis and four other employees were informed that they had been permanently replaced. Neither Laskaris nor Francek offered an explanation as to why Bisbikis and the four other employees were permanently replaced while everyone else was able to return to work. At the conclusion of the strike, Laskaris ejected Bisbikis from his office when he arrived with Cicinelli and Thomas to discuss the return-to-work process on September 18. Bisbikis returned with the union representatives a short while later, ignored Laskaris' demand that he leave, and persisted in conveying the grievances of unit employees as their steward. The recitation included a reference to Laskaris' June 29 threats, which Laskaris falsely denied. After Bisbikis

called him a liar, Laskaris told him to "get the fuck out," at which point Bisbikis insulted him in Greek. Laskaris banished Bisbikis for good, telling him that he was fired.

The aforementioned circumstances provide strong indications that Bisbikis' union and other protected activity was a "substantial or motivating factor" in the decision to discharge him. *North Hills Office Services*, 346 NLRB 1099, 1100 (2006) (General Counsel met its initial burden by showing that the employer instituted a new uniform policy and changed lunch schedules to curtail Section 7 activity). Evidence of animus can be inferred from the entirety of the record, looking to both circumstantial evidence and, where available, direct evidence. See e.g., *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1023-1024 (1999) (Circumstantial evidence that employer knew about and was monitoring an employee organizing campaign, combined with the suspicious timing of employee discharges, was sufficient to infer animus). In *Alternative Entertainment. Inc.*, 363 NLRB No. 131 (2016), enfd. 858 F.3d 393 (6th Cir. 2017), an employee engaged in protected concerted activity by discussing concerns about a change in the wage structure with other co-workers. Management knew about his protected activity, pulled him aside and asked that he refrain from discussing this issue with other workers. Shortly thereafter, the discriminatee was fired. The Board agreed that the timing of the discharge, in the absence of direct evidence, provided "strong circumstantial evidence" of not only knowledge of continued engagement with a protected activity, but also of a discriminatory motive. Id.

The timing significantly undermines the Company's assertion that Bisbikis was discharged solely for insulting Laskaris and calling him a liar. Laskaris ominously warned Bisbikis not to go ahead with a strike, but the unit did so anyway. After the strike began, Laskaris made clear his displeasure with Bisbikis by permanently replacing him. When Bisbikis tried to get an explanation for his discharge and explain some of his coworkers' grievances, Laskaris adamantly refused to speak with him.

Moreover, the Company failed to demonstrate that Bisbikis' insult of Laskaris was such an egregious violation of company policy that it warranted immediate discharge. Bisbikis allegedly violated the Company's code of conduct, but the Company never produced evidence of such a policy. Nor did the Company produce evidence explaining its decision to permanently replace Bisbikis, the union steward, and five other employees, while recalling seven others.

Lastly, even after Bisbikis was discharged, Laskaris made a point to voice his displeasure with Bisbikis to all of the mechanics in the shop during the October 6 meeting. The cumulative weight of the credible evidence strongly supports the conclusion that Laskaris' animus toward Bisbikis' protected union activity was the primary motivation for discharging him.

The Company's contention that Bisbikis' insubordination extinguished his Section 7 protection is incorrect. An employee's right to engage in concerted activity permits some leeway for impulsive behavior,

which must be balanced against the employer's right to maintain order and respect. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584 (7th Cir. 1965). The Board uses a four-factor test to determine whether communication between an employee and a manager or supervisor in a workplace is so derogatory that it causes the employee to lose the protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). The four factors are: (1) the place of discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by the employer's unfair labor practice. *Id.*

The incident between Bisbikis and Laskaris took place in the midst of a heated discussion in Laskaris' office outside the purview of any other employees. Bisbikis' language, while vulgar, did not disrupt the workplace, nor did it undermine management's authority. *Stanford Hotel*, 344 NLRB 558 (2005) (highlighting that the workplace outburst occurred away from the normal working area in a closed door meeting where no other employees were present, and did not weaken management's authority). Prior to the outburst, Bisbikis was speaking about issues related to both his own replacement and the replacement of other employees, as well as other grievances held by unit employees. Bisbikis' insult occurred after Laskaris refused to explain why certain employees were permanently replaced, would not consider the grievances Bisbikis wanted to convey, and denied ever meeting with Bisbikis about worker complaints prior to the strike. Bisbikis wanted to discuss potential unlawful labor practices that affected the unit, including himself, but resorted to insulting Laskaris after the two were

unable to have a productive conversation.[38] Considering all the *Atlantic Steel* factors together, Bisbikis' conduct was not egregiously derogatory, and thus he retained the protection of the Act. See *Syn-Tech Windows Sys.*, 294 NLRB 791, 792 (1989) (Employee did not lose the protection of the Act when he pointed his finger angrily at a manager and made an unspecified threat during a meeting about union activities); *Union Carbide Corp.*, 331 NLRB 356 fn. 1 (2000) (Employee's conduct was "at most rude and disrespectful" when he called his supervisor a "fucking liar").

C. The Adverse Actions Taken Against Unit Employees

The Company's attendance policy was first communicated to employees via the September 18 recall letters. The previously awarded benefits of free water and gloves were also taken away in the immediate aftermath of the strike. Creating these policies within days of a concluded strike is suspicious, especially since the Company gave no indication that it considered having a formal attendance policy or ending its practice of free water and gloves prior to the strike. The Company presented no evidence that it would have implemented the attendance policy regardless of the unit's protected activities. The Company continued to offer water and gloves, but at high prices, removed the shop water fountain, and banned employees from having refrigerators on the

38. Foul language was used at least once during the conversation prior to Bisbikis' insult when Laskaris told Bisbikis to "get the fuck out before I get you the fuck out."

premises. The Company's price gouging, lack of a credible explanation for its conduct, and suspicious timing indicate that the decision to withdraw free gloves and water was motivated by animus towards the protected activities of the unit. See *Frierson Building. Supply Co.*, 328 NLRB at 1023-1024; *Medic One, Inc.*, 331 NLRB at 475.

In the midst of a slow business period, the Company assigned Towe, an apprentice mechanic, to wash cars, a task normally completed by porters. That unspecified amount of time spent washing cars counted towards Towe's flat salary rate but not as book time. In the absence of evidence that Towe was bypassed for available book work, the claim that he suffered economic loss fails. Accordingly, this allegation is dismissed. *Manno Electric*, 321 NLRB 278.

Management instructed the recalled employees to bring their tools with them when they returned to work on September 18. Unit employees, however, were clearly not prepared to return to work that day. Rather than ask management for leeway to arrive later that morning so that they could get their tools after the storage facility opened, they arrived empty-handed with their union representatives and grievances. Laskaris was also uncooperative on September 18 and at the outset on September 19 when unit employees paraded, once again empty-handed, to the facility. He eventually relented, however, and permitted unit employees to return their tools later during the afternoon of September 19 and they returned to work the following day. Under the circumstances, considering the Company's interest in

avoiding disruption of having massive tool boxes hauled back into the shop during business hours, the eventual arrangement was not unreasonable. *Manno Electric*, 321 NLRB 278. This complaint allegation is also dismissed.

III. UNILATERAL CHANGES TO WORK TERMS AND CONDITIONS

The complaint alleges that the Company violated Section 8(a)(5) and (1) of the Act by enacting a new attendance policy, removing free gloves and water that were once provided to employees, assigning mechanics to wash cars, and changing the Union access policy without going through the collective bargaining procedure. The General Counsel claims that the Strike Settlement Agreement and Successor Contract required the Company to abide by the collective bargaining procedure with respect to changing any previously existing policies and procedures. The General Counsel also asserts that the Company's delay in recalling five permanently replaced until November was a violation of Section 8(a)(5). The Company concedes that it took these unilateral actions but asserts that it did so justifiably.

Where a unilateral change in the terms or conditions of employment is material, substantial, and significant, such a change constitutes a violation of Section 8(a)(5) and (1) of the Act. *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987) (noting that there is a statutory bargaining obligation where the unilateral change affecting the terms and conditions of employment of bargaining unit employees is material, substantial and

significant); *Alamo Cement Company*, 277 NLRB 1031 (1985) (finding that a change in classification where the employee performed essentially the same function as before the change in classification was not a substantial, material, and significant change). Not every unilateral change, however, constitutes a violation of the bargaining obligation. Compare *J.W. Ferguson & Sons*, 299 NLRB 882, 892 (1990) (finding that the change was not material, substantial, and significant where the employer increased the lunchbreak by 5 minutes and decreased the afternoon break by 5 minutes; *Weather Tec Corp.*, 238 NLRB 1535 (1978) (finding the employer's decision to end paying for coffee supplies that employees used was not a material, substantial and significant change) with *Bohemian Club*, 351 NLRB 1065, 1066 (2007) (finding changes to cleaning duties material, substantial, and significant because cooks had to work an extra 30 minutes to accomplish new tasks, and involved new tasks such as wiping down walls, counters, refrigerator doors, and sweeping the floor) and *Crittenton Hospital*, 342 NLRB 686, 690 (2004); (finding a change in the dress code policy a material, substantial, and significant change to the terms and conditions of employment).

A. Attendance Policy

In its September 18 email recalling seven employees, the Company communicated, for the first time, an attendance policy. Several weeks later, the Company implemented another attendance policy without the input of the union. The Company did not have a written attendance policy prior to the strike. It neither disputed

this contention nor offered any reasoning for its unilateral decision to implement a written attendance policy. Neither economic expediency nor sound business considerations are sufficient for overcoming the obligation to bargain over a material, substantial term of employment. *Van Dorn Plastic Machinery Co.*, 265 NLRB 864, 865 (1982), modified 736 F.2d 343 (6th Cir. 1984) (finding a violation of Section 8(a)(5) where the employer implemented a new attendance policy without a *compelling economic justification*) (emphasis added). An attendance policy is undoubtedly a substantial aspect of the terms and conditions of employment for an employee. Id; *Steelworkers Local 2179 v. NLRB.*, 822 F.2d 559, 565-566 (5th Cir. 1987) (any subject classified as a "term or condition of employment" is a mandatory bargaining matter). Having proffered no compelling justification for its refusal to bargain over the attendance policy, the Company's unilateral creation of an attendance policy violated Section 8(a)(5) of the Act.

B. Free Gloves and Water

Approximately one week after the strike ended, the Company unilaterally ended its practice of providing free gloves and water to its employees. The Company asserted that it rescinded these privileges as a cost-cutting measure but presented no compelling economic justification for this decision. *Van Dorn Plastic Machinery Co.*, 265 NLRB at 865. The workers needed gloves to complete their work, effectively making it a part of their uniform. Any change to the dress code required the Company to bargain with the Union beforehand. *Crittenton Hospital*, 342 NLRB at 690. Employee access to clean drinking water is a material

aspect of employment as dictated by OSHA regulation. 29 C.F.R. § 1910.141(b)(1)(i) ("Potable water shall be provided in all places of employment, for drinking, washing of the person, cooking . . ."). Having failed to afford the Union an opportunity to bargain over these changes, the Company's rescission of free gloves and water violated Section 8(a)(5) of the Act.

C. Washing Cars

On an unspecified date on or after September 20, Towe was tasked with washing cars, a job that was completed solely by porters before the strike. Section 8 of the Successor Contract stipulates:

> If business is slack, the Employer may assign an employee work other than that which the employee is regularly classified where such work would not be hazardous to the employee due to lack of experience and training. The employee shall receive their applicable rate.

The Company's assertion that work was slow after the strike was not disputed. Moreover, Towe, an apprentice mechanic, was the only witness to testify that he was assigned to wash cars on an unspecified occasion(s). While there was undisputed testimony that washing cars instead of performing book work could diminish a mechanic's earnings potential, there was no evidence indicating that Towe or any other unit employee suffered economic loss as the result of such work. Accordingly, this allegation is dismissed.

Appendix B

D. Union Access Policy

The Company prohibited Union representatives Cicinelli and Thomas from accessing the unit employees without notifying the Union or bargaining with the Union. Several unsubstantiated safety reasons were proffered by the Company, and none of them are compelling. The policy governing Union access to employees was strictly governed by the Successor Contract and any changes to this policy required notification and bargaining. See *Angelica Healthcare Services Group*, 284 NLRB at 853. The company had no compelling justification for its unilateral change to the Union access policy. Id. Accordingly, the Company's unilateral change to the union access policy was a violation of Section 8(a)(5) and (1).

E. November Recall

During the strike, five-unit employees were permanently replaced and were not recalled to work until November. The procedure by which employees were to return to the Company was expressly governed by the settlement agreement and Successor Contract. The settlement agreement stated that temporary replacement workers would be displaced while permanently replaced employees would be placed on a preferential hiring list in order of seniority. The Company was unable to provide any evidence showing that the five employees recalled in November had been permanently replaced during the strike. The lack of immediate reinstatement for these five employees constituted a departure from the settlement agreement and a unilateral change to a

material condition of employment in violation of Section 8(a)(5). *Angelica Healthcare Services Group*, 284 NLRB at 853. Furthermore, the record is devoid of a compelling economic justification for the Company's decision to not recall five employees for almost 2 months after the strike was over. *Van Dorn Plastic Machinery Co.*, 265 NLRB at 865. It should be noted, however, that unlike the request for a make whole remedy for Bisbikis, there is no make whole remedy requested in the complaint or by the General Counsel regarding the 2-month delay in recalling the five employees. (See GC Br. at 36.)

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening that things would not be the same if employees went on strike, telling permanently replaced employees that he did not want any of them to return to work and that if they returned to work it would not be long before they were gone, telling employees that he would not be at the Respondent very long and should find another job, telling employees, as the Union leafleted outside the facility, that he would lay off recalled employees if he ran out of work, threatening stricter enforcement of company rules, informing employees that it would be futile to file grievances, encouraging employees to resign their membership or become core members of the Union,

telling employees that nonunit employees lost their jobs over the decision to strike, and threatening employees with physical violence, the Respondent violated Section 8(a)(1) of the Act.

4. By enacting new attendance policies, and removing free work gloves and drinking water because of employees' union activity, all without notifying the Union and giving it an opportunity to bargain over the changes, the Respondent violated Section 8(a)(3), (5) and (1).

5. By prohibiting access to Unit employees at the Respondent's facility by Union Representatives Sam Cicinelli and Ken Thomas because they engaged in union activity, and without first notifying the Union and giving it an opportunity to bargain over the changes, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By discharging John Bisbikis on September 18 because he supported the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

7. The remaining allegations are dismissed.

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.

Appendix B

The Respondent, having discriminatorily discharged John Bisbikis, must offer him reinstatement and make him whole for any loss of earnings and other benefits. 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).

In accordance with the Board's decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. 859 F.3d 23, 429 U.S. App. D.C. 270 (D.C. Cir. 2017), the Respondent shall also be ordered to compensate Bisbikis for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Additionally, the Respondent shall be required to compensate Bisbikis for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, the Respondent shall be ordered to remove from its files any reference to Bisbikis' unlawful discharge and to notify him in writing that this has been done and that the unlawful suspensions and discharges will not be used against him in any way Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate

calendar quarters. Respondent shall also compensate the discriminatee 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, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, Cadillac of Naperville, Inc., Naperville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that their terms and conditions of employment things would not be the same if they went on strike.

(b) Telling permanently replaced employees that you do not want any of them to return to work and that if they return to work it would not be long before they were gone.

(c) Telling employees that they would not be employed by you very long and should find another job because they engaged in strike or other union activities.

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39. 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.

(d) Telling employees that, if you ran out of work, you would lay them off first because they engaged in strike or other union activities.

(e) More strictly enforcing company rules because of employees' union activities or support.

(f) Telling employees that it would be futile to file grievances.

(g) Encouraging employees to resign their membership or become core members of the Union.

(h) Telling employees that nonunit employees lost their jobs over their decision to strike.

(i) Threatening employees with violence if they engage in concerted or union activities.

(j) Enacting attendance policies and removing free work gloves and drinking water because employees engage in strike or other union activity, without first notifying the Union and giving it an opportunity to bargain over such changes.

(k) Prohibiting access to unit employees at your facility by Union representatives without first notifying the Union and giving it an opportunity to bargain over such changes.

(l) Unilaterally changing the terms and conditions of employment of unit employees by implementing an

attendance policy and charging employees for the cost of work gloves and drinking water.

(m) Discharging employees because they supported the Union.

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

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

(a) Within 14 days from the date of this Order, offer John Bisbikis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

(b) Make Bisbikis whole for any loss of earnings and other beefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Compensate Bisbikis for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

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

(e) Notify all employees that written attendance policies issued on and after September 18, 2017, and policies issued on or after September 25, 2017, charging employees for the cost of work gloves and drinking water, have been rescinded.

(f) Before implementing any changes to attendance policies, work gloves, drinking water or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All of Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

(g) Within 14 days after service by the Region, post at its facility in Naperville, Illinois copies of the attached notice marked "Appendix."[40] Copies of the notice, on forms provided by the Regional Director for Region

40. 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.

13, 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 June 29, 2017.

(h) 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.

Appendix B

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

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you if you support a Union or engage in Union activities.

WE WILL NOT threaten you that your terms and conditions of employment things will not be the same if you go on strike.

Appendix B

WE WILL NOT tell you, if you go on strike and subsequently to return to work, that we do not want you to return to work and that if you do return to work it would not be long before you were gone.

WE WILL NOT tell you that will not be employed by us very long and should find another job if you engage in strike or other union activities.

WE WILL NOT tell you that, if we run out of work, that we will lay you off first because you engage in strike or other union activities.

WE WILL NOT more strictly enforce company rules because your union activities or support.

WE WILL NOT tell you that it would be futile to file grievances.

WE WILL NOT encourage you to resign your union membership or become a core member of the Union.

WE WILL NOT tell you that non-unit employees lost their jobs over your decision to strike.

WE WILL NOT threaten you with physical violence.

WE WILL NOT enact attendance policies and charge you for work gloves and drinking water because you engage in strike or other union activity, without first notifying the Union and giving it an opportunity to bargain over such changes.

Appendix B

WE WILL NOT prohibit access to you at your facility by Union representatives without first notifying the Union and giving it an opportunity to bargain over such changes.

WE WILL NOT 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.

WE WILL, within 14 days from the date of the Board's Order, offer John Bisbikis full reinstatement to his former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

WE WILL make Bisbikis whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Bisbikis for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Bisbikis, and WE WILL, within 3

days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind, and have rescinded, written attendance policies issued on and after September 18, 2017, and policies issued on or after September 25, 2017, charging employees for the cost of work gloves and drinking water.

WE WILL, before implementing any changes to attendance policies, work gloves, drinking water or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All of Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

CADILLAC OF NAPERVILLE, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-207245 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX C — DECISION OF THE NATIONAL LABOR RELATIONS BOARD, DIVISION OF JUDGES, DATED JUNE 19, 2018

NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CADILLAC OF NAPERVILLE, INC.

AND

AUTOMOBILE MECHANICS LOCAL 701,
INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS, AFL-CIO

Case 13-CA-207245
JD-41-18
Naperville, IL
June 19, 2018

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Chicago, Illinois on March 20-21, 2018. The complaint alleges that Cadillac of Naperville, Inc. (the Company or Respondent) engaged in numerous violations of the National Labor Relations Act (the Act)[1] relating to a 7 1/2 week strike by its service mechanics

1. 29 U.S.C. §§ 151-169.

during the summer of 2017.[2] Specifically, the Company is alleged to have violated Section 8(a)(1) of the Act by: threatening employees before and after the strike with discharge and other reprisal; informing employees that it would be futile for them to bring complaints to the Union; and encouraging or soliciting employees to resign their membership or become core members in the Union. The Company also allegedly violated Section 8(a)(3) and (1) of the Act by discharging employee and union steward John Bisbikis in retaliation for his union and protected concerted activities. Finally, the Company allegedly violated Section 8(a)(5) and (1) of the Act by implementing new policies relating to employee attendance, grievance procedures, free water and work gloves without affording notice to the Union and an opportunity to bargain over the change.

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

2. All dates refer to 2017 unless otherwise indicated.

3. The Company excepted to my ruling that witness affidavits needed to be returned to the General Counsel after cross-examination pursuant to *Jenks v. United States,* 353 U.S. 657, 662 (1957). Relying on the Board's decision in *Wal-Mart Stores, Inc.,* 339 NLRB 64, fn. 3 (2003), the Company argued that it was entitled to retain witness affidavits until the close of the hearing. As I ruled at the time, that the Board's holding in that decision, as well as Section 102.118 of the Board's Rules and Regulations, is not inconsistent with my practice of permitting renewed access to witness affidavits upon request in connection with the cross-examination of other witnesses. (Tr. 104-108).

Appendix C

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, is engaged in the sale and service of new and pre-owned automobiles at its facility in Naperville, Illinois, where it annually derives gross revenues in excess of $50,000, and purchases and receives goods and materials valued in excess of $5,000 directly from points outside the state of Illinois. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company, an auto dealership, has been individually owned and operated by Frank Laskaris since 1996. He serves as president. John Francek is vice president of operations. The Company's operations consist of the sales, service, parts and administrative departments. Mark Klodzinski, as service manager, supervises the service and parts department employees.[4] The discriminatee, John Bisbikis, was employed 15 years by the Company as a journeyman mechanic. He was never disciplined prior

4. The Company admits that Laskaris, Francek and Klodzinski are supervisors within the meaning of Section 2(11) and agents within the meaning of Section 2(13) of the Act.

to his termination. Bisbikis served as a union steward for over 10 years. Prior to June, Laskaris had a good relationship with Laskaris, who often referred to him as a leader of the mechanics.

B. The Expired Contract

The New Car Dealer Committee (the NCDC) is a multi-employer bargaining committee composed of 129 car dealers who assigned their rights to it to negotiate and administer master agreements with the Union representing 1,949 employees. The Company has been an employer-member of the NCDC since it was formed in 2002. At all times since August 1, 2013, the Company has recognized the Union as the exclusive collective-bargaining representative of its approximately 12 mechanics. The mechanics comprise a bargaining unit (the Unit) appropriate for the purposes of collective bargaining as described in the 2013-2017 contract between the NCDC, on behalf of the Company and other car dealers (the Expired Contract):

> The Employer recognizes the Union as the exclusive bargaining agent for all of its Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

Article 2 of the Expired Contract delineated the Unit employees' duties and responsibilities as follows: journeyman technicians perform electrical, mechanical

and other technical repair work; body shop technicians perform painting and reconditioning work; semiskilled body shop technicians perform sanding, masking, buffing, polishing, shop clean-up, disassemble damaged vehicles and deliver parts to body shop technicians; semi-skilled technicians prepare new vehicles for delivery, minor inspections, repairs and maintenance services and used vehicle reconditioning; apprentices perform the work of, and are supervised by, journeyman technicians and journeyman technicians and journeyman body shop technicians; and lube rack and part-time express team technicians perform miscellaneous tasks such as minor maintenance work, snow plowing and removal, transporting vehicles, cleaning and organizing shop equipment and delivering parts.

Notwithstanding the aforementioned classifications, Article 4 of the Expired Contract provided the Company flexibility in certain situations:

> Temporary Work. If business is slack, the Employer may assign an employee work other than that which the employee is regularly classified where such work would not be hazardous to the employee due to lack of experience and training. The employee shall receive their applicable rate. This assignment shall not infringe on the jurisdiction of another Union. Money earned under these circumstances shall be considered a part of the employee's regular flat earnings.

Appendix C

Article 5 provides Unit employees with an hourly rate of pay times 40 hours worked each week, plus pay for additional work performed within their specific classifications.[5] In addition, mechanics were often able to earn significantly more than the flat rate based on the "book time" for particular tasks. However, book time compensation was not applicable to work performed outside of a Unit employee's specific duties. For example, lube rack and part-time express team technicians were responsible for cleaning vehicles. If a journeyman mechanic or apprentice performed such work, however, the time would be counted towards his base rate of pay, but would not be compensable as additional pay.

Unit employees are required to acquire the tools necessary to perform their work. They were also responsible to provide tool boxes to secure their tools. That arrangement is impliedly confirmed at Article 14, which requires the Company to insure employees' personal tools, requires employees to provide the Company with an inventory of their personal tools, authorizes the Company to inspect employee tool boxes, and requires employees to remove their tools within two weeks of termination.[6]

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5. Notwithstanding the pay rate formula stated in the contract, Unit employees are guaranteed pay for 35 hours if present at the dealership for at least 40 hours. (Tr. 162-163.)

6. The cited provisions remained essentially the same in the Successor Contract. (Joint Exh. 1-2.)

Appendix C

C. The Strike

On May 6, the Union and the NCDC began negotiations for a successor contract, which was due to expire on July 31. The members of the Union's negotiation team included Union representatives Sam Cicinelli and Kenneth Thomas, and Bisbikis.

On June 29, with negotiations dragging on, Bisbikis approached Laskaris in the latter's office to discuss several shop-related issues, including the Company's newly imposed requirement that employees pay part of the cost of their uniform shirts. Laskaris rejected Bisbikis' appeal regarding the shirts and redirected the discussion towards the sputtering labor negotiations, warning that if the mechanics decided to strike, "things wouldn't be the same."[7]

The parties were unable to negotiate a new contract by the July 31 deadline and, on August 1, the Company's Unit employees walked out and set up camp across the street from the dealership. On August 4, the Company sent the striking employees letters setting forth several changes to their terms and conditions of employment:

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7. I credit Bisbikis' detailed version of this conversation in contrast with Laskaris' steadfast denial ("I wasn't thinking about a strike") after conceding that, "a few weeks before it happened," he "thought there was a small chance" for a strike. (Tr. 116-117, 139, 205-208.)

Appendix C

To all Service Technicians,

It is very unfortunate that you have chosen to strike. In serving the best interest of the stability of Cadillac of Naperville, its employees and their families, as well as our loyal and trusting customers, you are hereby put on notice of the following:

We will no longer be paying for your health insurance. You will be responsible for the premiums in their entirety.

We have placed ads for replacement technicians. You will be notified once you have been replaced. At that time should you make an unconditional offer to return to work, you will be placed on a preferential hiring list should an opening occur.

Cadillac of Naperville will no longer be responsible for your belongings when you are not working. All tools, tool boxes, and personal belongings must be removed from our property by Saturday, August 5, 2017 by 5:30 p.m.

Please make immediate arrangements to have your tools and personal belongings removed from our property by contacting your immediate supervisor at (630) 355-2700 to arrange an appointment. They will assist you in returning any special tools or Cadillac of Naperville property, as well as assist in

> an expedient and peaceful transfer of your belongings.
>
> Sincerely,
>
> Cadillac of Naperville, Inc.[8]

As instructed, Unit employees removed their equipment and tool boxes during business hours by August 5 and transported them on trailers to a commercial storage facility. Empty toolboxes weighed at least 550 pounds; when full, they weighed several thousand pounds.

On August 9, the Company sent the following form letters to 6 of the 13 striking employees - Bisbikis, Louis Mendralla, Michael Wilson, Kenneth Scott, Brian Higgins and Mathew Gibbs - notifying them that they were being replaced:

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

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8. Joint Exh. 4.

9. The letter sent to Gibbs was not included with the other five letters in Joint Exhibit 5. However, the subsequent recall letter indicates that he received the same notification.

Appendix C

The Company was one of only three dealerships that replaced employees during the strike. Francek hired three replacement workers based on employment advertisements[10] or personal familiarity: Hector Plaza (August 7), Edward Silva, Jr. (September 1) and Scott Anderson (September 2). Another employee, Michael Vitacco, was hired on the day that the strike ended (September 15). They were all retained as mechanics after September 15. In addition, three non-unit employees were transferred from other departments to fill-in for the striking mechanics: service advisors Jay Montalvo and Jake Johnson (both on August 7), and salesmen George Laskaris (August 21). Montalvo and Johnson returned to their jobs as service advisors after the strike, while George Laskaris remained as a mechanic.[11]

Initially, the striking employees picketed across the side street from the dealership on Ogden Avenue. After the termination letters went out on August 9, the strikers became more vocal and repositioned themselves across the street from the main entrance. They blew horns, utilized a loud speaker to excoriate the Company, sought to engage customers, and yelled at nonstriking employees. On one occasion, striking mechanic Patrick Towe interfered with an elderly customer attempting to take a test drive.

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10. There was no evidence of the advertisements or the terms of employment of the replacement workers, specifically, whether they were hired on a temporary, permanent or other basis.

11. I credited the reliability of GC Exh. 6, a Company business record, over that of GC Exh. 5, which appeared to be a chart compiled for litigation.

On several occasions, the Company called the police to intercede.[12] However, the Company never filed police reports or unfair labor practice charges.

D. Strike Settlement Agreement

About 35 dealerships entered into interim agreements after several weeks into the strike. On Friday, September 15, the NCDC, on behalf of the remaining member companies, entered into a strike settlement agreement (the settlement agreement), contingent upon ratification by the Union membership. The Union's membership ratified the settlement agreement, as well as the 2017-2021 collective-bargaining agreement (the Successor Contract), on Sunday, September 17.

The settlement agreement addressed the return-to-work procedures for all Unit employees at the 129 dealer-members as follows:

> 2. *Return to Work:* The return-to-work process will be determined by each individual dealer. Employees will be reinstated per the terms of the Successor Contract, but may be placed on layoff depending on the business needs of the Employer. Replacement employees, if retained, shall be credited with seniority as set forth in the Successor Contract and will be placed on

12. I credited the undisputed testimony of Laskaris and Francek that the police was called at unspecified times. However, the incidents were brought under control once police arrived and no police reports were filed. (Tr. 210-213, 224, 229-230, 282, 310-312.)

> layoff status until higher seniority employees within the same classification are recalled.
>
> 4. *Mutual Non-Retaliation*: Both parties, on behalf of their respective members, hereby covenant and agree to use their best efforts and take any action deemed necessary to ensure an orderly and peaceful return to work by striking employees, to ensure no retaliation of any kind towards any employee or NCDC member dealer, and to maintain order in the workplace once striking employees have returned to work. NCDC and the Union agree, on behalf of themselves and each of their respective members, that there will be no retaliation against any employee based upon conduct that is protected by law, and that there will be no retaliation against any NCDC member dealer or the Union based on actions taken or statements made during negotiations or the ensuing labor dispute.[13]

The Successor Contract set forth the seniority, layoff and recall provisions at Article 3, which states, in pertinent parts:

> Section 2. Layoff and Recall. Part-time Express Team Technicians will be laid off before any other bargaining unit employee. In a decrease or increase in the number of

13. Joint Exh. 2-3.

Journeyman Technicians, apprentices, semi-skilled technicians, or lube rack technicians, when two employees are capable of doing the job, the one with the least product line seniority shall be laid offered first and recalled in reverse order, provided the employer has submitted a a current product line seniority list to the Union via certified mail. The Employer shall be permitted to recall or hire up to three (3) Lube Rack Technicians notwithstanding the layoff status of any Journeymen. A Lube Rack Technician hired or recalled while a Journeyman is on layoff status may not be promoted while that Journeyman retains recall rights. The Employer shall notify the employee of a layoff no later than the end of the employee's last scheduled workday of the calendar week, not the Employer's pay week.

Section 6. Reporting After Recall. The Employer shall give notice of recall to the employee. An employee who fails, without reasonable excuse, to report for work within three (3) working days of notice of recall shall be considered as having resigned from employment.[14]

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14. The Company relies on this provision as the basis for Laskaris' belief that he had three days to recall the strikers. The testimony of Laskaris and Francek, however, with both professing ignorance as to the content of the settlement agreement or alluding to conflicting advice from attorneys, did little to clarify the Company's responsibilities under this provision. (Tr. 218-219, 268-270, 306-308.)

Appendix C

E. Employees Attempt to Return to Work on September 18

(1) Laskaris Rebuffs Employees' Efforts to Return During Business Hours

On September 18, the day following the Union membership's ratification of the Successor Contract, the Unit employees congregated in their customary location across the street from the dealership at about 7:00 a.m. Cicinelli and Thomas, anticipating a contentious return-to-work process due to the replacement letters received by the five Unit members and concern over the logistical difficulties in returning the returning mechanics' tools and tool boxes, were also present. In fact, Cicinelli arrived with pre-prepared grievance forms, which he had the returning employees sign.

A few minutes later, Cicinelli, Thomas and Bisbikis walked across the street to the dealership in order to negotiate a date and process for the employees' return to work. They entered Laskaris' office. Francek was also present. Almost immediately, Laskaris said that he did not want Bisbikis present. Cicinelli responded that Bisbikis was a necessary participant because he was the steward and needed to be in the loop. Laskaris said that he did not care, insisting that Bisbikis was the ringleader and at fault for the strike, and he did not want him as an employee. Bisbikis asked Cicinelli what he should do. The latter suggested Bisbikis leave so he and Thomas could resolve issues preventing the employees from returning that day. Bisbikis complied and returned to join the other Unit members across the street.

During the meeting that ensued, Cicinelli insisted that Laskaris was obligated to reinstate the replaced employees pursuant to the settlement agreement. Laskaris replied that he needed time to figure out whether to recall the permanently replaced employees because he had not seen the contract and was getting inconclusive legal advice. He added that he did not want any of the strikers back and asked "can't you find them all jobs?" Cicinelli said that he probably could find them other employment, but the employees wanted reinstatement. At one point, Cicinelli referred to the replacement workers as ""scabs," causing Laskaris to admonish Cicinelli because they were "good family men" and note that the Union was obliged to represent them as well. Cicinelli said he did not care, but concurred with the notion that the Union would be responsible to represent them if they were retained and became Union members. As Cicinelli left to update the employees, Laskaris proposed that in return for the employees not returning he would give them $1,000 or $2,000 each to find a job elsewhere. Cicinelli said it was his responsibility to run any offer by the employees, but considered it a futile effort.[15]

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15. Testimony regarding the first meeting was fairly consistent. Laskaris' testimony regarding his alleged confusion over how to implement the settlement agreement and whether he was required to displace the replacement workers was not credible. He had no interest in ever reading the settlement agreement and shifted explanations between contradictory legal advice and testimony evincing a clear intent to deny reinstatement under any circumstances. (Tr. 38-41, 125-127, 220-226, 270.)

Cicinelli and Thomas left Laskaris' office and communicated his offer to the returning employees. After the employees rejected the offer, Cicinelli and Thomas returned to Laskaris' office along with Bisbikis. Once again, Laskaris asked why Bisbikis was there. Cicinelli responded that Bisbikis was there to speak on behalf of the Unit employees. Bisbikis then began to explain that the striking employees were personally offended after receiving permanent replacement letters. He asked Laskaris why he issued the letters, and if they issued because he and the other mechanics did not get along with Francek, which the latter denied. Bisbikis added that he had been there for 15 years and excoriated Laskaris for his treatment of Bisbikis and the other strikers. Laskaris said he did not want to hear it and asked why Bisbikis would want to return. Bisbikis replied that he had been there for 15 years and considered it his home. Francek interjected by questioning the strikers' loyalty because they harassed customers and other employees during the strike. Bisbikis denied that allegation. Francek then engaged Bisbikis in a side conversation questioning the latter's recent extended absence and Bisbikis replying that he was still disabled when he returned to work.[16] Laskaris reiterated that he did not want any of the strikers to return, especially the "seven" who received permanent replacement letters. Cicinelli said that the Union was aware of only five such letters and asked Francek to provide copies of the other two letters. As the conversation continued, there was disagreement over how many people were issued

16. Bisbikis was on short-term disability for a herniated disc in his back from December to May.

replacement letters, and to resolve that disagreement, Francek left the room to retrieve copies of the letters.

With Francek gone, Bisbikis brought up his June 29 conversation with Laskaris about several employee concerns. Laskaris denied ever having such a discussion and Bisbikis accused him of lying. Laskaris cursed at Bisbikis, telling him to ""get the fuck out before I get you the fuck out." Bisbikis replied by calling Laskaris a "stupid jack off" in Greek as he left the office. Laskaris asked Bisbikis "what did you just say." Bisbikis looked at Laskaris and asked what he was talking about? I didn't say a word." Cicinelli smirked, looked at Thomas and said "I didn't hear him say anything. Did you?" Laskaris replied, "[n]ow even if I have to take you back, now I'm firing you for insubordination.[17]

Cicinelli responded that the Union would have to file another grievance regarding Bisbikis' termination and then asked Bisbikis to leave the room. He then asked Laskaris to clarify his position regarding the recall

17. I credit the testimony of Laskaris, a fluent Greek speaker, that Bisbikis called him a "stupid jack off" in Greek. Bisbikis did not deny the statement at the time and the cavalier manner in which Cicinelli and Thomas, neither of whom speak nor understand Greek, denied hearing Bisbikis say anything manifested an evasiveness that undermined their credibility regarding this incident. At the time, however, Bisbikis was standing by the door and not, as Laskaris suggested, moving toward him in a threatening manner. (Tr. 42-48, 125-133, 142, 144, 167-173, 184-187, 221-234, 258, 273.) In addition, Laskaris made no mention of threatening behavior on Bisbikis' part in the termination letter that followed.

status of the remaining strikers. Laskaris reconsidered and agreed to allow the remaining employees who did not receive replacement letters to bring back their tools. Cicinelli suggested that some had trailers and could begin returning their tools in the afternoon. Laskaris rejected that arrangement on the ground that it would be too disruptive, insisting that it was not the Company's responsibility to transport the employees' tools to the dealership before they reported for work. The meeting ended with Laskaris giving Cicinelli and Thomas a list of guys who were not permanently replaced and the plan for the return-to-work schedule. He also agreed to open the shop two hours early on Tuesday at 5:30 a.m. and needed them to be in their stalls by 7:30 a.m. ready to go. Cicinelli insisted it would be a problem getting the tools out of storage before 9:00 a.m. and Laskaris replied, "It's noon. My understanding is 701 has a truck. 701 has a union hall for this purpose. Why don't you go get their tools, put them on the truck, take them down to the hall. Not my issue. Now I need you to get away from the front door and go." After Cicinelli and Thomas left, Francek followed up with telephone calls to each of the returning mechanics. He spoke with some and left messages for others. Some said they would be ready to start work at 7:30 a.m. One employee said he could not continue the call without union representation.

(2) The Union Attempts to Recruit the Replacement Workers

Shortly thereafter, Laskaris walked into the shop and found Thomas speaking to the five replacement mechanics.

Laskaris intervened and said, 'Ken, this is not the time. Guys get back to work. Ken, I'll set up a private conference room for you before or after work any time you want and you can sit and talk to them all you want, but you're not going to stop them from working." Thomas left and rejoined the group across the street.[18]

(3) The Company Formally Terminates Bisbikis

Later that morning, Laskaris sent Bisbikis a "notice of termination for insubordinate conduct and inappropriate language:"

> Your insubordinate behavior occurred during a conversation in my office on Monday, September 18, 2017 at or around 9:05 a.m. during a during a business meeting where you spoke to me in [G]reek and called me a [stupid jack off] . . . When confronted and told you can't speak to me that way, there was no apology nor denial of you actions, instead you very sarcastically to Sam Cicinelli "I guess that means I should leave now."
>
> This offensive and insubordinate behavior is a direct violation of Cadillac of Naperville's Standards of Conduct. In order to assure orderly operations and provide the best possible work environment, we expect employees to follow rules of conduct that will protect the interests and safety of all personnel.

18. I base this finding on Laskaris' credible and undisputed testimony. (Tr. 251-252.)

> This violation of conduct is a terminable action. We ask that you immediately refrain from entering our property. Should you have any personal items, please reach out to your supervisor to make any and all arrangements regarding your personal item pick up.[19]

(4) The Company Recalls 7 Employees

Later that afternoon, Veronica Coy, the Company's controller, e-mailed "all currently employed technicians returning from work stoppage" regarding the return-to-work arrangement and copied Cicinelli and Thomas:

> *Return to Work Procedures:* Under the terms of the new contract, each individual dealer may determine how many employees to recall and when. Please make note that after review of our work requirements we have determined that the following employed employees will need to return to work AND in their assigned work stall ready for work on September 19, 2017 at 7:30 a.m.

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19. Laskaris testified, as the letter states, that Bisbikis' conduct violated the Company's Standards of Conduct." He also testified that those standards were reflected in a "book" which was not produced. (Tr. 259-260, 276-277; Joint Exh. 6.) In the absence of documentary evidence to support that assertion, there is insufficient evidence to conclude that Bisbikis violated any written standards.

Appendix C

THE FOLLOWING EMPLOYEES HAVE BEEN RECALLED:

ZIOCCHI, MICHAEL D

GONZALEZ, RONALD J

MICHOLSON, CHARLES E

SCHULTE, RYAN D

TOWE, PATRICK

AGUIREE-PORTILLO, ANTONIO

SCOTT, JERICHO

We have made arrangements to have the dealership open 5:30 a.m. until 7:30 a.m. on September 19, 2017 in order to bring TOOL boxes and Tool carts in. Please note that ONLY TOOL boxes and Tool carts will be allowed to be returned to the stalls as we have a redesigned shop and usage will be at full capacity.

Please also note the Cadillac of Naperville Attendance Policy

ATTENDANCE AND PUNCTUALITY

As an employee you are expected to be regular in attendance and to be punctual. Any tardiness

or absence causes problems for your fellow employees and your supervisor.

When you are absent, your work load must be performed by others, just as you must assume the work load of others who are absent. In order to limit problems caused by absence or tardiness of employees, we have adopted the following policy that applies to absences not previously approved by the Company.

If you are unable to report for work on any particular day, you must call and speak to (not text message or email) your supervisor at least one hour before the time you are scheduled to begin working for that day. Absent extenuating circumstances, you must call in on any day you are scheduled to work and will not report to work.

Excessive absenteeism or tardiness may result in disciplinary action up to and including termination of employment. If you believe the absence is legally protected, please see the company's Disability Accommodation Policy for more information. Each situation of absenteeism or tardiness will be evaluated on a case-by-case basis. Even one unexcused absence or tardiness may be considered excessive, depending on the circumstance.[20]

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20. Joint Exh. 7.

Appendix C

F. Recalled Employees Attempt to Report to Work on September 19

At 7 a.m. on September 19, the employees met at their usual location across the street from the dealership. A short while later, Cicinelli and Thomas marched across the lot with the recalled mechanics to the service area as vehicles were coming through the service entrance. They were met there by Laskaris and Francek. Laskaris asked what they were doing. Cicinelli said that he wanted to discuss the logistics for the employees' return since the storage facility did not open until 9:30 a.m. Laskaris replied that it was not his problem and if the employees were not in their stalls with their tools ready to go at 7:30 a.m., he would issue them warning letters because they were technically late.[21]

Laskaris proceeded to escort the group into the new car delivery area. As they passed customers in parked vehicles waiting to enter, Cicinelli said to a customer that "these are the real technicians. Your scabs are in there." Francek interjected, reassured the customer that the real mechanics were working and the dealership would take care of him, adding that the individuals walking in "can't do shit."[22]

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21. Laskaris did not, in fact, issue written warnings to employees for lateness on September 19.

22. The testimony of Laskaris, Francek and Cicinelli confirmed the interaction of Cicinelli and Francek with the customer. In addition, Francek failed to refute Cicinelli's testimony that the former told the customer that the strikers "can't do shit,"

Once in the room, Laskaris told the employees, "This is my facility. You're going to listen to me. I don't give a fuck who tells you; listen to me. If I tell you to jump, you ask me how high. This is my - you play by my rules." Cicinelli interjected, "as long as you adhere to the terms outlined." Laskaris responded, "I know what that is. I don't need to be reminded of that." Cicinelli agreed with that comment. Laskaris told the employees to bring their tools after 5:00 or 5:30 p.m. that day and Cicinelli replied that he would be filing another grievance for back pay for that day because Laskaris continued to make it impossible for the employees to bring the tools back since the storage facility closed at 5:00 p.m. Laskaris then told Cicinelli to have the Unit employees bring them home. Cicinelli said that they did not all have trailers to transport their tool boxes and/or have room to fit them in their garages. Nor did they have the option of leaving them outside their homes since they were expensive. Laskaris said that was not his problem. He said for them to bring them in the next morning and Cicinelli replied that the storage facility did not open until 9:30 a.m. Cicinelli noted Laskaris' inconsistency in permitting employees to remove the tools on a Saturday, but now insisting it would be disruptive to bring them while the facility was open for business. He called it overly restrictive. Laskaris reminded Cicinelli that he told employees the previous day about being ready when reporting to work and that some confirmed they would be ready to go. They went through several more exchanges in which Laskaris said he was not going to do it Cicinelli's way and the latter insisting that he needed to comply with the contract. Laskaris finally relented,

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while Francek's testimony that Cicinelli referred to the mechanics on duty as "scabs" was also undisputed. (Tr. 72-73, 240-241, 295.)

stating that he would run his shop in a manner consistent with the contract, and agreed to let the employees bring back their tools after 4:30 p.m. that day.[23]

G. Employees Finally Return to Work on September 20

The seven reinstated employees returned to work on September 20. Later that morning, Laskaris pulled aside apprentice mechanic Patrick Towe showed him a video recording of someone walking across the entrance to the dealership. It was Towe carrying a sign and walking slowly on the stripe line in the middle of the street in front of the driveway. Towe's shenanigans enabled him to block a customer who was waiting to take a test drive. She was forced to drive very slowly behind Towe as he walked across the parking lot entrance. The customer began to accelerate as Towe had advanced to a point where he was nearly out of her way. However, Towe suddenly pirouetted and walked back towards the vehicle, causing the customer to slam her breaks.

Laskaris asked if that was him on the video recording and Towe said, "I don't think so." Laskaris was not swayed, pointed out that the prankster was wearing his sweatshirt, and comment on his harassment of a future service shop customer. He concluded with a remark that he hoped that Towe would refrain from similar conduct. Laskaris then said "I don't want any of you here." After further remarks,

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23. The testimony by Cicinelli, Laskaris, Francek and Towe regarding their interaction was fairly consistent. However, given Laskaris' penchant for colorful discourse with his employees, I credit Cicinelli's version of Laskaris' vulgar-filled remarks that day. (Tr. 51-55 80-81, 240-242, 294-297.)

Laskaris said, "Well, if this is your home, you wouldn't be doing this" and he told Towe to look for another job because he wouldn't be there very long. Towe said okay and Laskaris dismissed him back to work.[24]

H. The Company Restricts Union Officials Access to Employees

Prior to the strike, Thomas customarily visited Unit employees at the dealership approximately once every six weeks.[25] Laskaris, upset after the events of September 18 and 19, contacted an attorney and, on September 21, Laskaris and Francek sent a letter to the Union limiting its previously unfettered access to employees on its premises:

> This letter will serve as notice to Sam Cicinelli, Ken Thomas, and Mechanics Local 701. As a result of the intimidating and threatening behavior of union president Sam Cicinelli and B.A. Ken Thomas on Monday and Tuesday 9/18 & 9/19 towards myself, our employees, and shockingly even worse our customers. Neither Cicinelli nor Thomas will be welcome in our dealership or on property. If they choose to ignore our request they will kindly

24. The video was not a surveillance video generated by the Company and Laskaris was evasive as to its source. (Tr. 243-245.) In any event, I credit Towe's testimony regarding this conversation, which was not denied by Laskaris. (Tr. 82-84, 245.) Towe was laid off on December 2, 2017.

25. The existence of this custom and practice prior to the strike was undisputed. (Tr. 57-58, 252.)

be asked to leave the property immediately. Proper authorizes will be notified to have them removed if necessary.

As a result of the actions and behavior of Local #701 representatives mentioned above and complaints received from 4 employees who felt they were being "intimidated and bullied" by B.A. Ken Thomas on Tuesday the 19th. Local #701 representatives will need to make an appointment and request access to our facility and/or our employees while they are at work. An agreed upon time must be scheduled with myself or our V.P. John Francek. Failure to make such arrangements and respect our fair request will result in representatives from Local #701 being asked to leave the property immediately and return at an agreed upon scheduled time.

In closing let me be very clear. I personally will no longer be threatened or tolerate acts of intimidation by local #701 representatives in my own place of business. Nor will I tolerate such behavior towards my employees or our customers. Such behavior will be met with swift legal action going forward. I appreciate your cooperation in advance.[26]

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26. Laskaris' assertion that employees complained about the conduct of Cicinelli and Thomas was neither credible nor corroborated. To the contrary, Laskaris' testimony indicated his annoyance at the fact that the union representatives were soliciting the replacement workers while they were on the job and

Union access to the facility is governed by Article 8, Section 2 of in both the Expired Contract and the Successor Contract: "A Union representative shall be permitted access to the Employer's premises for the purpose of adjusting complaints individually or collectively."[27]

I. The September 25th Staff Meeting

On September 25, Laskaris called a staff meeting where he threatened employees with layoff. Laskaris called the meeting to express his frustration over the Union's decision to leaflet outside the dealership post the strike. During the meeting, Laskaris told the employees that the Union's leafleting was taking money out of their pockets and that if they ran out of work, all of the recalled employees would be laid off.[28]

J. Changes to Company Rules and Practices

(1) Free Water

During the term of the 2013-2017 agreement, the Company provided unit employees with free gloves and

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he injected himself to break up the conversation. (Tr. 261-262, 275; Joint Exh. 8.)

27. Joint Exh. 2 at 44.

28. Laskaris did not dispute Gonzalez' credible and undisputed testimony regarding this incident. (Tr. 158.) Francek confirmed making remarks about the leafleting and its connection to potential layoffs if work did not pick up, but did not dispute Gonzalez' testimony. (Tr. 297-298.)

bottled water in the Parts Department. Mechanics are required as part of their job to wear gloves and were provided with free gloves as needed. Prior to the strike, the Company also provided employees with a water fountain, as well as free bottled water and Gatorade during the summer months. The water fountain broke prior to the strike, however, and the Company provided bottled water.

During the first week upon returning to work, the Company no longer provided free water bottles and removed the water fountain. They were told to remove their refrigerators and the refrigerator in the break room was removed.[29] The following day, the changes were posted in a sign on the wall.[30]

(2) Attendance Policy

Prior to the strike, the Company did not have a formal attendance policy. It was left up to the service manager's discretion as to how they wanted to handle call-offs or calling in late. In some instances, the service manager simply required mechanics to either leave a voicemail

29. Laskaris was vague as to whether the water fountain broke - "not to my knowledge" - and testified that prior to the strike free bottled water was provided in the employee lounge refrigerator with a cup next to it for contributions that the Company matched for charity. (Tr. 249-251, 260-261.) Francek testified that the Company confirmed that the Company cleaned out old items. He also referred to a technician's refrigerator causing an electrical short, but did not address the banning of refrigerators. (Tr. 300-301.)

30. GC Exh. 4.

message or text message him if they were going to be late.[31] In its September 18 recall letter to seven employees, the Company inserted an attendance policy at the end of the email. About 2-3 weeks after employees returned to work, the Company revised that policy. It stated in pertinent part:

> ... Technicians should contact their Department Manager to report an absence at least (1) hour prior to their starting time, and lateness at least a (1/2) hour prior to their starting time so that arrangements can be made.
>
> If any technician is absent from work for three working days without informing his or her Department Manager, it will be assumed that the employee resigned and employment will be terminated as of the last day worked by the employee. Warning letters will be issued for each day of "No Call No Show" with copies being sent to the Member and the Union.
>
> ... The following describes the disciplinary actions that may result from Unexcused Absence, Tardiness and or Early Leave.
>
> - Unexcused absence applies to non-scheduled days off and/or non-negotiated days off.

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31. Towe and Bisbikis credibly testified that there was no written attendance policy prior to the strike. (Tr. 85, 134-135.).

- Tardiness applies to returning from lunch and/or break periods as well as the beginning of the workday (including not calling in the proper time for an absence.)

- Early leave applies to leaving before your scheduled workday ends.

Technicians are expected to be punched in and prepared to work no more than (5) mins past their regular start time and they be considered on time. When an employee is late beyond five (5) minutes, along with any subsequent time thereafter, they are considered tardy and shall be reprimanded or a written warning issued. Punching in and then leaving to park car, get breakfast, or other tasks are prohibited.

1st offense: Verbal reprimand (written notice for technician's personal file and Union to document the communication occurred)

2nd offense: Written warning notice (copy to employee's personnel file, employee and Union)

3rd Offense: Final written warning notice (copy to employee's personnel file, employee and Union)

4th Offense: Subject to termination after management review

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> Unexcused Absence/Tardiness/Early Leave warnings will be separate warnings to Discipline and Training warning letters except in the case of "No Call/No Show" warnings. All unexcused Absence/Tardiness/Early Leave warning shall be held for 1 year from the date of issue.
>
> Fulltime technicians are allowed a maximum of 2 excused sick days per calendar year after first 90 days of employment. Excessive absences will be subject to discipline.[32]

Upon learning of the new policy, the Union filed a grievance.

(3) Car Washing

Prior to the strike, the Company employed porters to clean, wash gas and move cars, as well as the facilities. Mechanics were not asked to wash cars. Upon returning from the strike, however, business was slow and, on at least one occasion, Towe was temporarily tasked with washing cars. The Company implemented that temporary change without notifying the Union.[33]

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32. Joint Exh. 9.

33. Towe was the only witness to testify that he was directed by Towe was asked by Klodzinski to wash cars on an unspecified date. (Tr. 86-87, 102.) Gonzalez explained that washing cars potentially reduced mechanics' earnings potential since it was not compensable as book time. He did not, however, confirm that he was actually assigned to wash cars at any time. (Tr. 163-164.) Nor

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K. The October 6th Meeting

At approximately 11:00 a.m. on October 6, Klodzinski instructed the mechanics to cease work so they could have a meeting. The service managers, service advisors, parts department, John, Frank and Mark were all present. In a meeting that lasted approximately 40 minutes, Laskaris revisited the contentious events of the past several months and his labor relations approach going forward. He told the mechanics that they could take notes and tell the Union the same thing to their face.[34] Laskaris' comments were secretly recorded by Towe:[35]

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do I credit Cicinelli's testimony that the Company never bargained over an attendance policy is undisputed. However, I do not credit his uncorroborated hearsay testimony that strikers told him that they photographed Unit employees washing cars. (Tr. 59-61)

34. Laskaris testified that he needed to address the group because he was "getting grievances over the most frivolous, stupid things in my eyes. (Tr. 245-246. 275.)

35. The Company did not object to the authenticity and accuracy of the recording but objected to its admission on the ground that Illinois is a dual party consent state and Towe did not receive Laskaris' permission to record the meeting. As I explained at hearing, tape recordings are typically admitted in Board proceedings, even if made without the knowledge or consent of a party to the conversation, and even if the taping violates state law. *Times Herald Record,* 334 NLRB 350, 354 (2001), enfd. 27 Fed. Appx. 64 (2d Cir. 2001); *Williamhouse of California, Inc.,* 317 NLRB 699, fn. 1 (1995), and *Wellstream Corp.,* 313 NLRB 698, 711 (1994).

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I want to make something really clear. I'm going to draw you an analogy. Chuck, you own a house? You invite us all into your home, give us an opportunity to sleep, eat, share holidays, earn a little living, happy times, also you come home one day, and we're standing on your front lawn, fucking with your neighbors, fucking with your kids, trying to keep you from putting bread on the table, going on Facebook saying how much of an asshole you are, how shitty your food is and how fucked up your house is. But once I get what I want, which is ... out of my control, nothing to do with the contract, you got to open your house and take all of these people back in, sing kumbaya and let all of these people back in . . . I have a hard time with that . . . I think you guys were misled, severely misled, let me give you an example. You show up on Monday to come back to work and he assembles you across the street and we're going to walk on the lot for hours of meetings and your guy who you see every four years who doesn't give a shit about you, is in my office telling me how the fuck I'm going to run my store. . . He's telling me how the shit is going to go down in my house. . . . I put my name up there so I could walk around with a big dick, no, this is our place. . .

So I tell him these okay these guys are coming back. Here's the return to work policy. I'm going to open up the doors two hours early, get your tools and be ready to get to work at 7:30, not

disrupting a day's work. He makes sure he lets you guys know, fuck that, we're not going to do that, we're going to do it our way . . . He starts whining we can't get our tools today. . . . So he assembles you and walks you across the parking lot . . . and you guys come walking up like West Side Story right in the front door and are going to cause a scene with the union guy who is not going to know your fucking name in a couple of months . . . "We'll go show him, we'll go fuck with him." Good idea guys. . . . So what I do? I tell you guys, "we're opening at 5:30.Bring your tools and be ready to go," didn't I? "Any questions?" Nope. Everybody leaves. Mark gets on the telephone with Johnny and calls every one of you guys. Spoke to most of you. What were you told? [An attendee says "between 5:30 and 7:30"]. . . and they said "no problem, I'll be there ready to go . . . Somewhere between Monday and Tuesday you guys get misled by some guy who really doesn't give a shit about you. Somehow he talks you into not bringing in your tools in. "We'll just say the rental place isn't open, storage place isn't open." He didn't say, you know what guys, you're my union guys, I'll send the union truck over to pick them up right now and I'll park that truck at union hall" . . . Did he do that for you guys, because I would have done that for you. He didn't. He said "meet me across the street, we'll go fuck with him again." You know he cost you guys a days' pay. He probably told you "that he'll have

to pay you on Tuesday." No. " "You said you'd be in your stall ready to go. You had plenty of notice. You weren't in your stall ready to go so I'm not paying you". . . "Let's fuck with the guy more" and the result is, Mike, you don't get another day's pay . . . I could have been a prick and said "we'll try it again tomorrow at 5:30." I should of, but I didn't. I said, fine, we'll try it again tonight after work . . . Then I said let's bring it in tomorrow morning and Sam said " "no, the rental place isn't open." I have a question for you guys. You're supposed to be in your stalls ready to go on Tuesday. You said you'd be ready to go. If your family depended on breathing on Wednesday based on the money you made on Tuesday, would those tools have been here. Chuck? You would found a way to get the tools here. So let's stop the bull shit, the rental places, it's all posturing bull shit.

Why am I telling you? You can grieve whatever you want. Let me tell you about the grievance process. You put it in writing and you complain to someone here, me or management and you let the union know. That's the process. Otherwise the grievance doesn't mean shit. He can walk up on the lot and hand me whatever he wants. . . What I'm telling you is I don't give a shit about grievances. Grieve all you want. It doesn't matter. They can't do shit. . . "They're not giving us free water . . . [or] gloves anymore." . . . Grieve all you want. . . . Bull shit.

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I don't care about grievances, grieve all you want. . . Keep putting you name on it. You look stupid saying they don't give me free water. Until this happened, you were happy working here. Grieved about water, go ask Jean who makes 20% of what you make where she gets her water, she'll tell you she gets it from her house. Be a man, grieve something important, like wages. . .

You don't know how many times I mortgaged my house to make sure you got a paycheck. . . . You didn't stand there and tell the Toyota guys, "fuck with your own owner and fuck with your own customers and leave ours alone." None of you did that. Instead, you call them over and say "you blow the horn let's get him to do it" . . . You wonder why I'm pissed. . . It's not right, I'm here to tell you I don't care, I don't care on what you grieve, I don't care how much you complain, they're not going to tell me what to do. I suggest you read your little blue book that he waved in my face like a smug asshole . . . and if I follow that book your life harder will get harder . . . . There's so much stuff in that book that nobody enforces. Why? Because we don't want to be that kind of place. You're going to grieve gloves, guys? Good luck. . . . Why are you putting your name on that, guys? Step away from all this and go ask I'm a man first and I have a family. Why am I signing a piece of paper crying about gloves? If it's so bad go

somewhere else. It's okay. You guys need to understand . . . I'm the nicest guy in the world, fuck with me and I'm going to fight harder. . . . I couldn't sit back during this thing and go "ah, it will end someday, no problem, here's your paycheck . . . Mark." . . . Why don't you call the parts guy . . . ask Jim later after eating shit for all these months, running parts for you guys, . . . while you're making $1,500, $2,000, $2,500 per week and he's making a fraction of that, ask him how he felt being laid off while with no paycheck you guys are playing darts outside, blowing horns, making sounds, fucking dancing. . . . Ask some of these people . . . [the sales] and parts people . . . what it feels like to throw water in front of his car, videotape him instead of letting him sell cars, and then going on Facebook and saying that he's going to run me over. . . You guys should instead be angry at Johnny and Sam . . .

Every 701 member has an option. . . You could be a financial core member . . . you get everything everybody else gets. You're a member like everybody else. All your benefits are protected. You trade one thing. You never have to strike. . . . But you give up your vote on the contract but you never have to strike. . . . But before you strike ever again educate yourself. Because if I were you, I would have changed my membership a week before the strike. . . . "I'm going to go to work and get a paycheck

while those guys throw play darts, lift weights and make assholes out of themselves". . . . By the way, your [union representative] he came in and had a meeting with a couple of guys to sign them up and they said tell me what I'm signing, he goes never mind, just sign, he bullies them. Then they said tell me about financial core. . . . There's no such thing. He lies to them. Now he's calling them scabs. . .

The same person who is on Facebook saying what a horrible place to work this is . . . why do you want to be here? . . . [Shows a videotape of Towe stepping in front of an elderly customer seeking to test drive a vehicle] . . .

If they're gang raping a woman and you stood by are you about as guilty as them? . . . Keep filing shit . . . I would look for a job if I were some of you, maybe all of you. . . . I wouldn't want to be where I'm not wanted. . . . While you're playing darts, Pat . . . are you kidding me? . . . You guys shit on our house. . . . I look out the window and I saw some of you guys.. . . We were in a labor dispute. I couldn't talk to you guys. But you could have picked up the phone and called Mark, or called me or called John. You could as a group . . . walked in with your leader Johnny who led you down a shitty path and . . . could have walked in before the strike and said "what are our options" and educated yourselves. At that point I didn't know what our options were .....

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There's a contract. We're going to follow it. But I'm not putting up with any more bullshit ... There's more videos of behavior ... that will make your stomach turn. ... I expected a little more loyalty towards the 70 families here... Refer to these guys as scabs and see what happens...

This shop is going to be run the way I want it to get run, not the way Sam's going to tell you . . . Gloves, water? You can't do shit about gloves or water. . . . Pick a fight that's worth fighting, guys. Stop it. Or just keep it up. Call him today. Tell him that I threatened your guys to all look for jobs. . . . Know what the penalty is? . . . Okay, I won't do that anymore. . . So they have you thinking they have some power over us. That's shit. . . .

I own this place. . . . If you think for a minute Chuck that I have to keep you here long term, you're wrong. It doesn't matter . . . I have 701 guys here who want to work, who are hungry and happy and respect coworkers jobs, so next time they face a horrible decision they'll know what they're walking into instead of obstructing customers and dealers who are trying to sell cars. . . . Johnny, stay the fuck off of Facebook and stop trashing the dealership. . . . and harassing people. . . .

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Watching a guy like Matt who came here as an apprentice and made $120,000 last year. That's gratifying to me. And then watching him go outside and act like a complete asshole, pissing on his fucking $10,000 a month. How smart is that? And not having a guy like Ronny and Mike and Chuck saying "Matt, fucking don't do that, chill, you want to do that, go back there and sit under a tree. That would have been good advice. . . . Nobody can tell you to act like an asshole, nobody can tell you to obstruct our business, obstruct our building to make a living. . . .

What you don't even know now they cost you a day's pay by giving you bad advice that day. . . .Some of you said I'll be there with my tools ready to go. Someone talked you out of it. So you start work on Wednesday instead of Tuesday. Cost you a day's pay. Right? He can fight for it. Right? Good luck. I can hear the judge now: "Let me get this right, Chuck, you're a grown man, been doing this a long time, you said you'd be there on time, it was 12 o'clock on Monday, you couldn't rent a truck and get your tools to work by Tuesday morning like you said you could?" He's not going to believe you. He's not going to be able to pay you. . . . That's your friend Sam, giving you good advice. . . .

And then they negotiated a contract. You know the first one you vote on wasn't what you were

offered. I was dumfounded. I thought that could be illegal. We could have offered you $50 an hour. . . . They didn't put the real numbers in front of you until they were ready to settle the strike. I tell you what, Sam did a great job against a real legal team, but he didn't do you guys any favors because the first contract offer was an unprecedented deal because everybody wanted to move on and keep going. Nobody wanted a strike. . . . That's not what's put in front of you. . . . I don't even know what you were offered because I stayed out of it. I didn't go to one meeting . . . . My point is, you guys get manipulated. Don't be manipulated by anybody, don't be manipulated by me, the union, anybody, look out for yourself, be smart. . . . The first thing they put in front of you was not even close to what you were offered. It was three times the historical rates that you guys got and it was voted down. Why? Because they lie to you. . . . You voted on some bullshit they put in front of you because they wanted a down vote to muscle. In the end you ended up with the same fucking deal but you sat out on the curb for six weeks too long for $300 a week. How's that feel? And you pissed a lot of people off. How's that feel, Mike? . . .

[The union] keeps preoccupying our time with bullshit; I'll keep you guys busy with bullshit ..... Keep shitting on your house with stupid bullshit over water. . . . [and that you used to

have] a chest on the wall, now I want it back. Really, who are you guys to anything? . . . You don't have a right to demand shit. They can write anything they want on those pieces ..... I'll buy you guys your own pads of grievances for Christmas if you want. . . .

Keep it up and we can play this game all day because I'm not backing down. I'm not going to be bullied by Sam. He's not going to put his fucking finger in my face ..... You guys put me on [the news]. . . I'm an asshole. . . .My kid is going to Google that shit someday. I deserve that? . . .

14 guys acted badly, misguided, misled . . . Easy decision for me. So go home every night and tell yourself, "What a cock sucker he is." It's OK. I can live with it. I can be the nicest guy in the world, you put me in a corner, I'm going to fucking eat your face. That's who I am. I'll give you a kidney, Ronnie but you fuck with me and my people, I'm going to eat your kidney out of your body and spit it at you. That's how nasty I can be. It's not in my nature to be a prick, but when I see shit like that Pat, it's easy to be a prick to you; real easy. And they can't stop me from being a prick. So you should ask yourself a question, do you want to work for a prick? Think about it. You got anything you want to say? . . . Let's go back to work.

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L. The October 27 Threat

Brian Higgins, a journeyman service technician, has been employed by the Company for about two years. He was not one of the Unit employees not recalled on September 18. On October 27, Laskaris called Higgins to inform him that he was finally being recalled to work and if he was still interested. Higgins responded affirmatively. Laskaris, however, replied that he did not want Higgins or any of the remaining permanently replaced employees to return to work. He also warned that if Higgins returned to work it would not be long before he was gone.[36]

M. The November 17th Recall Letters

On November 17, the Company offered recall to Higgins, Wilson, Scott, Gibbs and Mendralla from their status as "a permanently replaced employee in accordance with the recently ratified collective bargaining agreement between the NCDC and Local 701:"

> We expect you that you will return to work on Monday November 20, 2017. If, however, you are unable to report on Monday, November 20, 2017, as outlined in the Standard Automotive Agreement strike settlement agreement regarding recall, you will have three (3) working days to report after notice of recall. If you have reasonable excuse for being unable to report during this time period, please

36. Laskaris did not dispute Higgins' credible testimony regarding this conversation. (Tr. 149-150.)

> communicate that excuse within the three working day period to Jeremy Moritz . . . [his] assistant (Brittany Chadek) can be reached at . . . For these purposes, a communication from a union official (including Mr. Cicinelli) or the Union's attorney . . . regarding your intended return is sufficient.
>
> If you fail to report or do not provide a reasonable excuse within the three-day period, you will be considered as having resigned from employment. Waiving your recall at this time will be permanent and will result in loss of all future recall rights as well as a break in seniority with [the Company], in accordance with the current collective bargaining agreement.
>
> We are looking forward to having you return as a valued member of our organization and look forward to hearing from you soon.[37]

LEGAL ANALYSIS

I. SECTION 8(A)(1) THREATS

Under Section 8(a)(1) of the Act, an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title". 29 U.S.C. § 158. The Supreme Court described the balance between those employee rights and an employer's

37. Joint Exh. 10.

free speech rights as codified by Section 8(c) in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969):

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company.

Between June 29 and October 6, the Company made numerous threats and coercive statements that lacked the objective character necessary to invoke the protection of Section 8(c).

A. June 29

During a conversation initiated by Bisbikis on June 29 regarding employee concerns, Laskaris warned him that "things would not be the same" if Unit employees went on strike. The statement violated Section 8(a)(1). It did not communicate any objective facts or predictions as to the effects of a potential strike. Although vague, the statement's timing is significant as it occurred just before a strike was about to begin at the dealership. See *United Aircraft Corp.*, 192 NLRB 382, 383 (1971) (Employer violated the Act with statement two days before a pending strike that "[a] lot of people are going to get hurt and a lot of people won't be coming back"). On its face, the statement cannot be viewed as anything but a threat

that a strike would produce only negative consequences for the Unit. *Commc'ns Workers of Am. Local 9509*, 303 NLRB 264, 272 (1991) (employer's thinly veiled threats to an employee with respect to their union activities was unlawful); *APA Transport Corp.*, 285 NLRB 928, 931 (1987) (same); *Waterbed World*, 286 NLRB 425, 427 (1987) (same).

B. September 20

On September 20, Towe was interrogated by Laskaris about his alleged picket line misconduct, culminating with the dire prediction by Laskaris that Towe would not be at the Company very long and should find another job. The overarching theme of the conversation was not Towe's shenanigans on a particular day, but rather, Laskaris' disapproval of Towe's overall participation in the strike. Laskaris did not assert, and there is no other evidence in the record indicating otherwise, that the statement was made in jest. See *Electri-Flex Co.*, 238 NLRB 713, 716 (1978) (finding a Section 8(a)(1) violation where employer offered discredited testimony that the threat of discharge was a joke); cf. *Baker Machinery Co.*, 184 NLRB 358, 361 (1970) (rejecting a Section 8(a)(1) claim where foreman joked that an employee's days were numbered). Under the circumstances, Laskaris' statement of doubt as to Towe's continued employment was a threat of discharge in response to protected union activity in violation of Section 8(a)(1). *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995) (coercive threats may be implied rather than stated expressly); *National By-Products, Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991) (same).

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C. September 25

On or about September 25, Laskaris held a staff meeting with Gonzalez and other employees to address union leafleting at the dealership. At that meeting, in conjunction with his complaint about continued union leafleting in front of the dealership, Laskaris remarked that he would lay off all of the recalled employees if he ran out of work.

Pursuant to *Gissel*, the question is whether Laskaris' statements constituted an unlawful threat of retaliation in response to protected activity or a lawful, fact-based prediction of economic consequences beyond the employer's control. 395 U.S. 575, at 618-19. In this case, the Company provided no evidence that leafleting was causing such substantial economic harm as to justify the termination of a large number of employees. See *Massachusetts Coastal Seafoods*, 293 NLRB 496, 510-512 (1989) (statement by company official is an unlawful threat, not a lawful prediction, when the official gave no facts or figures to support prediction of economic effects); cf. *In Re Tvi, Inc.*, 337 NLRB 1039 (2002) (finding that supervisor made a lawful prediction of potential layoffs where company was not profitable and the statement was carefully phrased). Laskaris could have made his views about the dealership's economic condition known without threatening to terminate employees, but decided to engage in the type of "brinksmanship" that the Supreme Court has observed often leads employers to "'overstep and tumble (over) the brink." *Gissel*, 395 U.S. at 620, quoting *Wausau Steel Corp. v. NLRB*, 377 F.2d 369, 372

(7th Cir. 1967). Instead, he took the opportunity to once again cast union activity as inimical to Unit members' employment security in violation of Section 8(a)(1).

D. October 6

The complaint alleges that on October 6, Laskaris convened a meeting on the shop floor with all of the mechanics working that day. During the meeting, Laskaris threatened employees with stricter enforcement of company rules, informed them that it would be futile to file grievances, encouraged employees to resign their membership in the union or become core members of the union, coerced employees by telling them that past employees had lost their jobs over their decision to strike, and threatened employees with physical violence. Towe recorded the meeting in full, and the Company objected to the admission of the recording based on Illinois state law, but did not dispute the substance of the recording. The recording was received in evidence consistent with Board precedent. See fn. 35, supra.

An employer violates Section 8(a)(1) of the Act by threatening that it will more strictly enforce rules or policy because of employees' protected activity. *Miller Industries Towing Equipment, Inc.*, 342 NLRB No. 112, slip op. at 1 (2004) (employer unlawfully threatened stricter rule enforcement and restrictions on protected activities in non-work areas in response to unionization); *Mid-Mountain Foods, Inc.*, 332 NLRB 229, 237-38 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001) (supervisor unlawfully warned employees that the company would draft strict

work rules that would be "followed to the letter"); *Long-Airdox Co.*, 277 NLRB 1157 (1985) (employer unlawfully threatened employees with plant closure and told them it would more strictly enforce plant rules).

During the meeting, Laskaris informed the employees that if he chose to enforce the rules as they were written, things would be much harder for them:

> I suggest you read your little blue book that he waved in my face like a smug asshole . . . and if I follow that book your life harder will get harder . . . . There's so much stuff in that book that nobody enforces. Why? Because we don't want to be that kind of place.

Laskaris' statement falls squarely in the *Long-Airdox Co.* line of cases as an unabashed threat of greater enforcement in response to union activity. The crux of the meeting was that there would be negative consequences for engaging in union activities. Moreover, Laskaris' statement of greater enforcement was clearly motivated by general animus towards the protected union actions that occurred at the dealership.

Laskaris' statement regarding the futility of filing grievances was premised on his aversion to letting the union tell him how to run his business. The Board has found violations of Section 8(a)(1) where an employer "conveyed the impression that the contractual grievance procedure was futile." *Prudential Insurance Co. of America*, 317 NLRB 357 (1995) (supervisor unlawfully

informed employee that filing grievances would "lead to a bad situation" and "it didn't matter what happened during the grievance procedure"); *Laredo Packing Co.*, 254 NLRB 1 (1981) (personnel director unlawfully explained to an employee why the grievance he filed lacked merit and threatened discharge if he did not withdraw it). Laskaris made his views regarding the futility of filing grievances and the low merit of past grievances abundantly clear:

> What I'm telling you is I don't give a shit about grievances. Grieve all you want. It doesn't matter. They can't do shit. . . "They're not giving us free water . . . [or] gloves anymore." . . . Grieve all you want. . . . Bull shit. I don't care about grievances, grieve all you want. . . Keep putting you name on it. You look stupid saying they don't give me free water. Until this happened, you were happy working here. Grieved about water, go ask Jean who makes 20% of what you make where she gets her water, she'll tell you she gets it from her house. Be a man, grieve something important, like wages. . . You wonder why I'm pissed. . . It's not right, I'm here to tell you I don't care, I don't care on what you grieve, I don't care how much you complain, they're not going to tell me what to do.

In unequivocal fashion, Laskaris stated that he had no patience for past grievances, nor would he entertain any grievances that did not comport with his idea of a "real grievance." These comments crossed the line of protected employer speech under Section 8(c) and, thus, violated Section 8(a)(1).

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Laskaris continued the meeting by making a pitch for why the employees should resign from the Union or become financial core members:

> Every 701 member has an option. . . You could be a financial core member . . . you get everything everybody else gets. You're a member like everybody else. All your benefits are protected. You trade one thing. You never have to strike. . . . but you give up your vote on the contract but you never have to strike . .. but before you strike ever again educate yourself. Because if I were you, I would have changed my membership a week before the strike. . . . I'm going to go to work and get a paycheck while those guys throw play darts, lift weights and make assholes out of themselves. . . . By the way, your [union representative] he came in and had a meeting with a couple of guys to sign them up and they said tell me what I'm signing, he goes never mind, just sign, he bullies them. Then they said tell me about financial core. . . . There's no such thing. He lies to them. Now he's calling them scabs. . .

Pursuant to *Gissel*, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." Laskaris' remarks displayed clear animus toward the union and its representatives, and overzealously encouraged the Unit to consider his

proposal for withdrawing union membership. *Adair Standish Corp. v. N.L.R.B.*, 912 F.2d 854, 860 (6th Cir.), judgment entered, 914 F.2d 255 (6th Cir. 1990) (supervisor violated Section 8(a)(1) when he ""took it upon himself" to "let the employees know that [he] had forms to fill out to revoke their authorization cards"); *Peabody Coal Co. v. NLRB*, 725 F.2d 357, 364 (6th Cir. 1984) (finding a Section 8(a)(1) violation where the employer "offered both the method and the means to withdraw from the union" and encouraged consideration of this option"). It is noteworthy that Laskaris openly displayed animus toward the Union and engaged in other Section 8(a)(1) violations before and after these remarks. *NLRB v. E.I. DuPont de Nemours*, 750 F.2d 524, 528 (6th Cir. 1984) ("the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees"). Given the overtly hostile context of the October 6 staff meeting, Laskaris' encouragement of union members to resign from the union or become financial core members violated Section 8(a)(1).

Laskaris also blamed Unit employees for the loss of non-unit employees' jobs because they chose to strike. He admonished the strikers for disrupting the work of non-unit employees and asked the strikers how they felt about the parts and sales department employees who were laid off because of the strike. Considering the total context in which these statements occurred, Laskaris deliberately played on the sympathies of the Unit employees to coerce them from exercising their Section 7 rights again in the future. *NLRB v. E.I. DuPont de Nemours*, 750 F.2d at 528. Accordingly, all statements placing responsibility

on Unit employees for the loss of non-unit jobs violated Section 8(a)(1) of the Act.

As the meeting wound down, Laskaris ratcheted the impact of his coercive remarks with anatomically colorful remarks that reasonably threatened physical harm if Unit employees continued to engage in future union activity:

> 14 guys acted badly, so go home every night and say what a cock sucker he is, I'm Ok with it, put me in a corner, I'll eat your face, I'll give you a kidney, but you fuck with me and my people, Ronnie, I'm going to eat your kidney out of your body and spit it out. That's how nasty I can be. And they can't stop me from being a prick. Ask if you want to work for a prick. Anything you want to say?

Laskaris made this statement during a heated speech aimed at returning strikers and other employees, and it was not unreasonable for the employees present to be shocked by Laskaris' comments. See *Jax Mold & Machine, Inc.*, 255 NLRB 942, 946-947 (1981) (supervisor's statement made in anger that he would shoot union supporters constituted an unlawful threat), enfd. 683 F.2d 418 (11th Cir. 1982); cf. *Strauss & Son, Inc.*, 200 NLRB 812, 822 (1972) (no violation where employees would not have believed the employer when he said he wished he could load certain employees into a truck, put some dynamite into it, and blow them all up). Laskaris' remark was not made in jest but was an act of verbal intimidation that conveyed to the employees in attendance that union activities were not to be repeated. Even if Laskaris' statements were not

construed as legitimate threats to cause bodily harm, they would reasonably tend to coerce employees in the exercise of their Section 7 rights. *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, slip op. at fn. 6 (2016). For the foregoing reasons, Laskaris' threats violated Section 8(a)(1).

E. October 27

Higgins received a telephone call from Laskaris regarding his recall. During the call, Laskaris told Higgins that he did not want Higgins or any of the remaining permanently replaced employees to return to work. He then warned Higgins that if he returned to work it would not be long before he was gone.

Laskaris' statements were overtly coercive in trying to convince Higgins that returning to the Company would not be in his best interest. The expression of doubt as to Higgins' longevity with the Company violated Section 8(a)(1). See *Concepts & Designs, Inc.*, 318 NLRB at 954.

II. ALLEGED ADVERSE ACTIONS

The complaint alleges that Laskaris terminated Bisbikis' employment because he engaged in concerted union activities and to dissuade others from engaging in such activities. The Company contends that Bisbikis' discharge resulted from his use of vulgar language and, thus, insubordinate conduct, toward Laskaris. Other alleged acts of retribution include the institution of a new attendance policy, the removal of free gloves and water, the implementation of restrictions on Union

access to Company facilities, the Company's tasking of Unit mechanics with washing cars, Laskaris' dismissal of unit employees without pay on September 18, and the Company's four month delay in recalling five permanently replaced employees.

In determining whether Bisbikis and Unit employees were subjected to adverse employer action because they engaged in protected or union activity, the appropriate test is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved at *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). The General Counsel must initially show the employee's protected activity was a motivating factor in the decision to terminate. See *Coastal Sunbelt Produce, Inc. & Mayra L. Gagastume*, 362 NLRB No. 126, slip op. at 1 (2015) ("Under Wright Line, the General Counsel has the initial burden to show that protected conduct was a motivating factor in the employer's decision"). Establishing unlawful motivation requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009) (unlawful motivation found where the employee became active in union activity, the employer was aware that he was leading employee meetings, and the employer singled out the employee for testing).

If the General Counsel prevails, the burden shifts to the Company to prove that it would have terminated

Bisbikis regardless of his protected concerted activity. 251 NLRB at 1089; *Manno Electric,* 321 NLRB 278, 281 (1996) (employer's affirmative defenses failed to establish that it would have transferred the workers to new job sites regardless of their union activities). An employer may not offer pretextual reasons for discharging an employee. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007) (finding that employer's reliance on a minor infraction and a claim of insubordination were pretexts for discharging an employee); *Golden State Foods Corp.*, 340 NLRB 382 (2003) (noting that there is no need to perform the second part of the *Wright-Line* test if the reasons for discharge are merely pretextual.

A. Bisbikis and Unit Employees Engaged in Concerted Protected Activity

Protected concerted activity is defined as activity which is "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 (1983) (*Meyers I*), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986) (*Meyers II*), cert denied. 487 U.S. 1205 (1988). In *Meyers II*, the Board broadened the scope of the definition to include "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. 281 NLRB at 887.

It is undisputed that Laskaris and Unit employees engaged in protected concerted and union activity and

the Company had knowledge of this activity. Bisbikis prominently engaged in union activity as the union steward at the Company. On June 29, he went to Laskaris' office to discuss the costs of uniform shirts and the pending strike. Bisbikis and Unit employees organized and participated in the seven and a half week strike that followed the failure of the union and NCDC to reach a new collective bargaining agreement. On September 18, after the strike concluded, Bisbikis and Union representatives Cicinelli and Thomas met with Laskaris and Francek on behalf of the Unit so that they could discuss a return-to-work plan and communicate grievances.

B. The Discharge was Motivated by Animus

Common indicators of animus are a showing of "suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employee." *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

Bisbikis worked at the Company for 15 years, and by all accounts had an amicable relationship with management throughout his tenure. His relationship with Laskaris began to deteriorate, however, when he met with Laskaris on June 29 to discuss shop issues, particularly the new requirement that employees would be required to cover the cost of their uniform shirts. At this meeting, Laskaris rejected Bisbikis' proposal and warned him that if the mechanics went on strike, "things wouldn't be the

same." This threat constituted a Section 8(a)(1) violation which is also compelling evidence of animus. See *In Re Sunrise Health Care Corp.*, 334 NLRB 903 (2001) (veiled threat of more onerous working conditions was both an 8(a)(1) violation and evidence of animus); *In Re Casino Ready Mix, Inc.*, 335 NLRB 463, 465 (2001) (unlawful threat to move the Company or replace the drivers with owner-operators to avoid unionization was sufficient to establish animus).

Moreover, during the strike, Bisbikis and four other employees were informed that they had been permanently replaced. Neither Laskaris nor Francek offered an explanation as to why Bisbikis and the four other employees were permanently replaced while everyone else was able to return to work. At the conclusion of the strike, Laskaris ejected Bisbikis from his office when he arrived with Cicinelli and Thomas to discuss the return-to-work process on September 18. Bisbikis returned with the union representatives a short while later, ignored Laskaris' demand that he leave, and persisted in conveying the grievances of Unit employees as their steward. The recitation included a reference to Laskaris' June 29 threats, which Laskaris falsely denied. After Bisbikis called him a liar, Laskaris told him to "get the fuck out," at which point Bisbikis insulted him in Greek. Laskaris banished Bisbikis for good, telling him that he was fired.

The aforementioned circumstances provide strong indications that Bisbikis' union and other protected activity was a "substantial or motivating factor" in the decision to discharge him. *North Hills Office Services*,

346 NLRB 1099, 1100 (2006) (General Counsel met its initial burden by showing that the employer instituted a new uniform policy and changed lunch schedules to curtail Section 7 activity). Evidence of animus can be inferred from the entirety of the record, looking to both circumstantial evidence and, where available, direct evidence. See e.g., *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1023-1024 (1999) (Circumstantial evidence that employer knew about and was monitoring an employee organizing campaign, combined with the suspicious timing of employee discharges, was sufficient to infer animus). In *Alternative Entertainment. Inc.*, 363 NLRB No. 131 (2016), enfd. 858 F.3d 393 (6th Cir. 2017), an employee engaged in protected concerted activity by discussing concerns about a change in the wage structure with other co-workers. Management knew about his protected activity, pulled him aside and asked that he refrain from discussing this issue with other workers. Shortly thereafter, the discriminatee was fired. The Board agreed that the timing of the discharge, in the absence of direct evidence, provided "strong circumstantial evidence" of not only knowledge of continued engagement with a protected activity, but also of a discriminatory motive. *Id.*

The timing significantly undermines the Company's assertion that Bisbikis was discharged solely for insulting Laskaris and calling him a liar. Laskaris ominously warned Bisbikis not to go ahead with a strike, but the Unit did so anyway. After the strike began, Laskaris made clear his displeasure with Bisbikis by permanently replacing him. When Bisbikis tried to get an explanation for his discharge and explain some of his co-workers'

grievances, Laskaris adamantly refused to speak with him.

Moreover, the Company failed to demonstrate that Bisbikis' insult of Laskaris was such an egregious violation of company policy that it warranted immediate discharge. Bisbikis allegedly violated the Company's code of conduct, but the Company never produced evidence of such a policy. Nor did the Company produce evidence explaining its decision to permanently replace Bisbikis, the union steward, and five other employees, while recalling seven others.

Lastly, even after Bisbikis was discharged, Laskaris made a point to voice his displeasure with Bisbikis to all of the mechanics in the shop during the October 6 meeting. The cumulative weight of the credible evidence strongly supports the conclusion that Laskaris' animus toward Bisbikis' protected union activity was the primary motivation for discharging him.

The Company's contention that Bisbikis' insubordination extinguished his Section 7 protection is incorrect. An employee's right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584 (7th Cir. 1965). The Board uses a 4-factor test to determine whether communication between an employee and a manager or supervisor in a workplace is so derogatory that it causes the employee to lose the protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814,

816 (1979). The four factors are: (1) the place of discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by the employer's unfair labor practice. *Id.*

The incident between Bisbikis and Laskaris took place in the midst of a heated discussion in Laskaris' office outside the purview of any other employees. Bisbikis' language, while vulgar, did not disrupt the workplace, nor did it undermine management's authority. *Stanford Hotel*, 344 NLRB 558 (2005) (highlighting that the workplace outburst occurred away from the normal working area in a closed door meeting where no other employees were present, and did not weaken management's authority). Prior to the outburst, Bisbikis was speaking about issues related to both his own replacement and the replacement of other employees, as well as other grievances held by Unit employees. Bisbikis' insult occurred after Laskaris refused to explain why certain employees were permanently replaced, would not consider the grievances Bisbikis wanted to convey, and denied ever meeting with Bisbikis about worker complaints prior to the strike. Bisbikis wanted to discuss potential unlawful labor practices that affected the Unit, including himself, but resorted to insulting Laskaris after the two were unable to have a productive conversation.[38] Considering all the *Atlantic Steel* factors together, Bisbikis' conduct was not egregiously derogatory, and thus he retained the protection of the Act. See *Syn-Tech Windows Sys.*,

38. Foul language was used at least once during the conversation prior to Bisbikis' insult when Laskaris told Bisbikis to "get the fuck out before I get you the fuck out."

294 NLRB 791, 792 (1989) (Employee did not lose the protection of the Act when he pointed his finger angrily at a manager and made an unspecified threat during a meeting about union activities); *Union Carbide Corp. & Rex A. King*, 331 NLRB 356, fn. 1 (2000) (Employee's conduct was "at most rude and disrespectful" when he called his supervisor a "fucking liar").

C. The Adverse Actions Taken Against Unit Employees

The Company's attendance policy was first communicated to employees via the September 18 recall letters. The previously awarded benefits of free water and gloves were also taken away in the immediate aftermath of the strike. Creating these policies within days of a concluded strike is suspicious, especially since the Company gave no indication that it considered having a formal attendance policy or ending its practice of free water and gloves prior to the strike. The Company presented no evidence that it would have implemented the attendance policy regardless of the Unit's protected activities. The Company continued to offer water and gloves, but at high prices, removed the shop water fountain, and banned employees from having refrigerators on the premises. The Company's price gouging, lack of a credible explanation for its conduct, and suspicious timing indicate that the decision to withdraw free gloves and water was motivated by animus towards the protected activities of the Unit. See *Frierson Bldg. Supply Co.*, 328 NLRB at 1023-1024; *Medic One, Inc.*, 331 NLRB at 475.

Appendix C

In the midst of a slow business period, the Company assigned Towe, an apprentice mechanic, to wash cars, a task normally completed by porters. That unspecified amount of time spent washing cars counted towards Towe's flat salary rate but not as book time. In the absence of evidence that Towe was bypassed for available book work, the claim that he suffered economic loss fails. Accordingly, this allegation is dismissed. *Manno Electric*, 321 NLRB 278.

Management instructed the recalled employees to bring their tools with them when they returned to work on September 18. Unit employees, however, were clearly not prepared to return to work that day. Rather than ask management for leeway to arrive later that morning so that they could get their tools after the storage facility opened, they arrived empty-handed with their union representatives and grievances. Laskaris was also uncooperative on September 18 and at the outset on September 19 when Unit employees paraded, once again empty-handed, to the facility. He eventually relented, however, and permitted Unit employees to return their tools later during the afternoon of September 19 and they returned to work the following day. Under the circumstances, considering the Company's interest in avoiding disruption of having massive tool boxes hauled back into the shop during business hours, the eventual arrangement was not unreasonable. *Manno Electric*, 321 NLRB 278. This complaint allegation is also dismissed.

Appendix C

III. UNILATERAL CHANGES TO WORK TERMS AND CONDITIONS

The complaint alleges that the Company violated Section 8(a)(5) and (1) of the Act by enacting a new attendance policy, removing free gloves and water that were once provided to employees, assigning mechanics to wash cars, and changing the Union access policy without going through the collective bargaining procedure. The General Counsel claims that the Strike Settlement Agreement and Successor Contract required the Company to abide by the collective bargaining procedure with respect to changing any previously existing policies and procedures. The General Counsel also asserts that the Company's delay in recalling five permanently replaced until November was a violation of 8(a)(5). The Company concedes that it took these unilateral actions, but asserts that it did so justifiably.

Where a unilateral change in the terms or conditions of employment is material, substantial, and significant, such a change constitutes a violation of Section 8(a)(5) and (1) of the Act. *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987) (noting that there is a statutory bargaining obligation where the unilateral change affecting the terms and conditions of employment of bargaining unit employees is material, substantial and significant); *Alamo Cement Company*, 277 NLRB 1031 (1985) (finding that a change in classification where the employee performed essentially the same function as before the change in classification was not a substantial, material, and significant change). Not every unilateral

change, however, constitutes a violation of the bargaining obligation. Compare *J.W. Ferguson & Sons*, 299 NLRB 882, 892 (1990) (finding that the change was not material, substantial, and significant where the employer increased the lunch break by five minutes and decreased the afternoon break by five minutes; *Weather Tec Corp.*, 238 NLRB 1535 (1978) (finding the employer's decision to end paying for coffee supplies that employees used was not a material, substantial and significant change) with *The Bohemian Club & Unite Here! Local 2*, 351 NLRB 1065, 1066 (2007) (finding changes to cleaning duties material, substantial, and significant because cooks had to work an extra 30 minutes to accomplish new tasks, and involved new tasks such as wiping down walls, counters, refrigerator doors, and sweeping the floor) and *Crittenton Hospital*, 342 NLRB 686, 690 (2004); (finding a change in the dress code policy a material, substantial, and significant change to the terms and conditions of employment).

A. Attendance Policy

In its September 18 email recalling seven employees, the Company communicated, for the first time, an attendance policy. Several weeks later, the Company implemented another attendance policy without the input of the union. The Company did not have a written attendance policy prior to the strike. It neither disputed this contention nor offered any reasoning for its unilateral decision to implement a written attendance policy. Neither economic expediency nor sound business considerations are sufficient for overcoming the obligation to bargain over a material, substantial term of employment. *Van*

Dorn Plastic Machinery Co., 265 NLRB 864, 865 (1982), modified 736 F.2d 343 (6th Cir. 1984) (finding a violation of Section 8(a)(5) where the employer implemented a new attendance policy without a *compelling economic justification*) (emphasis added). An attendance policy is undoubtedly a substantial aspect of the terms and conditions of employment for an employee. *Id*; *Local 2179, United Steelworkers of Am. v. N.L.R.B.*, 822 F.2d 559, 565-66 (5th Cir. 1987) (any subject classified as a "term or condition of employment" is a mandatory bargaining matter). Having proffered no compelling justification for its refusal to bargain over the attendance policy, the Company's unilateral creation of an attendance policy violated Section 8(a)(5) of the Act.

B. Free Gloves and Water

Approximately one week after the strike ended, the Company unilaterally ended its practice of providing free gloves and water to its employees. The Company asserted that it rescinded these privileges as a cost-cutting measure, but presented no compelling economic justification for this decision. *Van Dorn Plastic Machinery Co.*, 265 NLRB at 865. The workers needed gloves to complete their work, effectively making it a part of their uniform. Any change to the dress code required the Company to bargain with the Union beforehand. *Crittenton Hospital*, 342 NLRB at 690. Employee access to clean drinking water is a material aspect of employment as dictated by OSHA regulation. 29 C.F.R. § 1910.141(b)(1)(i) ("Potable water shall be provided in all places of employment, for drinking, washing of the person, cooking ..."). Having failed to afford the Union an

opportunity to bargain over these changes, the Company's rescission of free gloves and water violated Sections 8(a)(5) of the Act.

C. Washing Cars

On an unspecified date on or after September 20, Towe was tasked with washing cars, a job that was completed solely by porters before the strike. Section 8 of the Successor Contract stipulates:

> If business is slack, the Employer may assign an employee work other than that which the employee is regularly classified where such work would not be hazardous to the employee due to lack of experience and training. The employee shall receive their applicable rate.

The Company's assertion that work was slow after the strike was not disputed. Moreover, Towe, an apprentice mechanic, was the only witness to testify that he was assigned to wash cars on an unspecified occasion(s). While there was undisputed testimony that washing cars instead of performing book work could diminish a mechanic's earnings potential, there was no evidence indicating that Towe or any other Unit employee suffered economic loss as the result of such work. Accordingly, this allegation is dismissed.

D. Union Access Policy

The Company prohibited Union representatives Cicinelli and Thomas from accessing the Unit employees

without notifying the Union or bargaining with the Union. Several unsubstantiated safety reasons were proffered by the Company, and none of them are compelling. The policy governing Union access to employees was strictly governed by the Successor Contract and any changes to this policy required notification and bargaining. See *Angelica Healthcare Services Group*, 284 NLRB at 853. The company had no compelling justification for its unilateral change to the Union access policy. *Id.* Accordingly, the Company's unilateral change to the Union access policy was a violation of 8(a)(5) and (1).

E. November Recall

During the strike, five Unit employees were permanently replaced and were not recalled to work until November. The procedure by which employees were to return to the Company was expressly governed by the settlement agreement and Successor Contract. The settlement agreement stated that temporary replacement workers would be displaced while permanently replaced employees would be placed on a preferential hiring list in order of seniority. The Company was unable to provide any evidence showing that the five employees recalled in November had been permanently replaced during the strike. The lack of immediate reinstatement for these five employees constituted a departure from the settlement agreement and a unilateral change to a material condition of employment in violation of Section 8(a)(5). *Angelica Healthcare Services Group*, 284 NLRB at 853. Furthermore, the record is devoid of a compelling economic justification for the Company's decision to not

recall five employees for almost two months after the strike was over. *Van Dorn Plastic Machinery Co.,* 265 NLRB at 865. It should be noted, however, that unlike the request for a make whole remedy for Bisbikis, there is no make whole remedy requested in the complaint or by the General Counsel regarding the two month delay in recalling the five employees. See GC Brief at 36.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening that things would not be the same if employees went on strike, telling permanently replaced employees that he did not want any of them to return to work and that if they returned to work it would not be long before they were gone, telling employees that he would not be at the Respondent very long and should find another job, telling employees, as the Union leafleted outside the facility, that he would lay off recalled employees if he ran out of work, threatening stricter enforcement of company rules, informing employees that it would be futile to file grievances, encouraging employees to resign their membership or become core members of the Union, telling employees that non-unit employees lost their jobs over the decision to strike, and threatening employees with physical violence, the Respondent violated Section 8(a)(1) of the Act.

4. By enacting new attendance policies, and removing free work gloves and drinking water because of employees' union activity, all without notifying the Union and giving it an opportunity to bargain over the changes, the Respondent violated Section 8(a)(3), (5) and (1).

5. By prohibiting access to Unit employees at the Respondent's facility by Union representatives Sam Cicinelli and Ken Thomas because they engaged in union activity, and without first notifying the Union and giving it an opportunity to bargain over the changes, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By discharging John Bisbikis on September 18 because he supported the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

7. The remaining allegations are dismissed.

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.

The Respondent, having discriminatorily discharged John Bisbikis, must offer him reinstatement and make him whole for any loss of earnings and other benefits. 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 No. 8 (2010).

In accordance with the Board's decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also be ordered to compensate Bisbikis for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Additionally, the Respondent shall be required to compensate Bisbikis for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay to the appropriate calendar years. *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016). Finally, the Respondent shall be ordered to remove from its files any reference to Bisbikis' unlawful discharge and to notify him in writing that this has been done and that the unlawful suspensions and discharges will not be used against him in any way

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee 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 No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, Cadillac of Naperville, Inc., Naperville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that their terms and conditions of employment things would not be the same if they went on strike.

(b) Telling permanently replaced employees that you do not want any of them to return to work and that if they return to work it would not be long before they were gone.

(c) Telling employees that they would not be employed by you very long and should find another job because they engaged in strike or other union activities.

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39. 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.

(d) Telling employees that, if you ran out of work, you would lay them off first because they engaged in strike or other union activities.

(e) More strictly enforcing company rules because of employees' union activities or support.

(f) Telling employees that it would be futile to file grievances.

(g) Encouraging employees to resign their membership or become core members of the Union.

(h) Telling employees that non-unit employees lost their jobs over their decision to strike.

(i) Threatening employees with violence if they engage in concerted or union activities.

(j) Enacting attendance policies and removing free work gloves and drinking water because employees engage in strike or other union activity, without first notifying the Union and giving it an opportunity to bargain over such changes.

(k) Prohibiting access to Unit employees at your facility by Union representatives without first notifying the Union and giving it an opportunity to bargain over such changes.

(l) Unilaterally changing the terms and conditions of employment of unit employees by implementing an

attendance policy, and charging employees for the cost of work gloves and drinking water.

(m) Discharging employees because they supported the Union.

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

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

(a) Within 14 days from the date of this Order, offer John Bisbikis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

(b) Make Bisbikis 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 this decision.

(c) Compensate Bisbikis for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

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

(e) Notify all employees that written attendance policies issued on and after September 18, 2017, and policies issued on or after September 25, 2017 charging employees for the cost of work gloves and drinking water, have been rescinded.

(f) Before implementing any changes to attendance policies, work gloves, drinking water or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All of Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

(g) Within 14 days after service by the Region, post at its facility in Naperville, Illinois copies of the attached notice marked "Appendix."[40] Copies of the notice, on forms provided by the Regional Director for Region

40. 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.

13, 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 June 29, 2017.

(h) 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. June 19, 2018

Michael A. Rosas
Administrative Law Judge

Appendix C

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

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you if you support a Union or engage in Union activities.

WE WILL NOT threaten you that your terms and conditions of employment things will not be the same if you go on strike.

Appendix C

WE WILL NOT tell you, if you go on strike and subsequently to return to work, that we do not want you to return to work and that if you do return to work it would not be long before you were gone.

WE WILL NOT tell you that will not be employed by us very long and should find another job if you engage in strike or other union activities.

WE WILL NOT tell you that, if we run out of work, that we will lay you off first because you engage in strike or other union activities.

WE WILL NOT more strictly enforce company rules because your union activities or support.

WE WILL NOT tell you that it would be futile to file grievances.

WE WILL NOT encourage you to resign your union membership or become a core member of the Union.

WE WILL NOT tell you that non-unit employees lost their jobs over your decision to strike.

WE WILL NOT threaten you with physical violence.

WE WILL NOT enact attendance policies and charge you for work gloves and drinking water because you engage in strike or other union activity, without first notifying the Union and giving it an opportunity to bargain over such changes.

Appendix C

WE WILL NOT prohibit access to you at your facility by Union representatives without first notifying the Union and giving it an opportunity to bargain over such changes.

WE WILL NOT 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.

WE WILL, within 14 days from the date of the Board's Order, offer John Bisbikis full reinstatement to his former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

WE WILL make Bisbikis whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Bisbikis for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Bisbikis, and WE WILL, within 3

days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind, and have rescinded, written attendance policies issued on and after September 18, 2017, and policies issued on or after September 25, 2017 charging employees for the cost of work gloves and drinking water.

WE WILL, before implementing any changes to attendance policies, work gloves, drinking water or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All of Journeyman Technicians, Body Shop Technicians, apprentices, lube rack technicians, part time express technicians and semi-skilled technicians.

CADILLAC OF NAPERVILLE, INC

(Employer)

Dated _____ By

(Representative)

(Title)

Appendix C

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Dirksen Federal Building, 219 South Dearborn Street, Room 808, Chicago, IL 60604-1443

(312) 353-9158, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-207245 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF

Appendix C

POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED NOVEMBER 22, 2021

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1150

CADILLAC OF NAPERVILLE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Consolidated with 19-1167

September Term, 2021

NLRB-13CA207245

Filed On: November 22, 2021

BEFORE: Srinivasan, Chief Judge; and Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, Walker, and Jackson, Circuit Judges

Appendix D

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/_____
Anya Karaman
Deputy Clerk