Greyhound Lines, Inc. *and* Louis Little. Case 08–CA–181769

May 6, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On July 21, 2017, Administrative Law Judge Thomas M. Randazzo issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.[4]

The main issue presented in this case is whether the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) when it discharged employee and chief union steward Louis Little on July 13, 2016,[5] because of his conduct during a June 24 confrontation with Manager Jon Heben. As more fully detailed below, this confrontation began when Little approached Heben, together with employee Danielle Young, to discuss Young's complaints about Heben's alleged mistreatment of her. This discussion quickly escalated, with Little using profanities and engaging in aggressive physical conduct, including in a location visible to employees and the Respondent's customers.

The judge found that Little was engaged in protected union activity during the confrontation. Applying the factors set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), the judge then analyzed whether Little's misconduct during the confrontation caused him to lose the protection of the Act. Under *Atlantic Steel*, the Board considers four factors: (1) the location 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 the Respondent's unfair labor practices. Id. at 816. The judge found that all four factors favored Little's continued protection under the Act. Accordingly, the judge concluded that the Respondent unlawfully discharged Little for engaging in union activity.

We agree with the judge's finding that Little engaged in union activity during his confrontation with Heben. We disagree, however, with some aspects of the judge's *Atlantic Steel* analysis. Contrary to the judge, we find that the nature of Little's conduct and the location of the confrontation do not weigh in favor of finding that Little retained the protection of the Act. As explained below, we find these factors are neutral. We agree with the judge, however, that the remaining factors—the subject matter of the confrontation and the extent to which Little's conduct was provoked by the Respondent—weigh in favor of continued protection, and we also agree with the judge's overall conclusion that Little retained the protection of the Act under *Atlantic Steel*. Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) when it discharged Little for engaging in union activity.[6]

---

[1] Member Emanuel is recused and took no part in the consideration of this case.

[2] 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.

No exceptions were filed to the judge's finding that this case is not appropriate for deferral to the grievance-arbitration procedure of the collective-bargaining agreement between the Respondent and the Amalgamated Transit Union Local 1700 (the Union).

The Respondent filed only bare exceptions to the judge's findings that it violated Sec. 8(a)(1) by maintaining "Hostility," "Personal Conduct/Courtesy," and "Company Information" work rules. Because the Respondent has not presented any argument in support of these exceptions, we find in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations that these exceptions should be disregarded. See, e.g., *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 3 (2018); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

The General Counsel does not except to the judge's denial of his request that the remedy include consequential damages as a result of the Respondent's unfair labor practices.

[3] We have amended the judge's conclusions of law consistent with our findings herein.

[4] We shall substitute a new notice to conform to the Order as modified.

[5] All subsequent dates are in 2016.

[6] The judge found Little's discharge unlawful under two additional theories as well. First, he found that Little also engaged in protected concerted activity during the confrontation with Heben and that the Respondent violated the Act by discharging Little because of that protected concerted activity. Second, the judge found that Little's discharge was independently unlawful, under Sec. 8(a)(1), because it was pursuant to the Respondent's unlawfully overbroad Hostility and Personal Conduct/Courtesy rules. We find it unnecessary to pass on these additional theories of violation, and we do not rely on the judge's analysis of them, because they would not materially affect the remedy. We note, however, that in support of his finding that Little's conduct was concerted, the judge cited *Anco Insulations, Inc.*, 247 NLRB 612 (1980), and *Alleluia Cushion Co.*, 221 NLRB 999 (1975). We do not rely on the judge's citation of these cases. We observe that *Anco Insulations* cited and relied on *Alleluia Cushion* as authority for the standard for determining whether

I. FACTS

The Respondent provides transportation services throughout the United States. It employed Louis Little as a bus driver at its Cleveland, Ohio facility, where the Union represents a unit of bus drivers and maintenance employees. Prior to his discharge in 2016, Little had been employed by the Respondent for 25 years and had served as a union steward for 20 of those years. During the 3 years prior to his discharge, he served as chief union steward. In these roles, he investigated and prepared grievances on behalf of unit employees and met with the Respondent's officials to discuss them. In May and June, several unit employees, including bus driver Danielle Young, spoke to Little in his capacity as chief steward about Manager Jon Heben, who is responsible for overseeing bus drivers and other personnel at the Cleveland facility. Young complained that Heben spoke to her with "attitude, smartness, [and was] cocky," usually in the presence of bus passengers.

On June 24, the Respondent called Young to cover a bus route scheduled to leave at 2 p.m. Young arrived at the facility at 1:30 p.m., but her departure was delayed past two o'clock by several circumstances. Apparently due to issues with the Respondent's computer system, Young was unable to determine which bus she was assigned to drive. She also looked into alternative routes for her trip because the highway lanes typically used for her route were closed due to an accident. After a clerk assigned Young a bus, Young spoke with Heben about directions for an alternative route. Young felt that Heben was disrespectful during this conversation by telling her to be quiet and to listen to him and by waving his finger in her face. At 2:35 p.m., Little arrived at the facility. By that time, Young had loaded passengers on her bus, but she had yet to depart. Because he had observed the highway closure, Little approached Young to discuss an alternative route. Young complained to Little that Heben had again been disrespectful to her that day, stating that Heben had waved his finger and yelled at her after she asked him for directions. Little decided that they should immediately discuss Young's complaint with Heben.

The two approached Heben in an enclosed hallway connecting the bus terminal and platform. There were no customers or other employees present in the hallway. Little told Heben that he wanted to talk to him about how he had spoken to Young. Heben denied that he had done anything wrong, reminded the two that Young's departure was delayed, and instructed Young to begin her route. Heben yelled and pointed his finger at Little and Young. Little explained to Heben that this very conduct was the reason for their discussion, but Heben continued to yell and point his finger. Little responded that had the Respondent not failed to assign Young a "damn bus" in its computer system and had the clerk done "what she was supposed to damn do," Young could have "gotten her shit and left" on time. Heben instructed Little not to swear. Little told Heben that because of Heben's behavior, he did not feel that Heben was acting like a supervisor. Heben moved closer to Little and pointed his finger in Little's face. Little told Heben that the delay was Greyhound's "fucking fault." After Heben again instructed Little not to swear, Little said "fuck you." Little and Young ended the confrontation, which Heben testified lasted "a minute or two possibly," by exiting the hallway and walking onto the platform near Young's bus. The record does not reveal how many passengers were on the bus. The bus door and windows were shut.

Heben followed Little and Young to the platform. He yelled that Young needed to get on her bus and leave. He walked up to Little, yelled at him to stop swearing, and told Little that he could not say whatever he wanted. Little turned to face Heben and said, "Just like you're putting your finger in my face, I can put my finger in your face." Heben and Little were face to face. Little repeatedly swung his hand across his body, pointing his index finger, and told Heben that he could "say whatever the fuck I want to say." The judge found that Little's gestures were aggressive, but not threatening. Heben asked Little if he was going to hit him, and Little replied that he was not. Little and Young walked away and the confrontation ended. A video recording that captured the platform confrontation shows that it lasted about 30 seconds.

At the hearing and in its exceptions before the Board, the Respondent asserts that Little punched Heben in the abdomen during the platform confrontation. The Respondent, however, failed to provide any evidence to contradict the judge's finding—based on his credibility determinations and scrutiny of the video recording—that Little's hand "never made contact with Heben."[7] Indeed, the Respondent does not dispute the judge's finding that, hours after the confrontation, Heben fabricated evidence of having been punched by rubbing his knuckles against his stomach to cause redness and taking a photograph of the fabricated injury.

The Respondent discharged Little on July 13. In the discharge letter, the Respondent explained that Little had

activity is concerted, and *Alleluia Cushion* and its progeny (necessarily including *Anco Insulations*) were overruled in *Meyers Industries*, 268 NLRB 493 (1984) (subsequent history omitted).

[7] Little and Young testified that Little did not make physical contact with Heben, and the judge credited their testimony over Heben's contrary testimony. We have reviewed the video recording and, like the judge, we see no indication that Little punched Heben in the stomach.

further delayed Young's bus route by confronting Heben and cited his "unrestrained use of profanity," "uncontrolled behavior" leading to a "blow to Heben's stomach," and "gross insubordination."

II. ANALYSIS

We agree with the judge that Little engaged in union activity during his June 24 confrontation with Heben. Earlier that month Young complained to Little, in his capacity as chief steward, that Heben had mistreated her. On June 24, Young complained to Little that Heben had again mistreated her. Plainly, this second complaint was a continuation of Young's earlier-expressed concerns and was addressed to Little in his role as chief steward. Little then approached Heben to discuss Young's complaint. He explained that he wanted to discuss how Heben had spoken to Young that day. After Heben responded by yelling and pointing his finger at Little and Young, Little said that those very actions were the reason for their discussion. Although Little did not explicitly announce as much, it was apparent and we find that Little was acting in his representative capacity as chief union steward on Young's behalf.[8]

Having affirmed the judge's finding that Little engaged in union activity during his confrontation with Heben, we now apply the four-factor *Atlantic Steel* test to determine whether Little retained or lost the protection of the Act in the course of that activity.

We find that the first *Atlantic Steel* factor, the location of Little's conduct, neither favors nor disfavors protection. The Respondent argues that Little lost the Act's protection because the confrontation on the bus platform took place in the presence of passengers and employees.[9] Although there is no affirmative evidence that any passengers on Young's bus witnessed or heard the confrontation, the bus was loaded and parked at the platform, and it is certainly possible that at least some passengers saw and/or overheard it. On the other hand, the bus door and windows were closed, the record does not reveal how many passengers were on the bus, and the Respondent does not dispute the judge's finding that no passengers complained about the confrontation. Moreover, this part of the confrontation only lasted about 30 seconds. We find that the Respondent has not established that Little's conduct impacted passengers or the Respondent's ability to service them. See *Goya Foods of Florida*, 347 NLRB 1118, 1134 (2006) (less than a minute of loud shouting inside a supermarket did not warrant loss of protection where there was no apparent disruption to customers), enfd. 525 F.3d 1117 (11th Cir. 2008).

Turning to employee exposure, three employees reported overhearing and witnessing the confrontation. The Board has found that "an employee's outburst against a supervisor in a place where other employees could hear it would tend to affect workplace discipline by undermining the authority of the supervisor." *Kiewit Power Constructors Co.*, 355 NLRB 708, 709 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011). However, employees Melvin Flowers and Marlon Jackson reported only hearing yelling and seeing Little and Heben on the platform; neither reported hearing profanities or seeing Little's aggressive physical conduct. Indeed, Jackson reported that the incident simply left the two of them "standing there scratching our heads wondering what had happened." This evidence does not establish that these employees witnessed a coworker "undermining the authority of the supervisor." The third employee, Zephaniah Lawson, reported seeing Little touch Heben on the shoulder, yell in Heben's face, and point in Heben's personal space. This evidence certainly implicates the concerns articulated by the Board in *Kiewit*. Lawson, however, did not report hearing any profanities, and his assertion that Little touched Heben is contradicted by the judge's finding that Little's hand "never made contact with Heben."

Finally, and critically, it was Heben—not Little—who chose to extend the confrontation by following Little and Young to the bus platform. The Respondent contends that Heben felt compelled to continue the confrontation because Little ignored Heben's instruction in the enclosed hallway that he not use profanities and because Heben was concerned about preventing any further delays in Young's departure. While this contention has some force, the fact remains that had Heben walked away as Little had just done, the confrontation would have ended, and neither passengers nor employees would have witnessed it. See *Kiewit Power Constructors Co.,* supra (employer "hardly in a position to complain that other employees overheard" two employees' protest of their disciplinary warnings, where the employer chose to distribute the warnings "in a group employee setting in a work area during working time"); *Brunswick Food & Drug*, 284 NLRB 663, 664–

[8] We reject the Respondent's contention that Little was not engaged in union activity because his confrontation with Heben was not a formal grievance meeting or a pregrievance conversation and did not result in the Union filing a grievance. See *Gross Electric, Inc.*, 366 NLRB No. 81, slip op. at 2 (2018) (stating that a union official "is not required to file a grievance in order to be engaged in union activity or to be protected from retaliation").

[9] The Respondent does not dispute that there is no evidence that customers or other employees observed or overheard the portion of the confrontation that occurred in the enclosed hallway. See *Stanford Hotel*, 344 NLRB 558, 558 (2005) (where meeting occurred in a basement lunchroom, no employees were present, and the door was closed to maintain privacy, location favored protection).

665 (1987) (where restaurant manager "selected the setting for [a] confrontation" with union organizers, "it [was] hardly in a position to object that customers were drawn into it"), enfd. mem. sub nom. *NLRB v. Kroger Co.*, 859 F.2d 927 (11th Cir. 1988).[10] In sum, we cannot find that the location of Little's conduct favors a conclusion that Little retained the Act's protection, but in light of the mitigating circumstances discussed above, neither can we find that it disfavors retaining protection. The "location of the discussion" factor is neutral in the *Atlantic Steel* analysis.[11]

The second *Atlantic Steel* factor—the subject matter of the discussion—strongly favors Little retaining the protection of the Act. Little clearly acted in his capacity as union steward when he approached Heben and communicated Young's complaints about Heben's alleged mistreatment of her.

We do not condone an employee's use of profanities or aggressive physical conduct. Nevertheless, for the following reasons, we find that the third *Atlantic Steel* factor—the nature of Little's outburst—neither favors nor disfavors a loss of protection.

There is no doubt that Little became confrontational in the course of advocating for Young. Little admitted using profanities, and the worst of them were directed at Heben. See *Plaza Auto Center, Inc*., 360 NLRB 972, 977 (2014) (distinguishing profanities used to describe an employer's policy with more troubling profanities that insult and target members of management). Moreover, although Little's conduct was not threatening, and (contrary to the Respondent's fabricated assertion) he did not strike Heben in the stomach, Little did gesticulate aggressively in close proximity to Heben. An employee's right to engage in protected activity must be balanced against an employer's need to maintain order, discipline, and respect in its workplace. See *Triple Play Sports Bar & Grill*, 361 NLRB 308, 311 (2014), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015); *Plaza Auto Center*, 360 NLRB at 978. Accordingly, we would ordinarily find that the nature of Little's conduct weighs against protection. See, e.g., *Plaza Auto Center*, 360 NLRB at 977 (employee's repeated obscene and insulting profanities during a face-to-face meeting with a supervisor weighed against protection).

The judge, however, credited the testimony of employees and union officials that employees and members of management alike at the Respondent's Cleveland facility commonly used similar profanities and that public and profane outbursts similar to the confrontation between Little and Heben were also commonplace. For example, Manager Jimmie Lytle testified that he used profanities at the facility, that employees used profanities in front of bus passengers, and that he (Lytle) had heated conversations with union officials during union-management meetings. Moreover, the judge found that the record was devoid of evidence that the Respondent had ever disciplined an employee for using profane language, and Lytle conceded that prior to Little's discharge, the Respondent had never disciplined, suspended, or discharged an employee for using profanities. The Respondent's tolerance of conduct similar to Little's substantially undercuts its argument that Little's conduct was so egregious as to warrant loss of the Act's protection. See *Traverse City Osteopathic Hospital*, 260 NLRB 1061, 1061 (1982) (employee's "profane outburst" was not so egregious as to remove him from the Act's protection in part because "the use of profanity by hospital personnel was not uncommon . . . and had been tolerated in the past"), enfd. mem. 711 F.2d 1059 (6th Cir. 1983); *Corrections Corp. of America*, 347 NLRB 632, 636 (2006) (employee's use of profanity did not result in loss of protection where profanities were "commonly used . . . by [employees] and supervisors alike"). Accordingly, notwithstanding Little's use of profanities and his aggressive physical conduct, we find that this factor neither favors nor disfavors his retaining the Act's protection under the circumstances presented here.[12]

Finally, we find that the fourth *Atlantic Steel* factor—whether Little was provoked—favors a finding that Little retained the Act's protection. Little used profanities in the enclosed hallway only after Heben began to yell and point his finger in response to Little's protected complaint about Heben's treatment of Young. See, e.g., *Battle's Transportation, Inc.*, 362 NLRB 125, 125 fn. 4, 134 (2015) ("sufficient provocation" of employee outburst where a manager told an employee to "shut up"). Notably, it was Heben—not Little—who chose to extend the confrontation by following Little and Young to the bus platform, yelling at

[10] See also *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 26–27 (D.C. Cir. 2011) (citing with approval Board's reasoning that "while quarrels with management are more likely to disturb the workplace if they are made in front of fellow workers, the NLRB will not hold this against the employee when the company picks a public scene for what is likely to lead to a quarrel").

[11] The Respondent faults Little for further delaying Young's departure. Even assuming Little is to blame for the entirety of the confrontation, the record reveals that it lasted no more than 2-1/2 minutes. We do not believe that this minimal delay meaningfully affects the analysis under *Atlantic Steel*.

[12] Chairman Ring and Member Kaplan find that Little did not lose the protection of the Act because the judge credited testimony that the Respondent permitted profanity in the workplace and did not have a record of disciplining employees for this. Without these findings, they would have found that Little lost the protection of the Act.

Young to start her bus route and walking up to Little to admonish him for using profanities.[13]

In sum, Little was profane and aggressive, but Heben behaved provokingly, and the Respondent had tolerated such conduct in the past. Little initiated the confrontation where neither passengers nor other employees were present, and the fact that it continued on the bus platform in view of passengers and employees was partly Heben's responsibility. While a few employees and an unknown number of bus passengers were present for the confrontation, the record does not establish that it had any meaningful impact on the Respondent's operations. Finally, the subject matter of the confrontation—Little's efforts, as chief union steward, to voice an employee's workplace complaints—strongly favors continued protection. Accordingly, we find that Little did not lose the protection of the Act, and the Respondent violated Section 8(a)(3) when it discharged him.[14]

AMENDED CONCLUSIONS OF LAW

Replace Conclusion of Law 2 in the judge's decision with the following paragraph.

"2. The Respondent violated Section 8(a)(3) and (1) of the Act on July 13, 2016, by discharging employee Louis Little because of his union activity."

ORDER

The National Labor Relations Board orders that the Respondent, Greyhound Lines, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Maintaining rules or policies that (1) prohibit employees from making any complaints, criticisms, or suggestions to or in the presence of passengers or the public or that require employees to make any complaints, criticisms, or suggestions through appropriate internal Company channels; (2) prohibit conduct that challenges or coerces another employee or that requires employees to treat members of management with respect at all times; and (3) prohibit employees from divulging anything about the affairs of the company or from permitting access to Company records or reports by any party outside the Company;

(b) Discharging or otherwise discriminating against employees because they engage in union activities;

(c) 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, revise or rescind employee rules or policies that are overbroad, ambiguous, or otherwise limit employees' rights under the National Labor Relations Act insofar as they (1) prohibit employees from making any complaints, criticisms, or suggestions to or in the presence of passengers or the public, and which require employees to make any complaints, criticisms, or suggestions through appropriate internal Company channels (as set forth in Rule 2-1 Hostility); (2) prohibit conduct that challenges or coerces another employee and requires employees to treat members of management with respect at all times (as set forth in Rule 2-3 Personal Conduct/Courtesy); and (3) prohibit employees from divulging anything about the affairs of the company or from permitting access to Company records or reports by any party outside the Company (as set forth in Rule 2-7 Company Information).

(b) Furnish all current employees with inserts for the current employee conduct policies that (1) advise employees that the above-mentioned unlawful policies or rules have been rescinded, or (2) provide employees with the language of revised lawful policies or rules on adhesive backing that will cover the above-mentioned policies; or (3) publish and distribute to employees policies that do not contain the above-mentioned unlawful rules or policies, or which contain or provide the language of lawful rules or policies.

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

(d) Make whole Louis Little for any loss of earnings and other benefits suffered as a result of his unlawful discharge and discrimination against him, including any search-for-work and interim employment expenses, in the manner set forth in the remedy section of this decision.

(e) Compensate Louis Little for the adverse tax consequences, if any, of receiving a lump-sum backpay award,

[13] As the judge correctly found, the fact that Heben's conduct did not constitute an unfair labor practice does not compel the conclusion that Little's conduct was either unprovoked or unprotected.

[14] In its exceptions brief, the Respondent criticizes the judge's focus on whether Little struck Heben and cites the decision of the United States Court of Appeals for the District of Columbia Circuit in *Felix Industries* for the proposition that threats or physical violence need not accompany obscene comments for such comments to lose the employee who utters them the protection of the Act. See *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001) (reversing the Board and finding that an employee's use of profane and denigrating language weighed against the employee retaining the protection of the Act). We agree that profane comments standing alone may, in certain circumstances, weigh in favor of losing the Act's protection, and as explained above, we acknowledge the offensiveness of Little's speech and conduct. Nevertheless, for reasons explained, we find that under the circumstances presented here, the factor of Little's conduct is neutral in the *Atlantic Steel* analysis.

and file with the Regional Director for Region 8, 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 for Louis Little.

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

(g) 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 electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 8, 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, 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 February 9, 2016.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 8 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.

Dated, Washington, D.C. May 6, 2019

_____
John F. Ring, Chairman

_____
Lauren McFerran, Member

_____
Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 maintain rules or policies that (1) prohibit you from making any complaints, criticisms, or suggestions to or in the presence of passengers or the public or that require you to make any complaints, criticisms, or suggestions through appropriate internal Company channels; (2) prohibit conduct that challenges or coerces another employee or that requires you to treat members of management with respect at all times; and (3) prohibit you from divulging anything about the affairs of the Company or from permitting access to Company records or reports to any party outside the Company.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union activities.

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

[15] 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."

guaranteed you by Section 7 of the Act, which are listed above.

WE WILL revise or rescind employee rules or policies that (1) prohibit you from making any complaints, criticisms, or suggestions to or in the presence of passengers or the public and that require you to make any complaints, criticisms, or suggestions through appropriate internal Company channels (as set forth in Rule 2-1 Hostility); (2) prohibit conduct that challenges or coerces another employee and that requires you to treat members of management with respect at all times (as set forth in Rule 2-3 Personal Conduct/Courtesy); and (3) prohibit you from divulging anything about the affairs of the company and from permitting access to Company records or reports by any party outside the Company (as set forth in Rule 2-7 Company Information), and WE WILL advise employees in writing that we have done so and that the unlawful rules or policies will no longer be enforced.

WE WILL furnish you with inserts for your current employee Rule Book that advise you that the above-mentioned policies have been rescinded or provide you with language of lawful policies on adhesive backing that will cover the above-mentioned unlawful policies, or WE WILL publish and distribute to you revised employee conduct rules or policies that do not contain the above-mentioned unlawful rules or that provide the language of lawful policies or rules.

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

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

WE WILL compensate Louis Little for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 8, 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 references to the unlawful discharge of Louis Little, 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.

GREYHOUND LINES, INC

The Board's decision can be found at www.nlrb.gov/case/08-CA-181769 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.

Cheryl Sizemore, Esq., for the General Counsel.
Patrick H. Lewis, Esq. and *Jeffrey A. Seidle, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Cleveland, Ohio, on March 1–2, 2017. Louis Little, an Individual (the Charging Party) filed a charge on August 8, 2016,[1] and the General Counsel issued a complaint and notice of hearing in this matter on November 28, 2016.[2]

The complaint alleges that Greyhound Lines, Inc. (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging the Charging Party on July 13, 2016, because he engaged in union and protected concerted activities by participating in a discussion with Respondent Manager Jon Heben about the manner in which Heben was treating employees. In addition, the complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining policies and/or work rules pertaining to "Hostility," "Personal Conduct/Courtesy," and "Company Information," and by enforcing the "Hostility" and "Personal Conduct/Courtesy" rules in discharging Little pursuant to those rules.[3] The Respondent, in its answer, denied that it violated the Act as alleged.

[1] An amended charge was filed by the Charging Party on September 29, 2016.

[2] All dates are 2016, unless otherwise indicated.

[3] The General Counsel amended complaint par. 7(F) at trial to add that Respondent allegedly enforced its "Hostility" rule, in addition to its "Personal Conduct/Courtesy" rule, in discharging Little. (Tr. 17.)

On the entire record,[4] including my observation of the demeanor of the witnesses,[5] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with an office and place of business in Cleveland, Ohio, where it is engaged in the interstate and intrastate transport of passengers and freight. The Respondent admits, and I so find, that annually in conducting its business operations described above, it derived gross revenues in excess of $50,000 for the transportation of passengers from the State of Ohio directly to points outside the State of Ohio.

It is also admitted, and I so find, that Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Amalgamated Transit Union Local 1700 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

The Respondent provides transportation of passengers and freight throughout the United States. At the Respondent's Cleveland, Ohio facility (the only facility involved herein), the Union is the exclusive collective-bargaining representative of the Respondent's operators (drivers) and maintenance employees. (Jt. Exh. 1, p. 13.)[6] The Respondent and Union have had a long standing collective-bargaining relationship, which has been embodied in successive collective-bargaining agreements, the most recent of which is effective from April 1, 2013, to March 31, 2018. (Jt. Exh. 1.)

Louis Little was employed by the Respondent as a driver from July 14, 1991, until July 13, 2016, when he was discharged. Over his 25 years of employment with Respondent, he served as a union steward for 20 years and the chief shop steward for 3 years. As the chief steward, the position he held at the time of his discharge, Little was responsible for investigating possible grievances and for preparing and filing grievances for bargaining unit members. In performing his duties as chief steward, he held pregrievance and grievance meetings with Respondent's various supervisors and managers. While the Cleveland facility has offices for certain managers and a Driver's Room where drivers check-in and receive their schedules, the record reflects that the Union's meetings with Respondent's officials were not held in specifically designated areas. Instead, the record establishes that union-management meetings were held in areas throughout the Cleveland facility, including in conference rooms, the drivers' room, the offices of Respondent's managers, and in areas open to the public, such as on the loading dock or in the bus terminal area where employees and customers could be present. (Tr. 53–54; 364–365.)

With regard to the Respondent's management personnel, Jon Heben (the manager of customer experience) is responsible for overseeing drivers and all terminal personnel at the Cleveland facility. Heben reports to Jimmie Lytle (the area manager of driver operations and safety), who oversees the day-to-day operations of the Cleveland facility, and it appears that Lytle reports to Joseph Hapac (the regional manager, driver operations, and safety).

2. The Respondent's employee conduct rules and the use of profanity at the Cleveland facility

The Respondent maintains employee conduct policies in its Greyhound Driver's Rule Book. (Jt. Exh. 2.) Section 2 of the Rule Book (entitled "Driver Behavior and Image") contains various rules, three of which are at issue in this case:

> **Rule 2-1 Hostility**: Drivers may not take hostile or aggressive actions, whether verbal, physical, by gesture, or otherwise, towards the Company, its employees, patrons, vendors, or agents. The use of vulgar language or profanity of any type will not be tolerated.
>
> Any complaints, criticisms or suggestions shall be made through appropriate internal Company channels and shall not be made to or in the presence of passengers or the public.
>
> **Rule 2-3 Personal Conduct/Courtesy**: Drivers are expected to conduct themselves as professionals. They must be pleasant and courteous in dealing with passengers, regulatory or enforcement authorities, the public, agents and fellow employees. Vulgar language, profanity or other rude behavior will not be tolerated.
>
> Drivers are expected to refrain from fighting, "horseplay," or any other conduct that may be dangerous to others. Conduct by drivers that threatens, intimidates, challenges or coerces another employee, a customer, or a member of the public will not be tolerated.
>
> To avoid an argument, where possible, the dispute shall be referred to a supervisor to resolve whatever problems exist.
> Drivers will treat members of management with respect at all times.

---

[4] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief.

The General Counsel filed a motion to correct the transcript on May 3, 2017, which was not opposed by Respondent. In an Order dated May 5, 2017, I granted the motion correcting the record. Therefore, volume 2, p. 579, line 5, which reflected Respondent counsel's question to witness Jon Heben as: "Why didn't you follow him?" was corrected to read: "Why did you follow him?"

[5] In making my findings regarding the credible evidence, including the credibility of the witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony, and the inherent probabilities based on the record as a whole. In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

[6] The collective-bargaining unit as set forth in the contract specifically states that the maintenance employees in the unit are those not otherwise represented by the International Association of Machinists and Aerospace Workers. (Jt. Exh. 1, p. 13.)

> **Rule 2-7 Company Information**: Drivers shall neither divulge anything about the affairs of the Company to nor permit access to Company records or reports by any party outside the Company.

Despite the fact that Rules 2.1 and 2.3 both provide that the use of vulgar language or profanity will not be tolerated by the Respondent, the undisputed evidence establishes that the use of profanity and vulgar language was commonplace at the Respondent's facility, and in particular, in and during union-management meetings where employee working conditions and possible grievances were discussed.

Employee Clarissy Rankin testified that employees use curse words such as "ass," "damn," "shit," and "fuck" at the facility, and that she has heard Respondent reports clerk Renee Ramsey specifically say "fuck Greyhound." (Tr. 134–135; 137–138.) Little testified that he has used profanity at the Cleveland facility, particularly on buses, and in the terminal, dock area, drivers' room, conference room, and the supervisor offices. Some examples of the profanity he has used consisted of: "shit," "damn," and "bullshit." (Tr. 147–148.) He testified that employee Renee Ramsey regularly used profanity at work (such as "fuck") and that she has told customers they should "fucking pay attention." (Tr. 208.)

Little testified that he has raised his voice with managers and supervisors in union-management meetings while representing employees, and has used profanity in front of Heben and Respondent's manager, Jimmie Lytle. (Tr. 148–149.) Also, according to Little's undisputed testimony, during union-management meetings where workplace issues were discussed, both union and management officials have raised their voices, spoke with or gestured with their hands while talking, and have used profanity. (Tr. 149–153.) Little also testified that former Operations Supervisor Marshay Gibbons has told employees to "get your shit together" and "stop fucking up." (Tr. 210–212.)

Little's testimony was corroborated by Union Official Herman Green, who testified that in interactions with management and supervisory officials, he and other union officials have raised their voices, cursed, and used profanity. (Tr. 366–367.) Likewise, Green testified that during such interactions, management officials also used profanity and used hand gestures such as pointing fingers during interactions with union officials. (Tr. 368–371.) Gibbons also corroborated Little's testimony, stating that in matters concerning union-management interactions, such as bargaining or grievance related matters, union officials and managers (including herself) screamed during meetings and used profanity with each other. (Tr. 450–468.) According to Gibbons, there were confrontations and outbursts throughout the facility and sometimes passengers were present. (Tr. 466.) Some of the profanity used consisted of: "bullshit," "full of shit," "that's a damn lie," and "are you fucking serious?" (Tr. 452.)

Such testimony establishing that profanity and outbursts were commonplace at the Cleveland facility was not disputed by the Respondent. In fact, Lytle acknowledged that drivers have cursed and used profanity in front of passengers, have gotten into physical altercations with passengers, and have had verbal confrontations with each other. (Tr. 48–54.) In fact, he admitted that even he has used profanity at the terminal. (Tr. 54–55.) He also acknowledged that he has had heated conversations and used profanity with union officials during union-management meetings, and that both union officials (such as Herman Green, Ron Jordan, and Little) and management officials (such as Supervisor Joe Hempfield and former Manager Marshay Gibbons) have used profanity at the facility. (Tr. 61–65.) Finally, Lytle testified that prior to Little's discharge, no employees at the Cleveland facility had ever been issued written discipline, or been suspended or discharged for using profanity. (Tr. 419.)

3. In May/June 2016, employees complained to the union regarding their conditions of employment, in particular, the manner in which they had been treated by Manager Jon Heben

The undisputed evidence establishes that in May and June 2016, several drivers complained to Little in his capacity as the chief union steward about the way Heben treated them. In particular, Drivers Danielle Young, Carolyn Hargrove, and Darnita Manigault testified that they reported Heben's demeaning and disrespectful attitude towards them to Little and the Union.

Carolyn Hargrove, a current employee of the Respondent, testified that in June 2016 she sought out and spoke to Little as chief union steward about the way Heben spoke to her. (Tr. 334–343.) In particular, she informed Little that when she had asked Heben for a schedule, he "went wild," and spoke to her in a "nasty voice." (Tr. 339.) She further described that encounter with Heben as him going "through his rage . . . eyes bulging out [and] he was red [in the face]." (Tr. 356–357.) She also testified that prior to June 2016, on an occasion when she was loading passengers on her bus or had just completed loading them, Heben spoke to her in a "nasty tone of voice," and that he displayed a "nasty, provoking attitude" towards her. (Tr. 346.) She also informed Little that Heben raised his voice in the encounters with her, and that he ". . . didn't talk to [her] like he would talk to a human being." (Tr. 347.)

Darnita Manigault, a 22-year employee currently employed by the Respondent, testified that in May/June 2016, she had discussions with Little about Heben and how he treated her at work. When she returned to work from a lengthy medical leave, she was in the process of taking a refresher course to drive. She testified that before she completed the course, in a telephone call, Heben ordered her back to driving routes, but she informed him that she was not proficient in certain areas of driving until she completed the course. (Tr. 408–410; GC Exh. 24.) Heben refused to consider her concerns and instead he insisted that she drive, resulting in her ending the phone call. Upon registering her complaint with the Union, Little advised her to record the incident, and she submitted a written statement to the Union. (GC Exh. 24.)[7]

In addition, Danielle Young testified that in June 2016, she spoke to Little about the fact that Heben spoke to her with "attitude, smartness, [and was] cocky," and that such conduct usually

[7] Manigault testified that she also experienced another unpleasant encounter with Heben when he yelled at her to get on her bus while she was in the process of performing a required pretrip bus inspection check, but that incident appears to have occurred on August 8, 2016, several months after the June 24, 2016 incident that resulted in Little's discharge. (Tr. 415–416; GC Exh. 23.)

occurred while she was loading passengers on her bus. (Tr. 258–260.) When Young conveyed her concerns about her working conditions to Little, he advised her to keep a written record of her interactions with Heben. Young also testified that after taking her problems with Heben to Little, Little indicated that he would talk to Heben about it. (Tr. 316–318.)

4. On June 24, 2016, employee Danielle Young reported to work to drive on a route to Buffalo, New York

Danielle Young started her employment with Respondent in March 2015 as an "on the board" driver, meaning she did not have a regular bus route, but instead was called by the Operations Support Center (OSC) to be assigned her routes. On June 24, 2016, Young was called to report to work for a trip from Cleveland, Ohio, to Buffalo, New York. On her way to the Cleveland facility she noticed that the east-bound route she needed to take from the facility to Buffalo was closed due to an accident. Young was concerned about finding a route around the accident and the blocked traffic.

5. The incident on June 24, 2016, concerning Heben's treatment of Young

Upon arriving at the Cleveland facility at 1:30 p.m. on June 24, Young went to the drivers' room, logged in on Respondent's computer system to determine what bus she was assigned, and noticed that there was no bus in the system for her trip to Buffalo. Young spoke to Reports Clerk Renee Ramsey who indicated she would get her a bus for her route. Young then spoke to other employees about what route to take to avoid the accident. Heben then came into the drivers' room. Once a bus was assigned to Young, Heben talked to her about alternate routes that she might take to get around the accident. Young testified that throughout that conversation, Heben told her to be quiet and to listen to him, which upset her.

Young loaded her passengers on her bus, but before she departed on her route she approached Little and expressed her concerns about Heben. Young, who was visibly upset, expressed to Little that Heben had been disrespectful to her when she asked about directions around the accident. She informed him that Heben had been yelling at her again, and waving his finger in her face. (Tr. 170.) Little testified that he then decided to have a conversation with Heben regarding his interaction with Young.

a. The testimonies of Little and Young pertaining to the June 24 incident

Little, who was accompanied by Young, testified that he got Heben's attention as Heben was walking through the vestibule, and told Heben that he wished to talk to him. Heben agreed, and they met in the vestibule, the section of the facility consisting of a hallway approximately 15 feet long by 8 feet wide, that is enclosed by double doors on one side leading into the terminal and double doors on the other side leading into the loading dock area. (Tr. 171.) While passengers and employees frequently pass through the vestibule to go to and from the platform loading dock area, at that time the doors on both sides were closed and no passengers or employees were present. Little, who had previously received complaints from several female drivers about the way Heben had treated them, testified that he wanted to meet with Heben to have a pregrievance conversation with him about Young's concerns over the way he was treating her, and it was not Little's intention to have an argument with Heben. (Tr. 249–250.) Little testified that in that conversation, he told Heben that he wanted to talk to him about how he had spoken to Young, but that Heben denied doing anything wrong. (Tr. 172.) Heben said that Young should have been on a bus and left, and at that time he directed her to leave the facility. As he directed her to leave, he pointed or waived his finger at her. (Tr. 275–276.) Little informed Heben that his yelling and finger pointing was the reason for their conversation. (Tr. 172.) Heben ignored Little and told Young she had been there 20 or 30 minutes and should have had a bus and loaded it. (Tr. 173.) In response to Heben's questions as to why Young had not loaded her bus, Young explained that there was no bus available when she arrived and she had to wait until the mechanic fixed the bus. (Tr. 173.)

Heben continued to yell and point his finger at Young and Little. (Tr. 173.) Little told Heben that if the Respondent had assigned the "damn bus" in the system, then they would not be there. (Tr. 174.) Little told Heben that Young could have "gotten her shit and left" and then they would not have to speak to anyone. (Tr. 271–272.) Heben stated that he was not "running the floor," but Renee was in charge of the buses. (Tr. 174.) Little stated that "if Renee . . . did what she was supposed to damn do, then we still wouldn't be here." (Tr. 174.) Heben continued "waiving his finger" at Little while telling him to stop cursing. (Tr. 174–175.) Little informed Heben that because of his "behavior, . . . finger pointing, and yelling" he did not feel that Heben was acting like a supervisor. (Tr. 175.)

Heben then moved closer to Little and pointed his finger in Little's face (Tr. 175). Little told Heben that it was Greyhound's "fucking fault" that there was no bus available for Young to drive. (Tr. 175.) When Heben told Little to stop swearing, Little looked at him and said "fuck you." (Tr. 174–175; 284.) Little then turned to Young and said that they should go. (Tr. 175–176.) Little ended the conversation with Heben as he and Young exited the vestibule area and walked onto the loading dock platform where Young's bus loaded with passengers was located. When they left the vestibule area, Heben was walking in the opposite direction towards the doors entering the bus terminal. (Tr. 175; 277; GC Exh. 12.)

While Little was on the platform with Young, Heben changed direction and followed them out. On the platform, Heben yelled that Young needed to get on the bus and leave. (Tr. 176.) Heben walked up to Little and yelled at him to stop swearing at him, and he told Little that he could not say whatever he wanted. (Tr. 176–177; 276–277.) Little turned around to face Heben and told him "just like you're putting your finger in my face, I can put my finger in your face." (Tr. 177–178.) Little testified that he was referring to the pointed finger gestures that Heben had made toward him while they were in the vestibule. (Tr. 177.) Heben was standing very close to Little and they were facing each other. (Tr. 299.) Little pointed his finger at Heben and said that he could "say whatever the fuck I want to say." (Tr. 274.) As Little was saying that, he was pointing his finger on his right hand at Heben and his hand, with pointed finger, was swinging down across his body. (Tr. 291–293.) Heben asked Little if he was going to hit him, Little responded that he was not going to hit him. (Tr. 179; 274.) Heben then exclaimed "you hit me." (Tr. 179.) Little then

denied several times that he had hit Heben, and Heben said in response that Little was "out of service," and he walked away.

Little and Young then walked from the dock area into the driver's room at the facility. (Tr. 179–180; 274.) Little immediately tried to call Lytle who was out of the facility, but could not reach him. Little then reported the incident by telephone to union official Herman Green. Shortly thereafter, Little spoke to Lytle on the phone, and Lytle told Little that he was aware of the situation and he directed Little to leave the facility. Little then left the facility as directed. (Tr. 182.)

Young's testimony regarding the incident corroborated Little's testimony on the essential elements of what transpired. She testified that she was upset with the way Heben had spoken to her when she arrived, that she shared her concerns about Heben's treatment with Little, that there was a discussion in the vestibule area where Little admittedly used profanity after Heben pointed his finger and yelled at them. She also testified that when she and Little exited the vestibule and walked onto the platform, Heben started toward the opposite set of doors that exited into the bus terminal. According to Young, if Heben would have simply continued in the direction of the terminal, the incident would have ended at that time. (Tr. 277.) However, she testified that instead, Heben followed them onto the platform and moved into close proximity of Little, and that Little was gesturing with his right hand while he was talking to Heben. In addition, she testified that while she was standing near Little, she bent down to pick up his scarf that he dropped, and heard Heben say, "Oh, you didn't hit me yet," and then "Oh, you just hit me, you're out of here," and he directed Little to get off the property and leave. (Tr. 273–274.)

Later that day while on her route to Buffalo, Heben contacted Young and told her he needed a written statement from her about the incident. She submitted a handwritten statement to Heben later that day in which she stated, inter alia, that she did not see Little hit Heben, and that Heben could have ended the confrontation by walking away. (Tr. 281; GC Exh. 12.) In addition, several days after the incident Young went to Lytle's office and informed him that Little "did not hit" Heben. (Tr. 283.) She also informed Lytle that the incident on the loading platform could have been avoided if Heben had continued to walk out of the vestibule to the terminal area.

b. The testimony of Heben pertaining to the June 24 incident

Heben's testimony, while for the most part consistent with Little's and Young's about what was said during the incident in the vestibule and on the platform, which undisputedly included Little's use of profanity, differed in some very material ways. First, while Heben testified that Young had been upset and was crying before she left for her route, he did not attribute that to the way he had treated her or spoken to her. Instead, he testified that she was upset and crying because she said her purse had been stolen and someone had written checks on her account which caused it to be overdrawn, and that her pay card was not working and she had no money. (Tr. 523–525.)[8] Second, according to Heben, Little's use of profanity during the incident was unprovoked. In that regard, Heben testified that after Little indicated that he wished to speak to him in the vestibule, Little asked him why he was harassing Young, and he (Heben) responded that all he had done was to help her with directions and in finding a bus to drive. (Tr. 540.) According to Heben, Little, without provocation, then went "ballistic on [him]" stating "fuck Greyhound" and that it was Greyhound's "fucking responsibility to have a fucking bus for the driver." (Tr. 541.) With regard to the assertions by Little and Young that Heben was pointing his finger at them, on direct examination Heben denied or could not recall if he made any hand "gestures" to Young. He did, however, admit that he raised his hand and pointed his finger at Little, but he claimed it was only in response to Little swearing at him. (Tr. 544.) Third, and most importantly, while Little testified that he never stuck Heben, and Young testified that she never saw Little hit Heben, Heben testified that Little made contact with his stomach using a "closed hand," specifically stating that Little "punched me with his fist." (Tr. 574–577; 584.) He also specifically testified that Little began swinging his arm at him while continuing to curse, and he "swung down and hit me in the stomach." (Tr. 548.) According to Heben, the punch occurred at 2:45 to 2:46 p.m. and it was captured on Respondent's surveillance video. (Tr. 562–563; R. Exh. 3.) Heben also testified that immediately after being struck by Little, he physically "clenched" and said "you just struck me." (Tr. 578.) Heben further testified that after Little allegedly hit him, he felt "a stinging and a burning-type feeling." (Tr. 549.)

According to Heben, that after being stuck by Little he called the Cleveland Police and filed a police report alleging that Little assaulted him. (Tr. 582; R. Exh. 4.) That police report establishes that at 3:32 p.m. the police responded to a reported assault at Respondent's facility involving Little and Heben. According to the report, Little and Heben had a verbal argument that "escalated" and Little "swung his right hand downward striking [Heben] in his stomach where he had received hernia surgery in the past," and that Heben "believes it was intentional." (R. Exh. 4.) The police reports further reveals that Heben "refused EMS" medical treatment for the alleged assault. (R. Exh. 4.)

In addition, Heben testified that after he filed the police report, approximately 3 and a half hours after he was allegedly hit in the stomach by Little, he took a photograph of his stomach, which was offered by the Respondent and admitted into evidence as Respondent Exhibit 5. Heben testified that he took the photograph with his cell phone by holding the phone in his right hand and holding up his shirt with his left hand to show his stomach. Heben also testified that he took the picture at "6:00, 6:20, 6:30" that evening, and the photograph shows a wrist watch on the person's left hand with shows a time of approximately 6:25. (Tr. 549; R. Exh. 5.) The color photograph of the stomach shows red coloration on the left side of the stomach where Heben alleges he was stuck, and also red coloration on the right side of the stomach. The photograph also shows that the left hand holding up the shirt has red coloration on the hand's knuckle area. (R. Exh. 5.)

[8] Lytle's notes from Little's investigatory meeting clearly reflect that Heben stated in that meeting that Young was upset over personal issues that involved someone stealing her purse from her home. (Tr. 497.)

6. The Respondent's investigatory interview with Little concerning the June 24, 2016 incident

The Respondent held a meeting with Little concerning the incident approximately 10 days later. In that meeting, Union Steward Tyrone Neal attended with Little, and Lytle was present with Driver Supervisor Harold Duncan. Although Little attended the meeting to provide his account of what transpired on June 24, the Respondent permitted Heben, who was an undisputed participant in the incident, to be present and to participate in Little's investigatory interview. Lytle questioned Little about the incident and Little tried to answer his questions, but he was interrupted by Heben who was either accusing Little of lying or stating that Little's statements were not the way it happened. (Tr. 184–185.) Lytle eventually removed Heben from the interview.

7. The Respondent discharged Little on July 13, 2016

Lytle, who oversees the operations at the Cleveland facility, testified that he decided to discharge Little. (Tr. 65.) While Lytle was not at the facility on the day of the incident, he testified that he watched the video and reviewed statements from employees concerning the incident, decided to discharge Little, and then prepared a discharge letter. (Tr. 66; Jt. Exh. 3.)

According to Lytle's testimony, he based Little's discharge in part on the statement of baggage handler Melvin Flowers, who wrote that he saw Little "having an argument" with Heben, and he heard one of them say "don't touch me . . . I didn't touch you." (GC Exh. 14.) Flower's statement makes no mention of the use of profanity or that Little punched Heben. Lytle testified that he also read Young's statement before deciding to discharge Little, wherein she alleged that Little did not hit Heben. He also testified that before discharging Little, he relied on the written statement of employee Marlon Jackson who was cleaning a bus and saw Little and Heben on the dock. (Tr. 79–80; GC Exh. 15.) According to Jackson's statement, he thought he heard someone say, "don't touch me, I didn't touch you." (GC Exh. 15.) That statement also makes no mention of Little's use of profanity, nor does it allege that Little struck Heben in the stomach. Lytle testified that he also considered the written statement of baggage handler Zephaniah Lawson, who stated that he saw Little "touch [Heben] on the shoulder yelling in his face." (R. Exh. 9.) Finally, Lytle testified that he considered Heben's statement sent via email to him at 6:41 p.m. on the day of the incident, where he alleged that Little "stuck [him] in [his] stomach." (R. Exh. 10.)

Even though Lytle considered the statements of the above-mentioned employees in making his decision to discharge, he never asked Little for a written statement explaining what happened at the facility that day. (Tr. 85–86.) Lytle also testified that he reviewed the surveillance video which captured the incident on the platform dock. With regard to the alleged punch, Lytle testified that the video supported his conclusion that Little struck Heben because it showed Little's hand came down and then Heben "had a reaction." (Tr. 104–105.) He further testified that Heben "went backwards a little bit" and then Heben turned and walked away. (Tr. 105.)

According to Lytle, the Respondent did not receive complaints, either verbally or on customer complaint forms, about the incident. (Tr. 99.) However, he testified that his decision to discharge Little was based on Little's "hostility and his overall conduct" in the loading dock area. (Tr. 81–82.) Lytle also testified that his decision was based on his determination that Little's conduct constituted violations of Driver Rules 2.1 (Hostility) and 2.3 (Personal Conduct and Courtesy). (Tr. 84–85.)

On July 13, 2016, Lytle met with Little at the facility and discharged him. Lytle provided Little with the discharge letter, which stated as follows:

> On the above date and time you arrived at the Cleveland terminal at approximately 2:35 p.m. after completing your run. You encountered Operator Young who was assigned to a schedule with a 2:00 p.m. departure time. Operator Young was apparently upset that Customer Experience Manager had spoken to her about getting her schedule on the road.
>
> As you are aware, on time performance is one of the largest complaints from our customers. Rather than assisting Operator Young to get her schedule on the road, you delayed the passengers further by taking Young with you to confront Manager Heben. The confrontation began inside the first set of doors by the north loading area, where you stated "it was Greyhound's fucking fault that there was no bus in the system." "It was Greyhound's fucking responsibility to have a bus in the system." "Fuck Greyhound," "if Greyhound would have had a fucking bus in the system she wouldn't have to fucking talk to anybody." Mr. Heben asked you to stop cursing, you replied, "I can say whatever the fuck I want, fuck you." Heben repeatedly asked you to quit swearing. Each time your reply was the same, "fuck you."
>
> Heben then moved outside in an attempt to get Operator Young to get the bus out. Once outside in the loading area where you were clearly visible by the passengers on the bus, you were captured on video flaying your arms, pointing and swinging them in the direction of Heben. During this exchange, you actually made contact with Heben, hitting him in the stomach while you continued to spew profanity.
>
> These actions include unrestrained use of profanity and such uncontrolled behavior that the blow to Heben's stomach was nearly inevitable. You are in violation of Driver's rules 2-1 Hostility and 2-3 Personal Conduct and Courtesy and ultimately gross insubordination.
>
> As a result of the incident that occurred on June 24, 2016, your employment with Greyhound Lines, Inc. is terminated effective immediately. . . . (Jt. Exh. 3.)

At that time, Little reviewed the discharge letter and informed Lytle that he did not deny using profanity with Heben, but he insisted that he "never physically touched" Heben. (Tr. 187.)

On that same day, Little filed a grievance over his discharge. (GC Exh. 2.) In a letter dated July 25, 2016, the Respondent denied the grievance at the second step of the grievance process. (GC Exh. 3.) The parties had a third step grievance hearing on August 31, 2016, which was attended by union representative Green, Heben, and Respondent's Regional Manager, Joseph Hapac. (Tr. 389; GC Exh. 4.) Green testified that Hapac watched the surveillance video of the incident in that meeting, and Hapac indicated that he did not see any contact made by Little. (Tr. 389.) Green, whose testimony on this subject was

uncontradicted, specifically testified that Hapac said he "couldn't see where the contact was made."[9] (Tr. 395.) Nevertheless, the Respondent, by Hapac, denied the grievance at the third step of the grievance process in a letter dated September 7, 2016. In that letter, the Hapac asserted that "Operator Little, on the day in question, used unrestrained profanity towards Jon Heben. In the process of flaying his arms, he made contact with Jon Heben's stomach area, which is not acceptable under any circumstance." (GC Exh. 4.) Thereafter, the grievance went to the arbitration stage of the proceeding, but the Union decided not to have an arbitrator decide the issue of Little's discharge.[10]

There is no evidence that Little had been disciplined or suspended for any workplace infraction prior to the incident on June 24. In addition, as mentioned above, it is undisputed that prior to Little's discharge, no employees at the Cleveland facility were disciplined, suspended, or discharged for using profanity. (Tr. 49.)

8. The video evidence of the June 24, 2016 incident on the loading platform

In support of its assertion that Little hit Heben in the stomach, the Respondent offered into evidence a surveillance video which captured the incident that occurred on the loading dock platform. (R. Exh. 3.) The Respondent's surveillance video of the incident is from a camera mounted on the wall or ceiling over the "express gate" in the platform dock area. (Tr. 562–565; R. Exh. 3.) The video is visual only and does not contain audio.

A review of that video shows that at 2:45 p.m. (14:45:46 on the video timer) Little can be seen entering the camera view on the platform walking toward the buses with Young beside him. He appears to be holding a coat or some kind of garment in his left hand. At 14:45:47 Little turns to face someone out of view, presumably Heben. Little appears to be talking and raises his right hand to shoulder level. With a pointed finger he swings it down across his body while facing that person. At 14:45:48 Little turns away and walks with Young beside him. Heben then enters the camera view walking toward Little who has his back to Heben. At 14:45:49 Heben walks up behind Little. At 14:45:50 Little stops and turns toward Heben who moves close to Little. At 14:45:51 Little stands facing Heben and appears to be speaking to him with his right hand down to his side. Heben has his back to the camera. At 14:45:53 Little and Heben are standing close to each other, face to face. Young is standing behind Little. Both Little and Young are facing the camera and Heben is facing them with his back to the camera. From 14:45:53 to 14:45:59 Little is speaking to Heben. At 14:45:59 to 14:45:60 Little swings his right hand with pointed finger across his body between he and Heben while appearing to talk. At the completion of his swinging motion his finger on his right hand is still pointing.

At 14:46:01 Little appears to still be speaking to Heben and he brings his right hand down to the right side of his body. At 14:46:02 Little brings his right hand with pointed finger back to shoulder level. At 14:46:03 Little swings his right downward across his body. This is the point where the Respondent's witnesses allege that Little struck or punched Heben (Tr. 578), but Heban's back is to the camera and it does not establish that Little's swing of his right hand with pointed finger made contact with Heben's stomach. The video does show that after Little swings his hand, Heben stands still with no discernible body movement, and then raises his right hand and points off in the direction in front of him and beyond Little.

After the alleged punch to the stomach, at 14:46:04, Heben, still without moving, brings his hand down to his side from pointing, and Little turns and walks away from Heben. At 14:46:05 Heben is standing in place while Little walks away from him taking two steps. Heben then follows Little. At 14:46:06 Little turns back around to face Heben. While standing perpendicular to Heben, Little raises his right hand to waist level and then swings it downward again in front of him across his body (but not between he and Heben), while still appearing to speak to Heben. At 14:46:07 Little drops what appears to be clothing from his left hand and makes the swinging right hand gesture again, this time with his right hand pointed finger ending near his left shoulder. Little looks down at the garment he dropped while Young picks it up. At 14:46:08 Little turns away from Heben and starts to walk away with Young. At 14:46:09 Little stops and turns to face Heben again, and swings his right hand again while appearing to speak. At 14:46:10 Heben turns away from Little and points again with his right hand in the direction beyond Little. At 14:46:11 Heben, now facing the camera with his back to Little, walks away. At 14:46:12 Heben leaves the camera's view. And at 14:46:13 Little and Young walk away while Little appears to continue speaking (presumably to Heben who is outside camera view), swinging his right hand with pointed finger in emphasis several more times before walking away with Young and exiting the camera's view.

9. The credibility determinations

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

My overall observation during the trial was that the General Counsel's witnesses appeared sincere and honest in their

[9] Hapac was not called to testify in the instant proceeding, and Green's testimony was therefore unrebutted.

[10] The Respondent asserts that it then filed a complaint in Federal District Court in the Northern District of Ohio seeking to compel arbitration of all claims in Little's grievance. (R. Br. pp. 13–14.)

demeanor, and they testified in a consistent, convincing, and straightforward manner. Current employees Hargrove and Manigault testified in a truthful manner about the way they had been treated by Heben while at work, and that they registered complaints with Little and the Union concerning their work-place interactions with Heben. As current employees who had no involvement with the June 24 incident, their testimonies appeared unbiased and sincere. In addition, the fact that they provided testimonies adverse to the interests of their current employer warrant additional weight to their statements. The Board has held that where current employees provide testimony against the interests of their employer, and thus contrary to their own pecuniary interests, such testimony is entitled to additional weight when credited. *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); *PPG Aerospace Industries, Inc.,* 353 NLRB 223 (2008); *Advocate South Suburban Hospital,* 346 NLRB 209, 209 fn. 1 (2006); *Flexsteel Industries, Inc.,* 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996).

Young, whom at the time of her testimony was no longer employed by the Respondent but was employed at the time she provided the Respondent with verbal and written statements asserting that Little did not strike Heben, also appeared to be truthful in her testimony. Her testimony regarding the incident was also consistent with Little's testimony.[11] Of all the General Counsel witnesses, however, I found Little to be the most credible. He was very convincing in his demeanor and testified honestly, freely admitting his unflattering use of profanity in the incident, in both the vestibule and on the platform. His testimony was also straightforward, believable, and consistent with Young's testimony in that they corroborated each other on key points.

The Respondent's witnesses, on the other hand, testified in a less convincing manner, and their testimonies were at times evasive, guarded, inconsistent with the evidence, and implausible. Lytle, who testified that he made the decision to discharge Little, presented testimony that was unreliable as it was at times evasive, implausible, and simply not believable. Even though he testified that he had a conversation with Young concerning the incident, and he read her written statement in which she clearly stated that she did not see Little hit Heben, he incredibly testified that he did not recall her saying that Little did not hit Heben. (Tr. 70.) Since Young was present at the incident, one would expect Lytle to be aware of and recall what she said regarding whether Little struck Heben. That alleged punch to the stomach was an important factor because it, along with the use of profanity, served as the basis for Little's termination. Lytle also testified that when he decided to discharge Little, he considered his 20 years of work experience with the Respondent. However, he also testified that he was unaware if Little had previously been suspended, and he stated that he could not recall Little's work record. (Tr. 78.) I find it difficult to believe that the person who reviewed Little's work record and then decided to discharge him, could not recall what that work record consisted of.

Evidence of Lytle's incredible testimony was also reflected by the fact that he initially denied Heben was present during Little's investigatory interview (Tr. 88, 95). Lytle's denial, however, was inconsistent with his own notes from that interview which clearly showed Heben was present. (Tr. 97; GC Exh. 30.) Lytle's denial was also inconsistent with his subsequent admission on direct examination during Respondent's case-in-chief, that Heben was present at Little's investigatory interview. (Tr. 497.) Lytle, who testified that his investigation of the incident warranted his determination that Little stuck Heben, was also defensive and evasive when confronted by counsel for the General Counsel with the fact that he watched the video and he could not see Little hit Heben because Heben's back was toward the camera. (Tr. 90.) Reluctantly, Lytle admitted that he did not see Little's hand make contact with Heben's stomach. (Tr. 90–91.)

On that critical question of whether Little actually hit Heben, Lytle was also evasive when questioned about the testimony he provided during Little's contested state unemployment hearing. (Tr. 490–495; GC Exh. 17.) In that connection, he testified in the instant hearing that he did not recall being asked at the unemployment hearing about whether Young told him Little did not hit Heben. (Tr. 491.) However, after counsel for the General Counsel played an audio recording of his testimony from that unemployment hearing, he reluctantly admitted that Young told him Little did not hit Heben. (Tr. 494–495; 500–501.)

I also found Heben an unreliable witness and his testimony not credible. He appeared at times to be untruthful in his assertions, in particular with his assertion that Little intentionally punched him in the stomach. His testimony was at times vague, conclusory, contradictory, and appeared contrived, implausible, and simply not believable. While Heben testified that Young was upset and crying when he spoke to her that day, he did not acknowledge that it was due to the degrading and harassing manner in which he had spoken to her, as Little and Young had testified. Instead, he incredibly asserted that Young's crying was due to her alleged assertion that someone stole her purse, wrote checks on her account causing it to be overdrawn, and because her pay card was not working and she had no money. Such testimony has no basis in the record and was unbelievable and contrived. Heben's testimony was also contradictory in that he initially denied that he called Young while she was on her bus to ask her for a statement about the incident, or that he even called her at all that day. (Tr. 609–610.) However, he was impeached with the written statement he drafted and emailed to Lytle on the day of the incident, wherein he stated: "I have also requested a statement from [Cleveland] Driver Danielle Young who witnessed the entire incident." (Tr. 610; R. Exh. 10.)

In addition, Heben acknowledged that when the confrontation started, Little was not angry. (Tr. 599.) However, Heben testified that after Little accused him of harassing Young and he denied any wrongdoing, Little simply went "ballistic on [him]" stating "fuck Greyhound" and that it was Greyhound's "fucking responsibility to have a fucking bus for the driver." (Tr. 541.) Little and Young both testified that Heben's finger pointing had

[11] I note that while Little testified that Heben asked him if he (Little) was going to hit him, Young testified that Heben instead stated "you didn't hit me yet." I find the fact that Young's asserted statement by Heben on this subject differs from that alleged by Little is not a material distinction that would detract from her credibility. In any event, and I find that it is more plausible that Heben asked Little if he was going to hit him.

provoked Little's use of profanity, yet Heben's testimony would have one believe that Little, without any provocation, just went "ballistic" on him with no prompting. That testimony rings hollow, and I find that Heben's denials that he used actions or gestures which provoked Little are not plausible or believable, and neither is his assertion that he could not recall if he made hand "gestures" to Young. (Tr. 544.)

Thus, in instances where the testimonies of Respondent's witnesses differ from that of the General Counsel's witnesses, I credit the testimonies of the General Counsel's witnesses.

10. The specific assertions that Little punched Heben in the stomach are not only incredible, they are not supported by the record evidence

While I do not credit the testimonies of Respondent's witnesses where they conflict with that of the General Counsel's witnesses, I particularly do so on the very important question of whether Little punched Heben. I credit Little's testimony that his hand never made contact with Heben, and conversely, I specifically discredit Heben's and Lytle's assertions that physical contact occurred. This finding is based not only on Heben's and Lytle's poor testimonial demeanor and incredible assertions, but also on the fact that their assertions are not supported by or consistent with the undisputed record evidence.

Heben's and Lytle's assertions that Little punched Heben in the stomach have been strongly and consistently denied by Little and Young. While Heben testified that the stomach punch was the result of Little's hand gesture of swinging his hand down while cursing (Tr. 548), he testified that the blow was nevertheless intentional, and that contact was made with Little's "closed hand" or "fist." (Tr. 574–577; 584.) According to Heben, the punch occurred at 2:45 to 2:46 p.m. and it was captured on Respondent's surveillance video. (Tr. 562–563; R. Exh. 3.) Heben also testified that immediately after being struck, he physically "clenched" and said "Mr. Little, you just struck me." (Tr. 549, 578.) Heben further testified that after being punched, he felt "a stinging and a burning-type feeling." (Tr. 549.)

Lytle, who was not at the facility when the incident occurred, investigated the matter in part by viewing the surveillance video. He testified that the surveillance video served as proof that Little struck Heben, even though he admitted Heben's back was toward the camera and he could not see the contact. Lytle's testimony reflects that he based that determination on Heben's reaction immediately after Little swung his arm downward across his body. Lytle testified that when Little's hand came down, Heben "had a reaction." (Tr. 104–105.) Lytle also testified that when Heben was punched, he "went backwards a little bit" and then "turned and walked away." (Tr. 105.)

Importantly, these testimonial assertions from Heben and Lytle are not supported by the undisputed video evidence which fails to establish that Little hit Heben. First, as Lytle reluctantly admitted, the video evidence of the alleged stomach punch has Heben with his back to the camera and it does not show that Little's hand gesture made contact with Heben's stomach. Second, the video evidence portraying what happened immediately after the alleged punch is not consistent with the plausible reactions of someone who was allegedly punched in the stomach. As mentioned above, Heben testified that immediately after being struck, he physically "clenched," told Little "you just struck me," and immediately felt ". . . a stinging and a burning-type feeling" on his stomach. The video evidence, however, shows no discernible body movement by Heben after Little's hand gesture. The only movement by Heben is the raising of his right hand to point off in the direction in front of him. After receiving a closed fist punch to the stomach by Little (who at the time of the incident weighed 345 pounds),[12] which had a force sufficient to leave a "stinging" and "burning-type feeling," it strains credulity to believe that Heben had no discernible physical reaction other than to raise his right hand and point off in the distance. If in fact Little had administered such a closed fist body blow to Heben, it is plausible that he would have made some type of body movement, whether it was clenching, doubling over in pain, moving backward away from Little, or pushing Little away from him. Incredibly however, the video shows no such movements. As such, Heben's assertions are simply not plausible, believable, or supported by the evidence.

Lytle's testimony on this critical point is also unsupported by the video evidence. Lytle determined that Little struck Heben after viewing the surveillance video, testifying that when Little's hand came down, Heben "had a reaction" (Tr. 104–105) and Heben then "went backwards a little bit," and then "turned to walk away." (Tr. 105.) However, none of that testimony is consistent with the video which establishes that Heben did not have a reaction, did not move backwards, and he did not turn to walk way. To the contrary, the video shows that it was Little who turned and walked away, and Heben, rather than turning and walking away himself, actually took several steps toward Little after the alleged body blow was administered. When asked at trial "Why did you follow him?" Heben incredibly responded "I don't know." (Tr. 579.)[13]

Thus, the video evidence offered into evidence by the Respondent to support its assertion that Little punched Heben, actually establishes the opposite—that Little did not make physical contact with Heben. As such, the video evidence in this case further establishes that Heben's and Lytle's assertions are not credible, plausible, or believable.

In support of its assertion that the body blow occurred, Respondent offered a photograph of what Heben alleged was his stomach approximately 3½ hours after he was allegedly punched. (R. Exh. 5.) Although nothing in the photograph identifies the individual's stomach as that of Heben's, Heben testified that he took the photograph with his cell phone by holding the phone in his right hand and holding up his shirt with his left hand to show his stomach. The photograph shows a wrist watch on the person's left hand with a time of approximately 6:25, approximately 3½ hours after the alleged punch. (Tr. 549; R. Exh. 5.) The color photograph of the stomach shows a red coloration on the left side of the stomach where Heben alleged he was stuck by Little's right fist, and also red coloration on the right side of

[12] Tr. 620.

[13] As mentioned earlier, by Order dated May 5, 2017, I granted the General Counsel's motion to correct the transcript to read: "Why did you follow him."

the stomach. The photograph also shows that the left hand holding up the shirt has red coloration on the knuckle area of the hand. (R. Exh. 5.)

The General Counsel argues in its brief that there is no evidence other than Heben's testimony to establish that the individual's stomach in the photograph is actually Heben's stomach. While that is true, and while I have found Heben to be an unreliable and incredible witness, I will nevertheless provide him the benefit of the doubt in analyzing this piece of photographic evidence, and treat it as if it were a picture of his stomach. That being said however, I find the photograph does not establish that Little punched Heben, and I have determined that it is entitled to no weight.

Although Heben was allegedly punched on the left side of his stomach, he was at a loss to explain why the right side of his stomach had the same red coloration that it had on the left side. (Tr. 552–553.) Upon further examination by counsel for the General Counsel, Heben reluctantly admitted red coloration on the right side of his stomach where he was not hit, as well as on the left side where he testified he was allegedly hit. When pressed by Counsel for the General Counsel to explain why his whole stomach area was red when he was only hit on the left side, he stated: "Well, I'm saying that I was hit in this area [the left side]. I don't know that I was hit in the whole area, but that's the way it looked. That's all I can tell you." (Tr. 553.) Likewise, Heben had no plausible explanation for the red coloration on his left hand that was holding up his shirt in the photograph. On examination by counsel for the General Counsel, even though Heben admitted redness on his stomach (Tr. 551), he was evasive about acknowledging the same red coloration on his left hand which is clearly visible in the photograph. In that connection, when Counsel for the General Counsel asked: "And in the photograph, your hands have some redness, that hand that you're holding up," Heben answered "I don't know, but possibly." (Tr. 551–552.) Incredibly, Heben then testified: "I don't really see any kind of redness on my hand that looks anything close to the redness that's on my stomach. But I don't know what to say about that. I don't see what you're referring to." (Tr. 552.)

If Heben was punched on the left side of his stomach as he claimed and not the right side where admittedly no blow occurred, it is implausible that both sides of his stomach would have same red coloration, and it is equally implausible that his left hand knuckles would have red coloration. What is plausible, however, is that Heben, after claiming he was punched by Little when in fact he was not, rubbed the knuckles of his left hand against his stomach causing the red coloration that is seen on that hand and on both sides of his stomach in the photograph.

The veracity of Heben's assertion that this photograph shows he was punched by Little is further undermined by his actions and assertions after the punch allegedly occurred. In this regard, the time-line in which the events unfolded establishes that at 2:46 p.m. Little allegedly administered a closed fist punched to Heben's stomach with a force that resulted in a "stinging" and "burning-type feeling." At 3:32 p.m., approximately 45 minutes after sustaining that blow, the police were called to the facility where they generated a police report that showed Heben, despite a stinging and burning feeling, "refused EMS" medical attention. (R. Exh. 4.) At approximately 6:25 p.m., almost 3 hours after the police were summoned and approximately 3 hours and 45 minutes after the alleged punch was administered, Heben allegedly took a photograph of his stomach which has red coloration from the punch. (Tr. 549; R. Exh. 5.) Then, at 6:41 p.m., approximately 4 hours after the blow was allegedly administered, Heben emailed his statement about the incident and the photograph of the alleged injury to Lytle and others. (R. Exh. 10.) At that time, approximately 4 hours after being punched, Heben indicated in his statement that he was going to seek medical treatment "for a quick examination as I am having discomfort where I was struck and feeling a little sick to my stomach too." (R. Exh. 10, p. 2.)

I find these facts establish that the alleged blow never occurred, and Heben's assertion that he left at the end of the day, approximately 4 hours later, due to the pain in his stomach is not credible, plausible, or believable. In that regard, I find it implausible that Heben would have refused medical attention offered by the police, especially where the alleged blow caused pain in the form of a stinging and burning feeling. It is plausible that if he really was experiencing pain from the blow, he would have immediately sought the medical attention that was offered, or he would have asked for medical attention if it was not offered. Likewise, it is plausible that if he was feeling pain, he would have shown the police officers the red marks left from the injury, or he would have had the police take a picture of it at that time as proof of the attack. On that subject, it is important to note that when asked by counsel for the General Counsel if he offered to lift his shirt up so the police could take a photograph of his alleged injury, Heben answered: "No, I didn't offer." (Tr. 583–584.) In addition, it is implausible that Heben, after sustaining a painful injury that was serious enough to warrant a police report, would wait 3 ½ hours before taking a picture of the red marks allegedly left by the punch. Finally, it is implausible that Heben, who refused medical attention offered by the police, would thereafter, 4 hours after the punch, claim that he had to leave work to seek medical attention. None of Heben's story adds up, and quite frankly, I find that Heben fabricated the punch to the stomach and his alleged photographic proof of the punch. This finding is consistent with, and supported by, that fact that Heben and Lytle were not credible witnesses and their assertions were not worthy of belief.

B. The Contentions of the Parties

The General Counsel argues that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging Little because he engaged in union and protected concerted activities. The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing unlawful work rules 2–1, 2–3, and 2–7, and by discharging Little pursuant to rules 2-1 and 2-3. The Respondent, on the other hand, argues that it lawfully discharged Little for his profanity and violent actions, and even if he was engaged in union activities, his actions were beyond the protections afforded by the Act. In addition, Respondent asserts that its work rules should be found lawful.

C. Analysis

1. Little was engaged in union and concerted activity for the

purpose of mutual aid or protection, and the Respondent discharged him because of that activity, in violation of Section 8(a)(3) and (1) of the Act.

a. In the June 24 incident Little was engaged in union activity and concerted activity for the purpose of mutual aid and protection

Section 7, the cornerstone of the Act, provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . " To ensure that employees are free to exercise their Section 7 rights without fear of reprisal, Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In addition, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Thus, the Act prohibits employers from discriminating against employees by discharging them on the basis of their union activities and/or for discharging them for exercising their organization and collective-bargaining rights, including their right to engage in concerted activities for the purpose of mutual aid and protection. See *MCPC Inc. v. NLRB*, 813 F.3d 475, 479 (3rd Cir. 2016).

The record in this case establishes that Young and several other female employees complained to Little and the Union about the way that Heben had treated them while at work. On the day of the incident in this case, Young believed that Heben had treated and spoken to her in a degrading and harassing manner regarding her work, which upset her. Young immediately reported that degrading treatment to Little. Little decided to address the perceived mistreatment of Young at the time it occurred, when both Young and Heben were present. The incident at issue thus arose when Little, acting in his capacity as Chief Union Steward, attempted to address those complaints about working conditions with Heben. In the course of their interaction, Heben denied any wrongdoing, and raised his voice and pointed his finger at both Little and Young. Little admittedly used profanity and then sought to end the meeting in the vestibule by leaving and walking into the platform dock area. Yet Heben pursued Little onto the platform, yelled at Young and pointed his finger at them. Little responded with a discussion that admittedly included the further use of profanity.

The Respondent argues in its brief that Heben had a legitimate right to direct Young to leave on her route, citing its interest in on-time departures for its customers, and it asserts that the incident "did not involve any legitimate dispute over employment conditions" and it therefore was not a "grievance meeting" or "for any concerted purpose." (R. Br. 1.) The Respondent further asserts that Little's effort to meet with and confront Heben was "not for any legitimate purpose." (R. Br. 12.) Instead, the Respondent argues that Little, for no apparent or articulated reason, caused a confrontation with Heben to sabotage its operation and prevent Heben from getting Young to depart on time. In this connection, the Respondent asserts in its brief that Little "created an unnecessary confrontation with Heben in an effort to prevent Heben from trying to assist Young, or other drivers in the future, to depart on time with their scheduled routes." (R. Br. 12.) Likewise, Respondent claims that Little purposefully "disrupted and delayed Greyhound's operations." (R. Br. 15.) These arguments, however, lack merit as they have absolutely no basis in the record.

While the Respondent's interest in maintaining scheduled departure times is not disputed, the way in which Heben addressed the issue resulted in Young's determination that Heben had mistreated her, pointed his finger at her, and spoke to her in a degrading manner as he had reportedly done in the past. Heben's actions caused Young's complaint to the Union that she was being mistreated and harassed by management while she was performing her work, which is clearly a condition of her work. Little then met with Heben in his capacity as Chief Union Steward to discuss the alleged mistreatment of Young. Contrary to Respondent's assertions, the evidence establishes that Little was engaged in union activity when he confronted Heben on June 24.

Besides constituting union activity, Little was also engaged in protected concerted activity. The Board has held that an employee's conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection" for it to be protected under Section 7 of the Act. *Fresh & Easy Neighborhood Market,* 361 NLRB 151, 153 (2014). The Supreme Court held that Congress did not intend to limit the protection of Section 7 of the Act to situations "in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems,* 465 U.S. 822, 835 (1984). The Court also held that "mutual aid or protection" concerns "the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978). The "concertedness" and "mutual aid or protection" elements under Section 7 are analyzed under an objective standard, whereby motive for taking the action is not relevant to whether it was concerted, nor is motive relevant to whether it was for "mutual aid or protection." *Fresh & Easy Neighborhood Market,* supra, slip op. at 3.

The Board defined concerted activity in *Meyers Industries (Meyers I),* 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB,* 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), as activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The Board clarified that definition of concerted activity in *Meyers II,* 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), to include cases "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." Id. at 887.

In this case, Little's actions sought to bring to management's attention the complaints from Young and other female employees about Heben's demeaning and disrespectful treatment toward them. Such treatment affects the conditions of employment of those employees. Even though Little confronted Heben individually (but in the presence of Young), the Board has found that

such "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.,* 247 NLRB 612, 613 (1980); see also *Alleluia Cushion Co.,* 221 NLRB 999, 1000 (1975). I find that Little's confrontation with Heben over his alleged mistreatment of Young and other employees was for the purpose of protecting and furthering employees' rights, and therefore under established Board law he was engaged in concerted activity.

I further find that Little's conduct was for the purpose of mutual aid or protection. It is well established that the "mutual aid or protection" clause encompasses "much legitimate activity [by employees] that could improve their lot as employees." *Eastex,* 437 U.S. at 567; *Fresh & Easy Neighborhood Market,* supra slip op. at 5. Here, Little's meeting with Heben concerning complaints about his treatment of Young and other employees was in furtherance of the mutual aid or protection of her and other employees' rights to work in a safe and harassment free environment. Little's actions were an attempt to protect the rights of those employees, and therefore were actions related to improving the employees' conditions of employment. See *Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168, 172 at fn. 3 (3d Cir. 2004). In fact, Board precedent firmly establishes that employee complaints about supervisors' treatment of employees is directly related to working conditions and constitutes protected concerted activity. *Calvin D. Johnson Nursing Home*, 261 NLRB 289 fn. 2 (1982), enfd. 753 F.2d 1078 (7th Cir. 1985); *Astro Tool & Die Corp.,* 320 NLRB 1157, 1162 (1996).

b. Little's actions were not sufficient to remove the protection of Section 7 of the Act

The Board has recognized that normally, remarks made by employees during meetings to resolve labor disputes or grievances constitute protected activity, even though they may include profanity or disrespectful language. *Atlantic Steel Co.,* 245 NLRB 814, 819 (1979). In addition, the Board and courts have observed that "passions run high in labor disputes and that epithets and accusations are commonplace." Atlantic Steel, supra at 819, quoting *Crown Central Petroleum Corporation v. NLRB,* 430 F.2d 724, 731 (1970). From a practical standpoint, the Board has also noted that "some latitude must be given to participants in these incidents. Indeed, although we might wish it otherwise, it is unrealistic to believe that the principals involved in a heated exchange can check their emotions at the drop of a hat." *Postal Service,* 251 NLRB 252, 252 (1980).

Under the principals of labor law, union representatives are considered to stand upon an equal footing with management with regard to resolving labor disputes, as such proceedings are "not an audience, conditionally granted by a master to his servants, but a meeting of equals—advocates of their respective positions." Id. It is well established however, that although union stewards enjoy protections under the Act when acting in a representational capacity and such employees are permitted some leeway for impulsive behavior when engaged in protected activity, that leeway is balanced against "an employer's right to maintain order and respect." *Piper Realty,* 313 NLRB 1289, 1290 (1994); *Tampa Tribune,* 351 NLRB 1324, 1325–1326 (2007). In this case, the Respondent asserts it was justified in discharging Little, consistent with that right to "maintain good order and discipline" in its workplace. (R. Br. 23.)

When an employee engages in abusive or indefensible misconduct during activity that is otherwise protected, the employee forfeits the Act's protection. *DaimlerChrysler Corp.,* 344 NLRB 1324, 1329 (2005). The Board, however, has held that the standard is high for forfeiting the protection of the Act, stating that protected conduct must be egregious or offensive to lose the protection it is provided. *Consolidated Diesel,* 332 NLRB 1019, 1020 (2000) (citations omitted), enfd. 263 F.3d 345 (4th Cir. 2001). In this regard, the Board has determined that "the manner in which an employee exercises a statutory right must be extreme to be beyond the Act's protection." Id. See also *Trus Joist Macmillian,* 341 NRLB 369, 371 (2004).

The Board has typically applied the analysis of *Atlantic Steel Co.,* 245 NLRB 814 (1979), to situations where face-to-face workplace conversations have been alleged to infringe on employers' rights to maintain workplace order, such as in the instant case. In Atlantic Steel, the Board set forth the test for determining whether an employee loses the protection of the Act. Under that test, the Board balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. Id. at 816. This multifactor framework enables the Board to balance employee rights with the employer's interest in maintaining order in its workplace. *Triple Play Sports Bar & Grille,* 361 NLRB 308, 311 (2014); See *Plaza Auto Center, Inc.,* 355 NLRB 493, 494 (2010), enfd. in part 664 F.3d 286 (9th Cir. 2011), decision on remand 360 NLRB 972 (2014).

As mentioned above, in this case Little's conduct during the incident consisted of several phrases directed at Heben in a raised voice which included the words "damn," "shit," and "fuck" (and several variations of "fuck"). Specifically, as Heben yelled and point his finger at Young and Little, Little told Heben that if the Respondent had assigned the "damn bus" they would not be there, and that Young could have "gotten her shit and left." When Heben stated that Renee was in charge of the buses, Little said "if Renee had did what she was supposed to damn do, then we still wouldn't be here." When Heben continued "waiving his finger" at Little while telling him to stop cursing, and pointed his finger in Little's face, Little stated that it was Greyhound's "fucking fault" that there was no bus available for Young to drive, and he told Heben: "fuck you." Little then ended the conversation with Heben as he and Young exited the vestibule area and walked onto the loading dock platform. Heben followed, yelled at Young, and engaged Little by telling him to stop swearing and that he could not say whatever he wanted to say. Little turned around to face Heben and told him that he could "say whatever the fuck I want to say." As Little spoke, he gestured several time with his pointed finger on his right hand, swinging it down and across his body.

In the instant case, an examination of the Atlantic Steel factors reveals that Little's alleged misconduct consisting of the use of profanity along with his hand gestures, did not rise to the level which would warrant losing the protection of the Act.

(1) The place of the discussion

The first factor, "the place of the discussion," weighs in favor of finding that the conduct did not remove the protection of the Act. The "discussion" or confrontation in this case took place in two locations—in the vestibule and on the platform dock. First, with regard to the initial confrontation in the vestibule, the Respondent correctly points out that customers pass through the vestibule when they move from the terminal area to the platform loading area, and vice versa. However, the record establishes that Little requested to meet with and talk to Heben while they were in the vestibule, and Heben agreed to do so. In addition, while the confrontation initially occurred in the vestibule, no customers or other employees were present and none walked through the vestibule area. In fact, the doors leading into the terminal and the doors leading onto the dock remained closed during the confrontation. Furthermore, there is no evidence that any customers or employees saw the confrontation in the vestibule area, heard the profanity that was used by Little, or registered complaints about what transpired in the vestibule. Thus, there is no evidence that this portion of the discussion occurred in the presence of employees, customers, or the public.

Little ended the discussion in the vestibule by walking away with Young into the platform area. The record establishes that it was Heben who changed direction from exiting the vestibule into the terminal area, and instead turned to follow Little onto the platform to cause the second phase of the confrontation in an area where other employees were located, and where passengers were on Young's bus. While the confrontation on the dock lasted only approximately 30 seconds and occurred near Young's bus, there is no evidence to establish how many people were on the bus or whether they could hear what occurred. In fact, the record establishes that the door and windows on the bus were closed when the incident occurred, and the Respondent did not receive any complaints from the passengers regarding the confrontation. In analyzing the "place of discussion factor," the Board has considered whether the respondent's customers were exposed to the alleged misconduct. *Wal-Mart Stores, Inc.,* 341 NLRB 796, 808 (2004). In this case, the record is devoid of evidence establishing that passengers on the bus witnessed or heard the incident, were affected by it, or even registered complaints about it.

While the Respondent requested that employees Marlon Jackson and Melvin Flowers submit written statements about the confrontation on the dock, they merely stated that they heard an argument and the only thing they overheard was one person who said "Don't touch me," and the other person respond "I didn't touch you." (GC Exhs. 14 and 15.) Employee Zephaniah Lawson, who also submitted a written statement to the Respondent which does not reflect where he was when he allegedly saw the confrontation, only stated that he saw Little "touch Jon [Heben] on [the] shoulder. . . ." (R. Exh. 9.) Interestingly, none of those statements mention the use of profanity, and the assertion that Little touched Heben on the shoulder was not corroborated by the video. Thus, there is no evidence that Little's use of profanity on the platform was mentioned or recognized by the three employees who provided statements, nor is there evidence that the use of profanity negatively affected or upset employees, or that it in any way affected their work.

In assessing this factor, it is also important to note that Heben was the one who pursued Little onto the platform and continued to point is finger at him. The fact that Heben initiated the confrontation in an area open to the public where passengers and employees were located, detracts from his standing to object and complain that passengers and employees could have overheard Little's statements. In *Brunswick Food & Drug,* 284 NLRB 663, 665 (1987), the Board found that an employer unlawfully discharged an employee, despite the fact that the patrons in the restaurant overheard the employee's excited and prolonged complaints about management as the employee jumped up from her seat and paced around the customers. In that case, the Board found the employee was provoked in front of customers, and it held that "[i]n any event, the Respondent selected the setting for this confrontation, and it is thus hardly in a position to object that customers were drawn into it." Id.

(2) The subject matter of the discussion

The second factor, the "subject matter of the discussion," weighs in favor of protection. Little was clearly acting in his capacity as chief union steward when he asked to speak to Heben about the way he was treating Young. In fact, even Heben acknowledged that Little initiated the conversation for the purpose of discussing Heben's treatment of Young. (Tr. 539.) Little's statements directly involved Heben's actions and their effects on Young's and other employees' working conditions. The tenor of the conversation then changed because Heben denied that he spoke inappropriately to Young or had harassed and mistreated her, and because he began to question Young regarding her work procedures that day. The situation was then exacerbated by Heben pointing his finger in the faces of both Young and Little, which was precisely one of the ways Young believed Heben had mistreated and harassed her earlier. Little's remarks, while including the use of profanity in the form of "damn," "shit," and "fuck," were nevertheless expressions of protest and outrage over what Little and Young viewed as mistreatment and harassment.

(3) The nature of the employee's outburst

The third factor, the nature of the conduct or the "outburst," also weighs in favor of protection. In assessing whether an employee's protected conduct loses the protection of the Act, the Board recognizes that disputes over working conditions are the type most likely to cause ill feelings and strong responses. *Kiewit Power Constructors Co.,* 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011) citing *Consumers Power,* 282 NLRB 130, 132 (1986). The Board has held that in deciding whether conduct is removed from the protection of the Act, it determines whether the conduct is "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers,* 350 NLRB 203, 204–205 (2007), enfd 519 F.3d 373 (7th Cir. 2008). In an attempt to distinguish between protected conduct that maintains the Act's protection from that which is so egregious that it loses its protection, the Board has found that a line "is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Kiewit Power,*

supra at 710, citing *Prescott Industrial Products Co.,* 205 NLRB 51, 51–52 (1973).

In assessing the nature of Little's outburst in determining whether his protected conduct lost the protection of the Act, there is no doubt that Little became confrontational in the course of advocating Young's cause after Heben provoked him by yelling and pointing his finger in their faces. He also used profane language and hand gestures that consisted of swinging his right hand in front of his body with pointed finger for emphasis. His hand gestures, while aggressive, were not threatening. I note that his use of profanity, while certainly disrespectful, was not threatening. Little's comments to Heben did not contain threats, and the Respondent failed to allege in Little's discharge letter that he had threatened Heben. In addition, the use of profanity was not planned or deliberate, but instead was a spontaneous response to being provoked by Heben. The record establishes that Little confronted Heben with an intent to discuss the alleged harassment and mistreatment of Young, not to direct profanity at him for no apparent reason. I find his outburst and use of profanity was a reaction to being provoked by Heben's yelling and finger pointing, the exact actions which Young cited as evidence of his degrading and harassing behavior in the first place. The Board has held that such statements which are "single, brief, and spontaneous reactions" by an employee and not "premeditated and sustained personal threats. . ." are not sufficient to remove the protection of the Act from the protected activities. *Kiewit Power*, supra at 710; see also *Burle Industries,* 300 NLRB 498 (1990), enfd. 932 F.2d 958 (3d Cir. 1991).[14]

In addition, when analyzing the nature of the outburst, consideration must be given to the undisputed fact that profanity was commonplace in the Respondent's workplace. Profanity, such as that used by Little, was used by both employees and management on a daily basis. It was frequently directed between employees, from employees to management and passengers, and from management to employees and passengers. Such profanity consisted of words such as: "damn," "shit," "bullshit," "ass," "assholes," "fuck," or phrases such as "fuck Greyhound," "fucking pay attention," "get your shit together," "full of shit," "stop fucking up," "that's a damn lie," and "are you fucking serious?" (Tr. 134–135, 137–138, 148, 208–212, 373–375, 450–452.) Despite the frequent and extensive use of profanity, the record is devoid of any evidence that employees had been disciplined for using profane language at the facility. In addition, I find it significant that the use of profanity, such as the language used by Little, was also commonplace and an accepted part of the many conversations and confrontations that occurred between union officials and Respondent's management officials in labor-management meetings and when discussing working conditions or grievances, which further weighs in favor of finding the protection of the Act should not be removed from Little's actions in this case. Consistent with that finding, the Board has held that where the use of profane and vulgar language was "a daily occurrence in [the] Respondent's workplace, and [it] did not engender any disciplinary response," such a factor weighed in favor of retaining the protection of the Act. *Pier Sixty,* supra, slip op. at 2–3.

In this case, despite the fact that Little's profanity included "damn" and "shit," the Respondent seems to have relied in particular on Little's use of the word "fuck" and its variants for what it described in the discharge letter as his "unrestrained use of profanity," his violation of the Hostility and Personal Conduct rules, and his alleged "gross insubordination." (Jt. Exh. 3.) In that regard, the discharge letter specifically cited his use of that word and phrases which included that word. (Jt. Exh. 3.) With regard to such profanity, it is important to note that the Board has found that the language used by Little is not so opprobrious as to remove the Act's protection. While certainly disrespectful and discourteous, the Board has nevertheless found that such profane language directed to or about management officials has not been sufficient to remove the conduct from the protection of the Act. In *Alcoa, Inc.,* 352 NLRB 1222, 1225 (2008), the Board found an employee acting in his union representational capacity, who called a supervisor an "egotistical fucker," did not lose the protection of the Act. In *Tampa Tribune,* 351 NLRB 1324 (2007), where an employee engaged in protected activity told two supervisors that the employer's vice president was a "stupid fucking moron," the Board did not find that statement sufficient to remove the protection of the Act. In addition, in *Plaza Auto Center, Inc.,* 355 NLRB 493, 494–497 (2010), an employee engaged in protected activity did not lose the protection of the Act despite calling the owner a "fucking mother fucker," a "fucking crook," and an "asshole" in a single and brief outburst of profanity. Id. In that case, the Board noted that the single brief outburst was provoked by the employer's failure to respond to the employee's concerns, the profane language was "not outside the range of conduct" at the employer's facility, and there was no threat of any physical harm by the employee. Id. See also *Union Carbide Corp.,* 331 NLRB 356, 359 (2000), enfd. 25 Fed. Appx. 87 (4th Cir. 2001) (employee who called manager a "fucking liar" was found not so "out of line" as to remove him from the protection of the Act); see also, *Pier Sixty*, 362 NLRB 505, 506 (2015) (in a Facebook posting the employee wrote that the employer's assistant director "is such a nasty mother fucker. . . fuck his mother and his entire fucking family," which did not lose the protection of the Act).

In *Postal Service,* 364 NLRB No. 62 (2016), a similar case involving confrontational protected conduct by a union steward, the Board found a union steward's conduct was protected during a meeting concerning grievances, even though she became confrontational in the course of advocating for a fellow employee and told the supervisor she was "being an ass," and she "peppered her language with profanity," which included much use of the word "fuck." Id. slip op. at 2. As the supervisor ended the meeting and stood up to leave, the employee stood up, tipping her chair back in the process, and stepped toward the supervisor. The employee then shook her finger at the supervisor and screamed, "I can say anything I want. I can swear if I want. I can do anything I want." Id. When the supervisor began to disagree with those statements, the employee took another step

[14] See in comparison *Trus Joist MacMillan*, 341 NLRB 369, 371 (2004), where the Board found that an employee lost the Act's protection where he planned and deliberately launched a personal attack on his supervisor that included a series of profane verbal insults.

towards the supervisor and loudly repeated that she could say and do whatever she wanted, and added that the supervisor could not stop her. That employee was subsequently issued a written disciplinary warning based, in part, on her conduct in that incident.[15] Id.

In the *Postal Service* case, the Board found, contrary to the judge, that the employer violated the Act to the extent it disciplined the employee for her conduct during the course of that incident. Id. When analyzing the nature of the outburst factor in the Postal Service case, the Board noted that it has "repeatedly held that strong, profane, and foul language or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity." Id., slip op. at 3; quoting *Hawaii Tribune-Herald,* 356 NLRB 661, 680 (2011), enfd. 677 F.3d 1241 (D.C. Cir. 2012) (citing cases); accord *Noble Metal Processing, Inc.,* 346 NLRB 795, 799 (2006). Applying its objective test to the facts of that case, the Board found that the employee was not threatening, but "merely loud, profane, disrespectful, and obnoxious," which apparently was not unusual for that employee's past behavior or beyond the conduct the employer had previously tolerated. *Postal Service,* slip op. at 4. In that case, the Board determined that the employee's outburst retained the protection of the Act. Id. I find the Postal Service case supports finding that the nature of Little's outburst retained the protection of the Act. This finding is consistent with the Board's reasoning that "a certain amount of salty language and defiance" is to be expected and "must be tolerated" in disputes over employees' terms and conditions of employment. Id. slip op. at 4; *Severance Tool Industries,* 301 NLRB 1166, 1170 (1991), enfd. mem. 953 F.2d 1384 (6th Cir. 1992). In addition, the Board and the courts "have recognized that some tolerance is necessary if grievance meetings are to succeed at all," and "bruised sensibilities may be the price exacted for industrial peace." See *United States Postal Serv. v. NLRB,* 652 F.2d 409, 411 (5th Cir. 1981) (internal quotation marks and citations omitted).

In analyzing the nature of the outburst factor, the Respondent argues that Little's conduct and profanity violated its Hostility and Personal Conduct Rules. However, the fact that his conduct and statements may have violated the Respondent's rules does not necessarily mean that they lost the Act's protection. The Board has held that employees who are engaged in protected activities "generally do not lose the protective mantle of the Act simply because their activity contravenes an employer's rules or policies." *Crowne Plaza LaGuardia,* 357 NLRB 1097, 1101 (2011), citing *Louisiana Council No. 17*, 250 NLRB 880, 882 (1980). In addition, even though the Respondent asserts that Little was discharged for "gross insubordination," that is not considered a separate and distinct basis for discipline requiring analysis under a framework other than that of *Atlantic Steel*. The record in this case establishes that Respondent characterized Little's outburst and his use of profanity during the incident as the alleged act of insubordination. As I have determined above, Little was engaged in union and protected concerted activity during the incident. It is well established that if an employee is disciplined "for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act." *Goya Foods, Inc.,* 356 NLRB 476, 477 fn. 11 (2011), *citing Consumers Power Co.,* 282 NLRB 130, 132 (1986) (footnote omitted). Where the conduct at issue arises from protected activity, as it has in the instant case, the Board does not consider such conduct as a separate and independent basis for discipline. Id., see *Tampa Tribune,* 351 NLRB 1324, 1326 fn. 14 (2007), enf. denied on other grounds sub nom. *Media General Operations, Inc. v. NLRB,* 560 F.3d 181 (4th Cir. 2009).

Furthermore, even though the Respondent characterized Little's use of profanity during his outburst as "gross insubordination," such a characterization does not necessarily mean it is sufficient to remove the Act's protection. Although insubordinate conduct weighs against protection under the Act, the Board distinguishes between "true insubordination" and behavior that is only "disrespectful, rude, and defiant." *Goya Foods, Inc.,* supra at 478; See *Severance Tool Industries,* 301 NLRB 1166, 1170 (1991), enfd. mem. 953 F.2d 1384 (6th Cir. 1992) (where the Board found an employee's "disrespectful, rude, and defiant demeanor and the use of a vulgar word" while engaged in protected activity, was insufficient to cause him to lose the Act's protection, notwithstanding the employer's characterization of the conduct as "insubordinate, belligerent, and threatening"). I find that in this case, Little's conduct falls squarely into the latter category and it did not constitute either "insubordination" or "gross insubordination." Accordingly, Little's conduct retained its protection under the Act.

Finally, the General Counsel correctly notes that the record is replete with evidence of confrontations by both supervisors and employees that did not result in termination. In that connection, former supervisor Marshay Gibbons testified that there have been confrontations and outbursts throughout the facility and sometimes passengers were present. (Tr. 466.) Gibbons specifically testified that two supervisors (Jeff Fitzgerald and David King) had an argument in the terminal in 2000 in view of the public. (Tr. 464–465.) That confrontation ended with Fitzgerald punching King in the face and the drivers and security personnel separating them. Id. Both, however, continued to work for the Respondent after that incident. Id. Gibbons also testified that she had a verbal confrontation with driver Curtis Franklin around 2010 concerning his attempt to call off from work. (Tr. 455.) That confrontation, which occurred in the driver's room, consisted of them yelling and cursing at each other. Id. Although

[15] In the *Postal Service* case, the written warning issued to the employee was also for conduct that occurred on several days that followed the incident, where the employee engaged in persistent "stalking" behavior toward the supervisor, repeatedly calling the supervisor's work and cell phones, calling the supervisor a "fucking idiot," and banging on her office door, ultimately resulting in a court-issued protective order straining the employee from continuing her "harassing, stalking, or threatening" conduct. Id. at 6. The employee's conduct after the incident also consisted of unprotected visits to the employer's main office, which were "unauthorized by the parties' collective-bargaining agreement and only tenuously, if at all, related to any bona fide representational purpose." Id. slip op. at 1, fn. 3. In that case, the Board affirmed the administrative law judge's finding that the employer did not violate the Act by issuing written discipline for the employee's conduct on those days that followed the initial incident.

she reported the incident to management, Franklin was not suspended or terminated, and he continues to work for the Respondent. (Tr. 458.) In addition, both Little and Gibbons testified that in 2008, Little (who at the time was not a union steward) had a verbal confrontation with Lytle at the public area of the facility where Lytle followed him into the dock area and was yelling and swinging his arms. (Tr. 154–157.) Gibbons also testified about that altercation, stating that Little and Lytle were "getting into it," and that then chief shop steward Herman Green had to step in to break up the altercation. (Tr. 158; 458–463.) Although Little was initially pulled out of service for 6–7 days, he testified that he eventually was not issued discipline and he was paid for the time he was off work. (Tr. 159.)

In support of its assertion that Little's outburst lost the protection of the Act, the Respondent cites *DaimlerChrysler Corp.,* 344 NLRB 1324, 1329–1330 (2005). In that case, employee Valentin's use of profanity directed toward a supervisor was not protected even though profanity was common in the workplace, because there was no evidence that "such language was common, much less tolerated, when used repeatedly in a loud ad hominem attack on a supervisor that other workers overheard." Id. at 1329–1330. The facts of that case, however, are distinguishable from the instant case. In that case, the supervisor's conduct did not provoke Valentin's ad hominem attack, where in the instant case Little's outburst was provoked by Heben's yelling and pointing his finger in the faces of Little and Young while Little was engaged in union and protected activity. In addition, the use of profanity was tolerated in the instant case, while in *DaimlerChrysler* the use of such profanity was not tolerated. In fact, the employer actually disciplined another employee for using profane language that had been directed to Valentin, and there were no exceptions to the administrative law judge's finding that the employer lawfully disciplined Valentin only a month after the incident at issue for conduct in a confrontation with another supervisor that included "screaming, abusive language, intimidation, finger pointing, and temporarily blocking the [supervisor's] egress." Id. at 1330, 1330 fn. 15.

DaimlerChrysler is also distinguishable from the instant case because the place of the discussion weighed against protection as it was Valentin who approached the supervisor at his cubicle located in an area full of cubicles occupied by both supervisory and nonsupervisory personnel, and "quite a few" employees were in the immediate area where Valentin's outburst was overheard by at least 3 people in an adjacent cubicle. Id. at 1329. In the instant case, however, it was Heben who agreed to meet in the vestibule and then cause the confrontation on the dock, both public areas where other employees and customers had access. In addition, in the instant case no other employees or customers were present in the vestibule and there is no evidence that any passengers on the bus heard the profanity used by Little or even witnessed the confrontation. Furthermore, even though 3 employees allegedly witnessed Little's outburst on the dock, two of those employees only indicated they heard someone say "Don't touch me," and someone else say "I didn't touch you." Additionally, the third person who allegedly witnessed the encounter stated that he saw Little put his hand on Heben's shoulder, which is not supported by the record. Importantly, and contrary to the facts of *DaimlerChrysler,* none of those three employees reported hearing Little's use of profanity, nor was there any evidence that Little's conduct interfered with any employee's ability to perform their work. Thus, if find the Respondent's reliance on that case is misplaced.

(4) Whether the outburst was provoked by the Respondent

Finally, the fourth factor of whether the outburst was provoked by the Respondent's unfair labor practices also weighs in favor of protection. As mentioned above, the record establishes that Little's outburst and use of profanity was provoked by Heben's actions both in the vestibule and after he followed Little onto the platform. The Respondent's argument that this factor must weigh against retaining the protection of the Act because Little's outburst was "completely unprovoked" as "[n]o injustice or unfair labor practice was committed at any relevant time which would prompt such a reaction,"[16] is without merit.

While it is true that the Heben's yelling and pointing his finger at Little and Young when confronted about his alleged harassment and mistreatment of Young, was neither alleged nor found to be an unfair labor practice, the Board has held that the absence of such a finding does not require the conclusion that the employee's conduct was unprovoked. *Pier Sixty,* supra, slip op. at 3, fn. 4; *Battle's Transportation, Inc.,* 362 NLRB 125, 125 fn. 4, 9–10 (2015). In *Pier Sixty,* supra, an employee posted vulgar comments on Facebook about his manager, which was in response to the employee being upset about the manner in which the manager addressed employees during a dinner service they were working. Id. In that case, on the issue of provocation, the Board specifically found that "[t]he absence of a finding that [the manager's] conduct itself constituted an unfair labor practice does not compel the conclusion that [the employee's] conduct was either unprovoked or unprotected." Id. slip op. at 3 fn. 4. In addition, in Battle's Transportation, supra, the Board found that the employer's chief operating officer's statement to the employee to "shut up," although neither alleged nor found to be an unfair labor practice, was "sufficient provocation" under an Atlantic Steel analysis. See also *Consumers Power,* supra at 132 (employee engaged in protected activity did not lose the protection of the Act when he raised his fists in response to a manager's gesture that was neither alleged nor found to be an unfair labor practice).

Thus, I find that all four factors of place, subject matter, nature of conduct, and provocation, favor Little's protection under Section 7 of the Act. While I do not condone his use of profanity or his confrontational and disrespectful conduct toward one of Respondent's management officials, under extant Board law his conduct was not so egregious as to render his union and protected concerted activities unprotected, nor was it sufficient to make him unfit for further employment. *Postal Service,* 364 NLRB No. 62 (2016).

2. The Respondent maintained and enforced unlawful work rules in violation of Section 8(a)(1) of the Act, and even assuming Little was not engaged in union and/or protected concerted

[16] R. Br. at 22.

activity, the Respondent discharged him pursuant to those unlawful rules, also in violation of Section 8(a)(1) of the Act.

a. The maintenance and enforcement of unlawful work rules or policies

(1) The legal standard

The rights under Section 7 have been found to "necessarily encompass[] the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 491 (1978). This includes employee communications regarding their terms and conditions of employment. *Central Hardware Co. v. NLRB,* 407 U.S. 483, 491 (1978); *Parexel International, LLC,* 356 NLRB 516, 518 (2011). As mentioned above, under Section 7, employees also have the right to engage in activity for their "mutual aid or protection," which also includes communicating regarding their terms and conditions of employment. *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978). Thus, a core activity protected by Section 7 is the right of employees to discuss, debate, and communicate with each other regarding self-organization and their workplace terms and conditions of employment. Consequently, the Board has held that employees' concerted communications regarding matters affecting their employment with other employees, their employer's customers, or with other third parties such as governmental agencies, are protected by Section 7 and, with some exceptions not applicable here, cannot lawfully be banned. See *Kinder-Care Learning Centers,* 299 NLRB 1171, 1171–1172 (1990). The Board reasoned that prohibitions against employees communicating with others such as third parties "reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent, and restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection." Id. at 1172; see also *Trinity Protection Services, Inc.,* 357 NLRB 1382, 1383 (2011).

It is well established that an employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646 (2004), citing *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Spring Valley Hospital Medical Center,* 363 NLRB No. 178 (2016); *T-Mobile USA, Inc.,* 363 NLRB No. 171 (2016); *Triple Play Sports Bar,* 361 NLRB 308, 313 (2014); *Hills & Dales General Hospital,* 360 NLRB 611, 615 (2014). The analytical framework for determining whether maintenance of rules violate the Act is set forth in *Lutheran Heritage Village-Livonia,* supra. Under *Lutheran Heritage,* a work rule is unlawful if "the rule explicitly restricts activities protected by Section 7." 343 NLRB at 646 (emphasis in the original). If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

In this case, the General Counsel does not allege that the rules in question were promulgated in response to union activity, or that they have been discriminatorily applied to restrict the exercise of Section 7 rights. Rather, the General Counsel argues that under the first prong of the test the challenged rules are overbroad on their face such that employees would reasonably construe the language in the rules at issue to prohibit their Section 7 activities.

In determining whether employees "would reasonably construe the [rule's] language to prohibit Section 7 activity," the Board adheres to certain guidelines in its analysis. The Board will determine that an employer rule is overbroad ". . . when employees would reasonably interpret it to encompass protected activities." *Triple Play Sports Bar & Grille,* supra, slip op. at 7. The Board has found that its ". . . task is to determine how a reasonable employee would interpret the action or statement of her employer, and such a determination appropriately takes account of the surrounding circumstances." *Roomstore,* 357 NLRB 1690, 1690 fn. 3 (2011). The Board, in analyzing work rules, "must give the rule a reasonable reading…," and "refrain from reading particular phrases in isolation, and… must not presume improper interference with employee rights." *Lutheran Heritage Village-Livonia,* supra at 646. In addition, the Board does not require that an employer actually apply a rule for it to be found unlawful. "Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." *Layayette Park Hotel,* supra; see also *Farah Mfg. Co.,* 187 NLRB 601, 602 (1970), enfd. 450 F.2d 942 (5th Cir. 1971) (the mere maintenance of the rule itself inhibits the engagement in otherwise protected organizational activity and is not precluded by the absence of evidence that it was invoked).

An employer's rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, as stated above, the inquiry is whether a reasonable employee would read the rule as prohibiting Section 7 activity. Id. Furthermore, any ambiguity in the rule must be construed against the drafter of the rule, which in this case is the Respondent. *Flex Frac Logistics, LLC,* 358 NLRB 1131, 1132 (2012), enfd. 746 F.3d 205 (5th Cir. 2014).[17] This principle stems from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights, whether or not such an effect on their rights is intended by the employer, instead of being tasked with dispelling such chill once it is manifest. Id.; See, e.g. *Lafayette Park Hotel,* 326 NLRB at 828.

(2) The Hostility Rule

Section 2 of the Rule Book, entitled "Driver Behavior and Image," contains a hostility rules set forth as follows:

[17] The Board's decision in *Flex Frac Logistics, LLC*, supra, was subsequently invalidated as a case decided by a panel that included two persons whose appointments to the Board were not valid. See *Noel Canning*, 134 S.Ct. 2550 (2014). The Board has since found however, that reliance on *Flex Frac Logistics* is appropriate because the panel's decision was enforced by the United States Court of Appeals for the Fifth Circuit prior to the issuance of *Noel Canning*. 746 F.3d 205 (5th Cir. 2014). The Board has also noted that there is no question regarding the validity of the court's judgment. *T-Mobile, USA, Inc.*, 363 NLRB No. 171, slip op. at 2, fn. 5 (2016); See also *UPMC*, 362 NLRB 1704 fn. 5 (2015).

> **Rule 2-1 Hostility**: Drivers may not take hostile or aggressive actions, whether verbal, physical, by gesture, or otherwise, towards the Company, its employees, patrons, vendors, or agents. The use of vulgar language or profanity of any type will not be tolerated.
>
> Any complaints, criticisms or suggestions shall be made through appropriate internal Company channels and shall not be made to or in the presence of passengers or the public.

The General Counsel alleges that only the second provision in this rule is unlawful, contending that the prohibition against making "complaints, criticisms or suggestions . . . to or in the presence of passengers or the public" would prohibit employees from communicating with the public about problems or issues relating to their wages or other terms and conditions of employment. In addition, the General Counsel alleges that requiring employees to follow "certain internal channels" for making complaints, criticisms or suggestions regarding working conditions, would unlawfully inhibit them from bringing such work-related complaints to other entities or the public for redress. (GC Br. 28–29.) The Respondent, on the other hand, argues that when reading both parts of the rule in context, a reasonable employee would interpret the rule to prohibit hostile and aggressive conduct, and they would know the rule is not applicable to their Section 7 rights. (R. Br. 27.) In addition, the Respondent argues that requiring employees to bring complaints through "appropriate internal company channels" should not be found overly broad because "[a] reasonable employee would recognize the Union as an 'appropriate internal Company channel' to bring complaints about the terms and conditions of employment." Id. I find no merit to the Respondent's assertions.

With regard to the Respondent's assertion that employees would somehow understand that the rule prohibiting complaints, criticisms or suggestions in the presence of passengers or the public would not include their complaints about working conditions, I note that the rule does not present accompanying language that would tend to restrict its application, and there is nothing in the rule that even arguably suggests that protected complaints about terms and conditions of employment are excluded from the broad parameters of the rule. As such, employees would reasonably conclude that the rule prohibits them from discussing their complaints, criticisms and suggestions about working conditions or engaging in certain protected communications with the public.

Contrary to the Respondent's assertion, I also find that employees would reasonably believe that in order to comply with this rule, they would be required to present complaints or grievances concerning their working conditions only to the "appropriate internal Company channels" for resolution, and they would be barred from presenting them to other entities such as government agencies for redress. The rule is vague and ambiguous. The Respondent does not identify the various "appropriate internal Company channels" that should be utilized. As mentioned above, any ambiguity in the rule must be construed against the drafter of the rule. *Flex Frac Logistics,* supra at 1132. In addition, even though the Respondent asserts that employees would recognize the Union as an "internal Company channel," that assertion is baseless. Even assuming employees would believe they were required to take every complaint about their working conditions to the Union, they would still recognize that the Respondent is prohibiting them from utilizing other methods to resolve such workplace issues, including discussing such issues with one another, third parties, the public, or governmental agencies such as the NLRB. By informing employees' that they are required to use an internal procedure to resolve their complaints about working conditions, employees would reasonably construe that as proscribing them from protesting or discussing their terms and conditions of employment, which are clearly protected by Section 7.

With regard to the ambiguities discussed above, it is important to note that in determining whether employer pronouncements violate Section 8(a)(1), the Supreme Court and the Board have recognized the assessment "must be made in the context of its labor relations setting," and "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969). In *Whole Foods Market,* 363 NLRB No. 87, slip op. at 4 fn. 11 (2015), the Board held that "[w]here reasonable employees are uncertain as to whether a rule restricts activity protected under the Act, that rule can have a chilling effect on employees' willingness to engage in protected activity. Employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Section 7 activity for fear of running afoul of a rule whose coverage is unclear."

While the Respondent's policy does not expressly say that employees will be disciplined for making complaints outside the unnamed internal channels, the Respondent's rule goes beyond merely stating a preference, as shown by the directive that employees' criticisms "shall" be made through internal Company channels. Such directive implicitly prohibits employees from registering complaints or criticisms to other employees or entities, which is overly broad and unlawful. *Hyundai America Shipping Agency, Inc.,* 357 NLRB 860, 872 (2011); See also *Kinder-Care Learning Centers,* supra at 1171–1172 (where the Board found such a requirement "reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent and restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection.")

In support of its assertion that the Hostility rule should not be found to violate the Act, the Respondent relies on *U-Haul Co. of California,* 347 NLRB 375, 378 (2006), where the Board found lawful an employer's statement in a rule advising that employees see the employer's president if they were unable to resolve work-related complaints with their supervisors. That case, however, is factually distinguishable. In that case, the handbook statement informed employees that they were invited to "speak up for [themselves]" at all levels of management, and assured the employees that the employer would listen. Id. In addition, the rule stated that "[f]urthermore, you should understand that if your supervisor cannot resolve your problems, you are expected to see me [the employer's president and chairman of the board]." Id.

The Board found the statement that employees "can speak up for yourself" invites, but does not require, the presentation of workplace problems to management. Id. In addition, the Board found that even if that statement could be read as a direction to employees to present their workplace issues to Respondent's managers, the handbook's use of "expected" was not comparable to an explicit requirement to bring it to the president's attention. Id. The Board thus upheld the statement advising—but not requiring—employees unable to resolve problems with supervisors to "see" the president. Furthermore, the Board found nothing in the challenged statement that explicitly or through reasonable interpretation prevented employees from complaining to customers or nonsupervisory employees. Id. Those facts differ considerably from the rule in the instant case, which states that complaints "shall" be made through internal Company channels, thus establishing that employees were required to present their complaints to the Respondent. Thus, I find that the Respondent's maintenance and enforcement of these provisions in this rule constitutes a violation of Section 8(a)(1) of the Act.

(3) The Personal Conduct/Courtesy Rule

Section 2 of the Rule Book also contains a rule pertaining to personal conduct and courtesy, which states as follows:

> **Rule 2-3 Personal Conduct/Courtesy**: Drivers are expected to conduct themselves as professionals. They must be pleasant and courteous in dealing with passengers, regulatory or enforcement authorities, the public, agents and fellow employees. Vulgar language, profanity or other rude behavior will not be tolerated.
>
> Drivers are expected to refrain from fighting, "horseplay," or any other conduct that may be dangerous to others. Conduct by drivers that threatens, intimidates, challenges or coerces another employee, a customer, or a member of the public will not be tolerated.
>
> To avoid an argument, where possible, the dispute shall be referred to a supervisor to resolve whatever problems exist.
>
> Drivers will treat members of management with respect at all times.

The General Counsel argues that the two portions of this rule that prohibit employees from engaging in conduct that "challenges or coerces another employee," and that which requires employees to "treat members of management with respect at all times," are overbroad and violate the Act. The Respondent argues that, read in context, those two portions of the rule do not violate the Act.

With regard to the prohibition against conduct that "challenges or coerces" other employees, the General Counsel asserts it is too far-reaching as employees would reasonably read the rule to prohibit employee discussion and interaction that is implicit in Section 7. The Respondent argues that since the rule reminds drivers that they are "expected to conduct themselves as professionals" and prohibits "vulgar language, profanity or other rude behavior," it would take a "strained reading of this policy to see how it could possibly . . . touch upon Section 7 activity." (R. Br. 28–29.) I find these assertions by the Respondent are baseless and lack merit.

As mentioned above, an employer rule is unlawfully overbroad when employees would reasonably interpret it to encompass protected activities. *Triple Play Sports Bar & Grille*, supra, slip op. at 7. The portion of this rule prohibiting conduct that "challenges or coerces" other employees is vague and ambiguous as it does not identify or clarify the challenging or coercive conduct. Even though part of the rule addresses "fighting," "horseplay" or "any other conduct that may be dangerous to others," there is no language limiting challenging or coercive conduct to those examples. The broad restriction on such conduct also fails to contain language that excludes Section 7 protected activity from the rule's prohibition. Prohibiting conduct that "challenges or coerces" without further clarification is ambiguous and overbroad, and employees would reasonably believe or interpret this policy as proscribing protected activities such as discussions or actions concerning their wages, hours, and working conditions that the Respondent may deem to be a "challenge" to management or "coercive" to other employees. The Board has found similarly ambiguous language to violate the Act. *Hills & Dales General Hospital,* 360 NLRB 611 (2014) (where the Board found prohibitions of "negative comments" and "negativity" overbroad and ambiguous by their own terms); *Claremont Resort & Spa,* 344 NLRB 832, 832 (2005) (where the Board found an employer rule prohibiting negative conversations about associates or managers unlawful on its face); *Tenneco Automotive,* 357 NLRB 953, 957–958 (2011) (where the Board found an employer's directing employees to refrain from saying anything to each other that might be deemed offensive or "evoke a response" would reasonably be construed by employees to refer to a strike or other protected discussions). In addition, I note that the Respondent's assertion that employees would allegedly know the prohibition against challenging or coercive conduct would not be applicable to employees' protected activities, is belied by the fact that Respondent specifically applied this rule to prohibit Little's union and protected activities in this case. Thus, the portion of the Respondent's rule that prohibits conduct that "challenges or coerces" other employees is overly broad and unlawful.

With regard to the portion of the personal conduct rule that requires employees to treat members of management "with respect," the General Counsel argues that phrase is subjective and vague, and therefore unlawful. The Respondent, on the other hand, argues that since the rule addresses "fighting" and "conduct that is dangerous to others," employees would not read the rule to ban Section 7 activity. (R. Br. 29.) I similarly find no merit to the Respondent's assertions pertaining to this part of the rule.

The portion of the personal conduct rule that requires employees to treat members of management "with respect" is vague and patently ambiguous. It does not explain or define the conduct which would be considered disrespectful, and it is subject to different meanings, including a reasonable belief that it would include employee conduct that is protected under Section 7 of the Act. The rule also provides no descriptive context or illustrative examples of the kind of conduct the Respondent would consider to be disrespectful. As such, employees would have no way to

gauge whether their conduct would be found by Respondent to be subjectively disrespectful. The respectful treatment requirement is also set apart from the rule's focus on professional conduct toward employees and the public and its prohibition on misconduct, which would further cause employee uncertainty about the kind of conduct the Respondent would determine to be disrespectful to its managers.

Similar policies or rules that are vague and ambiguous as to their application to Section 7 activity, and which lack contextual or limiting language that provide clarification to employees that the rules do not restrict their Section 7 rights, have been found unlawful. *Casino San Pablo,* 361 NLRB 1350 (2014); *2 Sisters Food Group, Inc.,* 357 NLRB 1816 (2011). In *Casino San Pablo,* the employer maintained a rule prohibiting insubordination or other "disrespectful conduct," which included conduct that failed "to cooperate fully with [s]ecurity, supervisors and managers." Id. slip op. at 2. In that case, the Board noted that in the typical workplace setting where managerial prerogatives and supervisory hierarchies exist, employees would reasonably understand that insubordination or "other disrespectful conduct" would include protected conduct that might be deemed insufficiently deferential to management, such as employees acting in concert to object to working conditions imposed by management, collective complaints about a supervisor's arbitrary conduct, or joint challenges to unlawful wages or working conditions. Id. slip op. at 3; See *2 Sisters Food Group, Inc.,* supra at 1817 (where Board found unlawful a rule prohibiting the "inability or unwillingness to work harmoniously with other employees," determining that rule was "sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7"); See also *First Transit, Inc.,* 360 NLRB 619, 620–621 (2014) (where the Board found patent ambiguity in the phrase "inappropriate attitude or behavior . . . to other employees," and that employees would reasonably construe that rule as limiting protected communications concerning working conditions and employment).

In addition, I note that the Board has recognized there have been many cases where protected concerted activity has been perceived by management and supervision as an affront to their managerial authority and where employees were disciplined accordingly for engaging in such protected activity. *Casino San Pablo,* supra, slip op. at 3; See e.g., *Hawaii Tribune-Herald,* 356 NLRB 661, 680 (2011); *Noble Metal Processing, Inc.,* 346 NLRB 795, 800 (2006). Thus, I find this portion of the rule requiring management to be treated with respect at all times is overly broad and unlawful, as it would reasonably be interpreted by employees to apply to their protected complaints about working conditions. I also note that is precisely what the Respondent did in this case—it applied this rule to Little's union and protected concerted activity to discharge him.

Thus, based on established Board law, I find the portions of the Respondent's Personal Conduct/Courtesy rule that prohibit conduct that "challenges or coerces" other employees, and requires employees to treat members of management "with respect," are ambiguous, overly broad, and unlawful, and their maintenance and enforcement constitute a violation of Section 8(a)(1) of the Act.

(4) The Company Information Rule

Section 2 of the Rule Book also contains a rule pertaining to the disclosure of company information, which states as follows:

> **Rule 2-7 Company Information**: Drivers shall neither divulge anything about the affairs of the Company to nor permit access to Company records or reports by any party outside the Company.

The General Counsel asserts this rule violates the Act because it prohibits employees from discussing anything about the Respondent to any outside parties. The Respondent denied in its answer that it violated the Act by maintaining this rule, but it failed to offer any argument in support of its position in its posthearing brief.

While this policy does not expressly prohibit disclosure of topics protected by the Act, it sets forth a broad prohibition against divulging any information about the company or access to company records or reports to outside parties. In that connection, the rule contains no language limiting the prohibition in any way, it fails to offer any context with regard to the information that is prohibited, it does not define or establish what Company "affairs" are, and it does not establish what records or reports are inaccessible to outside parties. Critically, there is no provision exempting discussions about wages, hours, and other working conditions, and there is nothing in the policy that even arguably suggests that protected communications or documents are excluded from its parameters.

The blanket prohibition on disclosing company affairs is ambiguous and overbroad as it fails to define or limit the impermissible conduct, and I find that employees would reasonably believe this rule would prohibit protected communications, such as those concerning employees' terms and conditions of employment to outside parties or governmental agencies, such as the NLRB. The Board has routinely found such blanket prohibitions as overbroad and unlawful. *Advance Transportation,* 310 NLRB 920, 925 (1993) (where the Board found a rule prohibiting employees from discussion of "company affairs, activities, personnel, or any phase in operations with unauthorized persons" unlawful on its face); See also *Fremont Mfg. Co.,* 224 NRLB 597, 603–604 (1976), enfd. 558 F.2d 889 (8th Cir. 1977) (a rule prohibiting employees from "making any statement or disclosure regarding company affairs, whether expressed or implied as being official, without proper authorization from the company" is an unlawful restriction on employee rights).

In addition, under the ambiguous blanket prohibition against permitting access to Company records or reports to parties outside of the Respondent, I find reasonable employees would believe that would apply to records or documents pertaining to wages, hours, or other working conditions, such as personnel documents. The Board has repeatedly held that nondisclosure policies or rules prohibiting employees from disclosing employee personnel information or documents violates Section 8(a)(1) of the Act. The Board has reasoned that rules with such restrictions are unlawfully overbroad because employees would reasonably believe they were prohibited from discussing or otherwise communicating with others concerning wages and other terms and conditions of employment, which is an activity clearly protected under Section 7 of the Act. In *Quicken Loans, Inc.,*

361 NLRB 904 (2014), affirming 359 NLRB 1201 (2013), the Board found unlawful a "Proprietary/Confidential Information" rule prohibiting the disclosure of information defined as: (1) "non-public information relating to or regarding…personnel" and (2) "personnel information including, but not limited to, all personnel lists, rosters, personal information of co-workers" and "handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses," noting that the Board has found that rules prohibiting employees from disclosing this type of information about employees violates the Act. 359 NLRB at 1201 fn. 3.

Similarly, in *Flex Frac Logistics, LLC,* 358 NLRB 1131, 1132 (2012), enfd. 746 F.3d 205 (5th Cir. 2014), the Board found that an employer's prohibition on "[d]isclosure" of "personnel information and documents" to persons outside the organization was unlawfully overbroad as it would reasonably be understood to include "wages or other terms and conditions of employment with nonemployees." Id. at 1131. See e.g., *IRIS U.S.A., Inc.,* 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (where the Board found an employer rule unlawful that stated information about "employees is strictly confidential"); *Cintas Corp. v. NLRB,* 482 F.3d 463, 469–470 (D.C. Cir. 2007) (approving the Board's finding that a rule requiring employees to maintain "confidentiality or any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" was unlawfully overbroad), enfg. 344 NLRB 943 (2005).

Base on the above, I find that the Respondent's rule is overly broad as employees would reasonably believe or interpret it as proscribing discussions or disclosing documents about their terms and conditions of employments, that the Respondent may consider as confidential. Thus, the Respondent's maintenance of the provision discussed above in its Company Information rule constitutes a violation of Section 8(a)(1) of the Act.

b. Little's discharge pursuant to the unlawful Hostility and Personal Conduct/Courtesy rules constituted a violation of Section 8(a)(1) of the Act

The Board has long held that discipline imposed pursuant to an unlawfully overbroad rule is unlawful (the "*Double Eagle* rule"). See, e.g. *Double Eagle Hotel & Casino,* 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). In *The Continental Group, Inc.,* 357 NLRB 409 (2011), the Board clarified the *Double Eagle* rule by holding that discipline imposed pursuant to an unlawfully overbroad rule violates the Act when an employee violates the rule by "(1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." *Continental Group, Inc.,* supra at 412. The Board made it clear that the *Double Eagle* rule is applicable to situations where an employer disciplines an employee pursuant to an overbroad rule for conduct "that touches the concerns animating Section 7" (e.g., conduct that seeks higher wages) that is protected, but not concerted. Id. In making that determination, the Board reasoned that the potential "chilling effect" on employees' exercise of their Section 7 rights is even greater in those situations. Id.

However, the Board held that an employer will avoid liability for discipline it imposes pursuant to an overbroad rule if it ". . . can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline." Id; See also *Switchcraft, Inc.,* 241 NLRB 985 (1979), enfd. 631 F.2d 734 (7th Cir. 1980). The employer has the burden of not only asserting this affirmative defense, but also establishing that the employee's interference with the operation or production was the actual reason for the discipline. The *Double Eagle* rule thus reflects the Board's balancing of employees' Section 7 rights and employers' legitimate interests in being able to establish work rules for purposes of maintaining discipline and production. Id. at 412–413. Critically, an employer's mere citation to an overbroad rule as the basis for the discipline will be insufficient to meet its burden of proof. Id. at 412. Therefore, if the employer provides the employee with a reason (either oral or written) for imposing the discipline, the employer ". . . must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule." Id.; See e.g. *Gerry's I.G.A.,* 238 NLRB 1141, 1151 (1978), enfd. 602 F.2d 1021 (1st Cir. 1979) (holding "It is impossible, of course, for the employer . . . to establish [that the employee was discharged based on interference with production] when interference with work is not the reason given in the discharge letter and the discharge letter instead is in the literal language of the overly broad rule.")

The record establishes that Little, acting in his capacity as chief union steward, was engaged in conduct clearly within the protection of Section 7 of the Act when he confronted Heben about Young's allegations of harassment and degrading treatment. Little's actions constituted union and protected concerted conduct, and engagement in conduct that implicates the concerns underlying Section 7. The evidence also establishes that Respondent discharged him on the basis of that union and protected concerted activity, and pursuant to the Respondent's assertion that his conduct constituted a violation of its overly broad Hostility and Personal Conduct/Courtesy rules. In this case, there is insufficient evidence to establish that Little's confrontation with Heben interfered with his work, the work of Respondent's employees, or with Respondent's operations. As mentioned above, the Respondent argues in its brief that Little's "unnecessary confrontation" with Heben was "an effort to prevent Heben from trying to assist Young, or other drivers in the future, to depart on time with their scheduled routes," and that by doing so, Little "disrupted and delayed Greyhound's operations." (R. Br. 12, 15.) As also mentioned above, I have found those assertions to be baseless and unsupported by the record.

Even assuming credit is given to Respondent's assertion in the discharge letter that Little's decision to confront Heben "delayed the passengers further by taking Young with [him] to confront Manager Heben," the record establishes that Heben agreed to meet with Little and Young at that time. There is no evidence that Heben informed Little or Young that he could not meet with them because to do so would disrupt the Respondent's operations. Likewise, there is no evidence that Heben asked to meet with them at another time, or that he told Little that he would

have to meet with them at another time because to do so would disrupt the operations. Furthermore, even if Little's engagement in union activity and protected conduct "delayed the passengers," it did not constitute a disruption to Respondent's operations because Young completed her route as directed.[18]

In addition, even if sufficient evidence existed demonstrating that Little's conduct interfered with the Respondent's operations, there is no evidence that such interference was the reason for his discharge. In this regard, the Respondent's discharge letter establishes that the reason Little was discharged was his conduct and use of profanity during the confrontation. (Jt. Exh. 3.) The Respondent also failed to assert as an affirmative defense in its answer to the complaint that Little's conduct allegedly interfered with its business operations. (GC Exh. 1(g).) The Respondent also did not inform Little that he was being discharged on the basis of alleged interference with its operations. Instead, Respondent's managers informed him that he was being discharged on the basis of his conduct with Heben during the incident in question.

Thus, the Respondent has not met its burden of establishing that Little's union and protected conduct interfered with its operations, and even assuming such interference, it failed to meet its burden of showing that interference with its operations was the actual reason for the discharge. Accordingly, the Respondent's discharge of Little pursuant to its unlawful Hostility and Personal Conduct/Courtesy rules constituted a separate violation of Section 8(a)(1) of the Act.

3. Whether deferral to the grievance-arbitration process is appropriate

The parties' collective-bargaining agreement, effective from April 1, 2013, to March 31, 2018, contains a grievance-arbitration procedure in Article G-8, that provides for a three-step grievance procedure, and if the grievance is not resolved at Step 3, it can be submitted to an arbitration procedure that is "final and binding." (Jt. Exh. 1.) While the parties have processed Little's discharge grievance through Step 3 without resolution, the grievance is now at the arbitration step where the General Counsel asserts the Union has decided not to present it to an arbitrator, and instead has insisted on a determination before the Board.

At the trial, the Respondent made a motion to defer this case to the parties' grievance-arbitration procedure, or in the alternative, to postpone the hearing while the arbitration proceeds. That motion was opposed by the General Counsel. After considering the matter, I denied the motion in its entirety at trial. (Tr. 12–16.)

In its posthearing brief, the Respondent renewed its assertion that deferral is appropriate, arguing that there is no issue raised in the complaint that is not proper for resolution by an arbitrator within the process established by the parties in their collective-bargaining agreement. (R. Br. 2–3, 32–34.) The General Counsel, on the other hand, argues that this case is not appropriate for deferral because the collective-bargaining agreement does not encompass the entire dispute. In that connection, the General Counsel argues that Respondent acted with animosity towards Little's union activity as the confrontation that led to Little's discharge was based on his representation of a bargaining unit employee, and that the contract does not speak to the lawfulness of the Respondent's work rules and its reliance on those rules to justify Little's discharge. (GC Br. 5.) I find merit in the General Counsel's arguments, and for the reasons stated below, I find that deferral to the grievance-arbitration procedure is not appropriate.

It is well established that the Board has considerable discretion in determining whether to defer to the arbitration process when doing so will serve the fundamental aims of the Act. *Cooper Tire & Rubber Co.,* 363 NLRB No. 194, slip op. at 6 (2016); *Wonder Bread,* 343 NLRB 55 (2004), see *Dubo Mfg. Corp.,* 142 NLRB 431 (1963); *Collyer Insulated Wire,* 192 NLRB 837 (1971); and *United Technologies Corp.,* 268 NLRB 557 (1984). The Board's standard for deferring to arbitration is also solely a matter for its discretion to resolve alleged unfair labor practices where in its judgment its intervention is necessary for protection of the public rights found in the Act, and Section 10(a) of the Act expressly provides that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. *Babcock & Wilcox Construction Co.,* 361 NLRB 1127, 1129–1130 (2014). The Board has found that the discretionary aspect of its deferral policy is "particularly significant in 8(a)(3) and (1) cases such as this, where employees' contractual rights, implicated in the grievance, are separate from their rights under the Act." Id. slip op. at 4. In addition, it is firmly established that the burden of proving that deferral is appropriate is placed on the party urging deferral. Id. slip op. at 2.

In cases of prearbitral deferral, the Board's standard is set forth under *Collyer Insulated Wire,* 192 NLRB 837 (1971), and *United Technologies Corp.,* 268 NLRB 557 (1984). The Board determined that prearbitral deferral is appropriate when the following factors are present: the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution. *United Technologies Corp.,* supra; Wonder Bread, supra at 55.

In *Babcock & Wilcox Construction Co.,* 361 NLRB 1127 (2014), however, the Board made a change to its prearbitral deferral standard. In *Babcock,* the Board revisited its deferral standards in 8(a)(3) cases. In postarbitral cases, it revisited *Olin Corp.,* 268 NLRB 573 (1984), and found that the existing postarbitral deferral standard did not adequately balance the protection of employee rights under the Act and the national policy of encouraging arbitration of disputes concerning the application or interpretation of collective-bargaining agreements. The Board found that the *Olin* standard created an excessive risk of deferral when an arbitrator had not adequately considered the issue of the unfair labor practice, or when it was simply impossible to determine whether that issue had been considered by the

[18] In addition, the record establishes that it was not uncommon for the Respondent to experience delays in departures at its facility. In fact, the Respondent asserted in Little's discharge letter that "on time performance" was "one of the largest complaints" from its customers." (Jt. Exh. 3.)

arbitrator. In that case, the Board created a new standard for deferring to arbitral decisions in 8(a)(3) and (1) cases, finding that postarbitral deferral is appropriate where the arbitration procedures appear to have been fair and regular, the parties agreed to be bound, and the party urging deferral demonstrates that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law "reasonably permits" the arbitral award. Id. slip op. at 5–10.

In Babcock, the Board also decided to change its prearbitral deferral practices under *Collyer and United Technologies,* determining that it should not defer to the arbitral process unless the first prong of the postarbitral deferral standard was satisfied, that is, unless the arbitrator was explicitly authorized to decide the unfair labor practice issue. Thus, the Board determined that it will "no longer defer unfair labor practice allegations to the arbitral process unless the parties have explicitly authorized the arbitrator to decide the unfair labor practice issue, either in the collective-bargaining agreement or by agreement of the parties in a particular case." Id. slip op. at 12–13.

In applying the prearbitral deferral standard articulated *in Collyer* and *United Technologies,* the dispute clearly arose within the confines of a long and productive collective-bargaining relationship; the parties' agreement provides for arbitration of a very broad range of disputes; and the employer has asserted its willingness to utilize arbitration to resolve the dispute. An examination of the remaining factors, however, reveals that this dispute is not well suited for resolution under the arbitral process. In that connection, there is a claim of employer animosity to the employees' exercise of protected statutory rights because the General Counsel has claimed, and I have so found, that Little was discriminated against on the basis of his union and protected concerted activities. On that subject, the Board has noted that where the facts show a sufficient degree of hostility towards its employees' exercise of rights protected by the Act on the facts of the case at bar alone, "there is serious reason to question whether we ought defer to arbitration." *United Aircraft Corp.,* 204 NLRB 879, 879 (1972). In this case, the Respondent not only discharged Little for his union and protected concerted activities when he presented his concerns to management regarding a driver's belief that she was being harassed and demeaned by Heben, it went so far as to fabricate its assertion that Little punched Heben in the stomach in an attempt to justify its unlawful action. That, I find, demonstrates more than a sufficient degree of hostility towards its employees' exercise of rights protected by the Act.

Importantly, I also find that the arbitration clause does not clearly encompass the dispute at issue. Article G-22 of the collective-bargaining agreement provides that "no employee will be discriminated against because of affiliation with or activity in the Union," article G-6 reserves to the Respondent the right to prescribe "reasonable rules . . . not inconsistent with the terms of this Agreement," and article G-7 provides that Respondent cannot discipline an employee without "just cause," which includes violations of Company rules . . . not inconsistent with this Agreement. (Jt. Exh. 1.) However, the collective-bargaining agreement does not address the lawfulness of Respondent's work rules, which is explicitly within the Board's authority to determine, and it does not address discipline or discharge of an employee pursuant to unlawful work rules maintained and enforced by the Respondent. Thus, under the final factor, the instant dispute is not eminently well suited to resolution under the arbitral process.

In addition, under the *Babcock* standard discussed above, the arbitrator must be explicitly authorized by the parties to decide the unfair labor practice issues, either in the collective-bargaining agreement or by the parties' agreement. In this case, the Union has refused to have an arbitrator decide the issues whether the Respondent's rules are overbroad and unlawful, and whether Little's discharge on the basis of, and resulting from, the enforcement of those unlawful work rules violated the Act. The collective-bargaining agreement also fails to explicitly authorize an arbitrator to decide those unfair labor practices issues. Thus, without the express agreement of the Union and Respondent, an arbitrator does not have the authority to determine those critical unfair labor practice issues in this case, and the Babcock factor required for prearbitral deferral has not been satisfied.

Finally, I find that the unfair labor practice allegations that the Respondent maintained and enforced unlawful work rules, and discharged Little pursuant to those unlawful rules, are inextricably intertwined with the General Counsel's theories in this case, and that deferral is not appropriate where only some, but not all, of the unfair labor practice allegations can be processed in arbitration. *Sheet Metal Workers Local 17,* 199 NLRB 166, 168 (1972), enfd., 502 F.3d 1159 (1st Cir. 1973); see also, *Arvinmeritor, Inc.,* 340 NLRB 1035, 1035 fn. 1 (2003), citing *American Commercial Lines,* 291 NLRB 1066, 1069 (1988) (Board found when an allegation for which deferral is sought is "inextricably related to other complaint allegations that are either inappropriate for deferral or for which deferral is not sought, a party's request for deferral must be denied.")

Based on the record evidence in this case, and the well-established Board law discussed above, I find that the Respondent failed to satisfy the Board's standards for prearbitral deferral under *Collyer, United Technologies,* and *Babcock.* Accordingly, deferral to the grievance-arbitration process is not appropriate, and I find that the Respondent discharged Little for engaging in union and protected concerted activities, in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Greyhound Lines, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Amalgamated Transit Union Local 1700 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by discharging employee Louis Little on July 13, 2016, because of his engagement in union and protected concerted activities, and in violation of Section 8(a)(1) of the Act for also discharging Little on the basis of, and pursuant to, unlawfully maintained and/or enforced conduct rules or policies.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by maintaining at its

Cleveland, Ohio facility: (1) Rule 2-1 "Hostility," which prohibits employees from making complaints, criticisms, or suggestions to or in the presence of passengers or the public, and which requires employees to make any complaints, criticisms, or suggestions through appropriate internal Company channels; (2) Rule 2-3 "Personal Conduct/Courtesy," which prohibits conduct by employees that challenges or coerces another employee, and requires that employees treat members of management with respect at all times; and (3) Rule 2-7 "Company Information," which prohibits employees from divulging anything about the affairs of the Company and prohibits permitting access to Company records or reports by any party outside the Company.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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 Louis Little, shall be ordered to offer him reinstatement to his former position, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him. As this violation involves a cessation of employment, the make whole remedy shall be computed on a quarterly basis, less any interim earnings, as prescribed in *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 *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), the Respondent shall compensate Little for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, submit and file with the Regional Director for Region 8 a report allocating the backpay award to the appropriate calendar year for said employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

In accordance with *King Soopers, Inc.,* 364 NLRB No. 93 (2016), the Respondent shall also compensate Little for search-for-work and interim employment expenses regardless of whether those expenses exceed his 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. The Respondent shall also be ordered to expunge from its files any and all references to the discriminatory and unlawful discharge of Little, and notify him in writing that this has been done and that evidence of the discriminatory and unlawful action will not be used against him in any way.

The General Counsel further requests that I order Little be reimbursed for "consequential economic harm" incurred by him as a result of Respondent's unlawful conduct. (GC Br. 36–42.) However, the Board does not traditionally provide remedies for consequential economic harm in its make-whole orders. See e.g. *Operating Engineers Local 513 (Long Const. Co.),* 145 NLRB 554 (1963). While the General Counsel acknowledges that the Board typically does not include such a remedy, he nevertheless urges that if Little is unable to pay his mortgage or car payment as a result of the unlawful discrimination against him, he should be compensated for the "economic consequences that flow from the inability to make payments," such as late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car. (GC Br. 39.) I am, of course, obligated to follow existing Board precedent in resolving the issues present in this case. *Pathmark Stores, Inc.,* 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984). Accordingly, I deny the General Counsel's request for this additional remedy.

Finally, the Respondent shall be ordered to revise or rescind Policy No. 2-1 "Hostility," 2-3 "Personal Conduct/Courtesy," and 2-7 "Company Information" of its Driver's Rule Book. This is the standard remedy to assure that employees may engage in protected activity without fear of being subjected to unlawful rules. See *Hills & Dales General Hospital,* supra, slip op. at 2–3; see also *Guardsmark, LLC,* 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). As stated therein, the Respondent may comply with the order of rescission by reprinting Rules 2-1, 2-3, and 2-7 without the unlawful language or, in order to save the expense of reprinting the whole policy manual, it may supply its employees with policy handbook inserts stating that the unlawful rules have been rescinded or with lawfully worded policies on adhesive backing that will correct or cover the unlawful portions of the policies or the unlawfully broad portions of the policies, until it republishes the policies without the unlawful provisions. Any copies of the policies that include the unlawful rules must include the inserts before being distributed to employees. *Hills & Dales General Hospital,* supra, slip op. at 3; *Guardsmark, LLC,* supra at 812 fn. 8; See also *Bettie Page Clothing,* 359 NLRB 777, 778–779 (2013).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[19]

ORDER

The Respondent, Greyhound Lines, Inc., Cleveland, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and/or enforcing rules or policies that: (1) prohibit employees from making any complaints, criticisms, or suggestions to or in the presence of passengers or the public, and which require employees to make any complaints, criticisms, or suggestions through appropriate internal Company channels; (2)

[19] 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.

prohibit conduct that challenges or coerces another employee, and requires employees to treat members of management with respect at all times; and (3) prohibits employees from divulging anything about the affairs of the company and prohibits permitting access to Company records or reports by any party outside the Company.

(b) Discharging or otherwise discriminating against employees because they engage in union or protected concerted activities;

(c) Discharging or otherwise discriminating against employees pursuant to or on the basis of unlawful or overly broad employee rules or policies;

(d) In any like or related manner, 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 of this Order, revise or rescind employee rules or policies that are overbroad, ambiguous, or otherwise limit employees' rights under the National Labor Relations Act insofar as they: (1) prohibit employees from making any complaints, criticisms, or suggestions to or in the presence of passengers or the public, and which require employees to make any complaints, criticisms, or suggestions through appropriate internal Company channels (as set forth in Rule 2-1 Hostility); (2) prohibit conduct that challenges or coerces another employee, and requires employees to treat members of management with respect at all times (as set forth in Rule 2-3 Personal Conduct/Courtesy); and (3) prohibits employees from divulging anything about the affairs of the company and prohibits permitting access to Company records or reports by any party outside the Company (as set forth in Rule 2-7 Company Information).

(b) Furnish all current employees with inserts for the current employee conduct policies that: (1) advise employees that the above-mentioned unlawful policies or rules have been rescinded, or (2) provide employees with the language of revised lawful policies or rules on adhesive backing that will cover the above-mentioned policies; or (3) publish and distribute to employees policies that do not contain the above-mentioned unlawful rules or policies, or which contain or provide the language of lawful rules or policies.

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

(d) Make whole Louis Little for any loss of earnings and other benefits suffered as a result of his unlawful discharge and discrimination against him, including any search-for-work and interim employment expenses, in the manner set forth in the remedy section of this decision.

(e) Compensate Louis Little for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 8, 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 for Louis Little.

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

(g) 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 electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 8, 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, 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 February 9, 2016.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 8 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.

Dated, Washington, D.C. July 21, 2017

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

[20] 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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce rules or policies that: (1) prohibit you from making any complaints, criticisms, or suggestions to or in the presence of passengers or the public, and which require you to make any complaints, criticisms, or suggestions through appropriate internal Company channels; (2) prohibit conduct that challenges or coerces another employee, and requires you to treat members of management with respect at all times; and (3) prohibits you from divulging anything about the affairs of the Company and prohibits permitting access to Company records or reports to any party outside the Company.

WE WILL NOT discharge or otherwise discriminate against you on the basis of, or pursuant to, unlawful, overly broad, or ambiguous employee rules or policies.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union or protected concerted activities.

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

WE WILL, within 14 days of the Board's Order, revise or rescind employee rules or policies that are unlawful, overbroad, ambiguous, or otherwise limit your rights under the National Labor Relations Act insofar as they: (1) prohibit you from making any complaints, criticisms, or suggestions to or in the presence of passengers or the public, and which require you to make any complaints, criticisms, or suggestions through appropriate internal Company channels (as set forth in Rule 2-1 Hostility); (2) prohibit conduct that challenges or coerces another employee, and requires you to treat members of management with respect at all times (as set forth in Rule 2-3 Personal Conduct/Courtesy); and (3) prohibits you from divulging anything about the affairs of the company and prohibits permitting access to Company records or reports by any party outside the Company (as set forth in Rule 2-7 Company Information), and WE WILL advise employees in writing that we have done so and that the unlawful rules or policies will no longer be enforced.

WE WILL furnish you with inserts for your current employee conduct policies that: (1) advise you that the above-mentioned policies have been rescinded, or (2) provide you with language of lawful or revised policies on adhesive backing that will cover the above-mentioned unlawful policies; or WE WILL publish and distribute to you revised employee conduct rules or policies that do not contain the above-mentioned unlawful rules, or provide the language of the lawful policies or rules.

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

WE WILL make Louis Little whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest, including any search-for-work and interim employment expenses he incurred as a result of his unlawful discharge.

WE WILL compensate Louis Little for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 8, 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 Louis Little.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharge of Louis Little, and WE WILL, within 3 days thereafter, notify said employee in writing that this has been done and that the discharge will not be used against him in any way.

GREYHOUND LINES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/08-CA-181769 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.