Intertape Polymer Corp. *and* Local 1149 International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL–CIO. Cases 07–CA–273203 and 07–CA–273901

June 17, 2024

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS PROUTY AND WILCOX

On November 2, 2021, Administrative Law Judge Robert A. Giannasi issued a decision in the above-captioned cases finding that the Respondent did not violate Section 8(a)(3) and (1) of the National Labor Relations Act by suspending and issuing disciplinary warnings to employees Mike Abbott and Robert Tremper for their conduct during a February 3, 2021 meeting with management to discuss a departure from past practice and a safety concern that constituted a potential contract violation.* The judge additionally found that the Respondent did not violate Section 8(a)(3), (4), and (1) of the Act by issuing disciplinary warnings to Tremper and employee Mario Pruccoli on March 8, 2021, because of their union and other protected activity, including filing grievances and an unfair labor practice charge over the Respondent's earlier discipline of Abbott and Tremper. The judge therefore recommended that the consolidated complaint and compliance specification be dismissed in its entirety. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

While the exceptions to the judge's decision were pending, the National Labor Relations Board issued *Lion Elastomers LLC*,[1] in which it overruled *General Motors LLC*,[2] and reinstated the prior setting-specific standards, including the four-factor test set forth in *Atlantic Steel*,[3] for determining whether an employee lost the Act's protection by engaging in misconduct in the course of Section 7 activity, and decided to apply its holding retroactively to all pending cases. On August 25, 2023, the Board issued a Decision, Order, and Notice to Show Cause in this proceeding, reversing in part the judge's decision and finding that the Respondent violated Section 8(a)(3) and (1) by issuing disciplinary warnings to Tremper and Pruccoli on March 8, 2021.[4] The Board also gave notice to the parties to show cause why the remaining allegations, concerning the Respondent's alleged unlawful suspension and issuance of disciplinary warnings to Abbott and Tremper for their conduct during the February 3, 2021 meeting, should not be remanded to the judge for further proceedings in light of the Board's decision in *Lion Elastomers*. The General Counsel and the Respondent each filed a response to the Notice to Show Cause. Both parties opposed remanding the remaining allegations to the judge. On December 22, 2023, the Board issued a Notice and Invitation to Parties to File Briefs, finding that a remand is unnecessary as the remaining allegations may be decided based on the existing record, and inviting the parties to submit briefs addressing whether, and, if so, how, *Lion Elastomers* should affect the Board's decision on whether the Respondent violated Section 8(a)(3) and (1) by issuing disciplinary notices to and suspending Abbott and Tremper for their conduct during the February 3, 2021, meeting. The General Counsel and the Respondent filed responsive briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. For the reasons discussed below, we find that the allegations involving the Respondent's discipline of Abbott and Tremper for their conduct during the February 3, 2021, meeting are governed by the loss-of-protection standard set forth in *Atlantic Steel*, which the Board reinstated in *Lion Elastomers*. Applying the *Atlantic Steel* standard, we find that Abbott and Tremper retained the protection of the Act. Accordingly, we find, contrary to the judge, that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining them.

I. FACTUAL BACKGROUND

The Respondent manufactures adhesive tape and other packaging products. Local 1149, International Union, United Automotive, Aerospace and Agricultural Workers of America, AFL–CIO (the Union) represents a bargaining unit of production and maintenance employees at the Respondent's Marysville, Michigan facility. The Respondent and the Union were parties to a collective-bargaining agreement, effective from May 3, 2018 to

[1] 372 NLRB No. 83 (2023).

[2] 369 NLRB No. 127 (2020). In *General Motors*, the Board held that it would no longer apply the prior setting-specific standards to determine whether employers have unlawfully disciplined or discharged employees who allegedly engaged in "abusive conduct" in connection with activity protected by Sec. 7 of the Act. Accordingly, the *General Motors* Board overruled: (1) the four-factor test governing employees' conduct towards management in the workplace set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979); (2) the totality-of-the-circumstances test governing social-media posts and most conversations among employees in the workplace set forth in *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015), enfd. 855 F.3d 115 (2d Cir. 2017), and *Desert Springs Hospital Medical Center*, 363 NLRB 1824, 1824 fn. 3 (2016); and (3) the test governing picket-line conduct set forth in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985), cert denied 474 U.S. 1105 (1986).

[3] 245 NLRB at 816.

[4] *Intertape Polymer Corp*., 372 NLRB No. 133 (2023), enfd. 2024 WL 2764160 (6th Cir. May 9, 2024).

May 2, 2021. At the time of the events in this case, Abbott was employed by the Respondent as a maintenance electrician. Tremper and Pruccoli were both production employees. Tremper was a union steward, and Pruccoli was a union committeeman.

On February 3, 2021, a machine known as the Banbury caught fire.[5] Abbott extinguished the fire and locked out the Banbury.[6] After being informed of the fire, Maintenance Manager Jon Zuzga arrived at the facility approximately 2 hours earlier than his usual start time. After inspecting the Banbury, Zuzga asked Abbott to show him what he had done to put out the fire. As they were walking toward the Banbury, Abbott asked Zuzga to get a safety lock.[7] Zuzga responded that he did not need a lock, because he was not going to touch the equipment.[8] Abbott insisted that the Banbury needed to be locked out, and he asked for a union representative. Union steward Robert Tremper joined Zuzga and Abbott. Zuzga testified that he assumed Abbott requested union representation because Abbott believed that by not locking out the Banbury, Zuzga was creating an unsafe situation, which is a violation of the collective-bargaining agreement.[9]

When Tremper arrived, Zuzga stated that after they were done meeting and "identify there's no use for a lock," Abbott would have to explain "why he pulled so many resources away from the company for something that was unnecessary."[10] Abbott responded that Zuzga would have known what was going on if he had come to the facility earlier, and he noted that the fire had occurred several hours before Zuzga arrived. Zuzga replied, "You don't get to tell me when I work, when I come in."

Zuzga then moved the conversation to his office, away from the noise of the production floor. When Zuzga suggested that everyone sit down, Tremper responded, "I'm not here for some sit-down party" and remained standing. Zuzga then asked why Abbott thought he needed a lock for the Banbury. Abbott explained that the previous maintenance manager, Mark St. Pierre—whom Zuzga had replaced approximately 4 or 5 months earlier—would replace an employee's lock with his own lock or a department lock on equipment that remained down at the end of a shift. Zuzga responded that St. Pierre was no longer in charge, the past practice was not company policy, and company policy did not require locking out the Banbury unless someone was planning on "entering the machine in a way that's going to be dangerous."

Zuzga then ordered Tremper to go back to work and Abbott to go with him to inspect the Banbury, warning that there would be "repercussions" if they failed to comply. Tremper responded that he could not go back to work because Zuzga had just threatened Abbott with discipline. Zuzga denied that he mentioned discipline, but Tremper disagreed. Zuzga then informed Abbott that he was suspended "because I can't work with you right now," after which he turned to Tremper and said he was not going to "allow the Union to bully management."[11]

Abbott left Zuzga's office immediately, but Tremper remained and attempted to ask questions about Abbott's suspension, such as why Abbott was suspended and for how long.[12] Zuzga only responded that Abbott was in-

[5] All dates are in 2021, unless otherwise indicated.

[6] Locking out is a safety practice of putting a lock on a machine to prevent an unexpected startup or release of energy during service and maintenance. The Respondent supplies each employee with four padlocks for that purpose. The padlocks have the employee's name on them, and only the employee has keys. The Respondent also has department locks which are not assigned to any employee.

[7] Abbott's shift was scheduled to end in approximately 1 hour, he anticipated that the Banbury would remain down at the end of his shift, and he was scheduled to be off work for the next 3 days. It is undisputed that the previous maintenance manager, Mark St. Pierre, whom Zuzga had replaced 4 or 5 months earlier, would replace an employee's lock with his own or a department lock if a machine remained down at the end of the employee's shift. Otherwise, the Respondent would have to either ask the employee to return to the facility or cut the employee's lock off the machine when it was ready to be placed back in service.

[8] It is unclear whether Zuzga was initially aware that Abbott had already placed his own lock on the machine. Zuzga repeatedly stated on February 3 that company policy did not require putting a safety lock on the Banbury because no one was going to be touching it.

[9] Specifically, Zuzga testified: "[T]he contract . . . says . . . that management can't put people in an unsafe situation and I assumed that that's what Mike was getting at with the lockout/tagout."

Sec. 18.1 of the parties' 2018 to 2021 collective-bargaining agreement, titled "Health & Safety," provided, in relevant part:

> The Company agrees to maintain safe, sanitary and healthful working conditions, to equip hazardous machinery with effective safety devices, . . . and to furnish without cost to employees such protective equipment as may be reasonably needed by the employees for the safe and healthful performance of their jobs.
>
> . . . .
>
> [The Company] maintains that safety is a core value. . . . The employees, in the performance of their jobs, shall:
>
> 1) Utilize all safeguards and protective equipment provided.
> 2) Understand and carefully follow safety rules and safety regulations.
> . . .
> 4) Seek always for the safe way of working on each job or activity.
> 5) Watch out for the safety of your fellow employees.

[10] In his contemporaneous written account of the February 3 meeting, Zuzga stated that he told Abbott and Tremper "when this is done Mike [Abbott] will have to explain . . . why we wasted so much company time." Asked at the hearing to explain what he thought was unnecessary or a waste of time, Zuzga testified:

> [H]is whole premise behind wanting a union rep was because he was saying that me not bringing a lock is creating an unsafe situation and that warranted him getting a union rep. My point . . . was when we're done looking at the situation and we identify there's no use for a lock, that I wanted Mike to explain what the reason behind all of this was.

[11] In his contemporaneous written account of the February 3 meeting, Zuzga stated that he said "Mike [Abbott] you are suspended go home and I told Bobby [Tremper] I was not going to allow the union to bully management."

[12] In describing the February 3 meeting, the judge did not mention Tremper's testimony that he attempted to ask Zuzga questions about Abbott's suspension. However, Tremper's testimony on this point is uncontroverted.

subordinate. Tremper attempted to ask what Abbott did that was insubordinate, but Zuzga refused to answer any more questions and directed Tremper to leave his office. Tremper protested that they were not done talking. Zuzga repeated that the meeting was over and again directed Tremper to leave.

Zuzga testified that instead of leaving, Tremper stood in the doorway and asked in an aggressive tone, "Are we men here? Are we men here? We can't talk? We're men. We're men, right? Are you a man?"[13] Tremper finally left Zuzga's office after Zuzga stated he was giving Tremper a "direct order." In all, Zuzga told Tremper to leave his office at least four times before he complied.

At the hearing, Tremper was asked to explain why he refused to leave Zuzga's office until Zuzga gave him a "direct order." Tremper testified that "as an employee" he would have left Zuzga's office immediately. However, he was there in his capacity as a union steward representing Abbott, and he was "trying to balance [his] job along with representing a union member." Tremper testified further that he believed he and Zuzga were equals when dealing with each other in their respective roles as representatives of the Union and the Respondent, and therefore Zuzga could not cut off his investigation of Abbott's suspension by unilaterally ending the meeting.

On February 16 or 17, the Respondent issued Abbott a written "verbal warning." Abbott's warning states, in relevant part:

> We started to walk [toward the machine], and you stopped and told me I needed a safety lock. I told you that I did not because I would not be touching or going in the equipment. You said I did need to lock it out and asked for your Union Rep. As we were walking you stated to me, "If you would have come in earlier you would know what is going on." And I replied that isn't how this works and you don't get to tell me when I should be here and you said "Well, you should have been."
>
> This is a violation of company work rule #21: Indirect Insubordination: challenge and abuse of directions given by supervision or management. Future violations will lead to further disciplinary action, up to and including termination.

Also on February 16 or 17, the Respondent issued Tremper a "Final Warning Disciplinary Action" and suspended him for 5 days. Tremper's warning states, in relevant part:

> During a meeting . . . on February 3, 2021, you were directed by Jon [Zuzga] to leave his office and return to your work area due to your unacceptable behavior. You were insubordinate and refused to leave Jon's office stating you were not going to leave his office and he can't kick you out and challenging him as to whether he was giving you a direct order or not. He had to give you multiple directives to leave before you complied. In addition, you interfered with a manager's investigation and ability to understand work that had been performed on a critical piece of equipment. You were disruptive, verbally combative and impeding the discussion regarding the work the employee had done.

The warning also states that Tremper will be terminated if, anytime in the next 3 years, he "interfer[es] with other employees' ability to work and conduct business" or "behav[es] in a threatening or intimidating manner."

II. JUDGE'S DECISION

Consistent with the Board's decision in *General Motors*,[14] the judge applied the *Wright Line*[15] burden-shifting framework to determine whether the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining Abbott and Tremper. The judge found that Abbott and Tremper were engaged in protected activity when they met with Zuzga on February 3.[16] However, he found no evidence of animus against protected activity on the part of Zuzga or any other management official.[17] The judge therefore found that the General Counsel failed to sustain her burden under *Wright Line* of proving that animus toward union or other protected activity was a motivating factor in the Respondent's decisions to suspend Abbott and Tremper. He also found that even assuming the General Counsel met her burden under *Wright Line*, the Respondent met its defense burden of establishing that it would have disciplined Tremper even in the absence of his protected conduct for refusing to go back to work after Zuzga legitimately ended the meeting and for disparaging Zuzga by asking whether he was a man.[18]

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[13] Tremper testified, in contrast, that Zuzga was yelling and to restore calm, he (Tremper) said, "We are men here. We can discuss it. We don't need to be yelling."

[14] 369 NLRB No. 127.

[15] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

[16] The judge noted that, under the General Counsel's theory of the case, the Respondent suspended and issued disciplinary warnings to Abbott and Tremper because they attempted to enforce the safety provisions of the contract and bring a safety-related concern to the attention of Zuzga under the contractual grievance procedure. The judge noted that there is no evidence Tremper and Abbott explicitly asked for a grievance meeting or explicitly raised a contractual grievance. The judge nevertheless found that "Tremper and Abbott were engaged in protected activity of some kind when they met with Zuzga on February 3."

[17] The judge did not address the General Counsel's argument that Zuzga evinced union animus when he commented that Abbott would have to explain "why he pulled so many resources away from the company" after Abbott requested union representation, and when he commented that he was not going to allow the Union to bully management immediately after suspending Abbott.

[18] The judge rejected the General Counsel's contention that the proper question to ask regarding Tremper is whether he lost the protection of the Act by his improper conduct. The judge observed that, in *General Motors*, 369 NLRB No. 127, the Board overruled the prior

Additionally, the judge found that even if Abbott's suspension was "technically unlawful," it is unnecessary to find a violation or to provide a remedy because the suspension was short, lasting only for the remainder of Abbott's shift; Abbott did not suffer any loss of pay; and he is no longer employed by the Respondent. The judge therefore found that any violation stemming from Abbott's suspension has been substantially remedied or rendered moot.[19] Accordingly, the judge dismissed the allegations involving both Tremper and Abbott.

III. POSITIONS OF THE PARTIES

As discussed above, while the exceptions to the judge's decision were pending, the Board issued *Lion Elastomers*,[20] in which it overruled *General Motors*,[21] and reinstated the prior setting-specific standards, including the four-factor test set forth in *Atlantic Steel*,[22] for determining whether an employee lost the Act's protection by engaging in misconduct in the course of Section 7 activity and decided to apply its holding retroactively to all pending cases. On December 22, 2023, the Board issued a Notice and Invitation to Parties to File Briefs, inviting the parties to submit briefs addressing whether, and, if so, how, *Lion Elastomers* should affect the Board's decision on whether the Respondent violated Section 8(a)(3) and (1) by issuing disciplinary notices to and suspending Abbott and Tremper for their conduct during the February 3 meeting. The General Counsel and the Respondent filed responsive briefs.

The General Counsel contends, without explanation, that the allegations involving Abbott continue to be governed by *Wright Line*, and not by any of the loss-of-protection standards that were reinstated in *Lion Elastomers*. The General Counsel additionally contends that the judge erred in failing to find, under the *Wright Line* framework, that the Respondent unlawfully disciplined Abbott because of his and Tremper's protected activity.

The General Counsel contends that Tremper's discipline should be analyzed under the standard set forth in *Atlantic Steel*,[23] which was reinstated in *Lion Elastomers*.[24] The General Counsel further contends that, pursuant to the *Atlantic Steel* standard, the Board should find that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and issuing a disciplinary warning to Tremper because that action was taken based on Tremper's protected union activity at the February 3 meeting and nothing Tremper did in the course of that activity caused him to forfeit the protection of the Act.

The Respondent contends that the Board should adopt the judge's finding that Abbott's suspension was substantially remedied by the Respondent's subsequent conduct of reimbursing Abbott for any loss of pay he suffered. With regard to Tremper, the Respondent contends that the Board should adopt the judge's finding that his discipline was lawful even under *Atlantic Steel*, because Tremper was not involved in protected activity when he engaged in the misconduct for which he was disciplined, and even assuming he was involved in protected activity, his misconduct was sufficient to forfeit the protection of the Act.

IV. DISCUSSION

A. Atlantic Steel provides the appropriate framework for analyzing the allegations involving both Abbott and Tremper

We find that the four-factor *Atlantic Steel* test, which the Board reinstated in *Lion Elastomers*, provides the appropriate framework for analyzing the allegations involving the Respondent's discipline of both Abbott and Tremper.[25] The Board has applied the *Atlantic Steel* fac-

setting-specific standards for determining whether an employee has lost the Act's protection by engaging in misconduct in the course of Sec. 7 activity and substituted the *Wright Line* framework for those standards. The judge additionally found that applying a loss-of-protection standard, such as that set forth in *Atlantic Steel*, 245 NLRB at 816, would not change the result. Thus, the judge found that even assuming, in accordance with the General Counsel's theory of the case, that Tremper and Abbott were engaged in protected activity in bringing a safety-related grievance to the attention of management during the February 3 meeting, the meeting ended when Zuzga denied the grievance, and Tremper was therefore not involved in protected activity when he engaged in the misconduct for which he was disciplined. The judge additionally found that even if Tremper's pursuit of the grievance remained protected after Zuzga legitimately ended the meeting, Tremper forfeited the protection of the Act by refusing to leave Zuzga's office until given a direct order and asking whether Zuzga was a man while standing in front of the door.

[19] The judge did not specifically rule on the complaint allegation that the Respondent violated the Act by issuing Abbott a disciplinary warning. The General Counsel has excepted to the omission.

[20] 372 NLRB No. 83.

[21] 369 NLRB No. 127.

[22] 245 NLRB at 816.

[23] Id.

[24] 372 NLRB No. 83, slip op. at 2.

[25] As noted above, the General Counsel contends that the allegations involving Abbott should be analyzed under *Wright Line*. The *Wright Line* standard governs "dual motive" cases where the General Counsel alleges that discipline or discharge was motivated by the employer's animus toward Sec. 7 activity, while the employer contends that it was motivated by a legitimate business reason. *Lion Elastomers*, 371 NLRB No. 83, slip op. at 1–2. The Board has held, however, that the *Wright Line* standard is not appropriate when the employer defends a disciplinary action based on an employee's alleged misconduct in the course of otherwise protected union or concerted activity. Id., slip op. at 6 (citing *Gross Electric Inc*., 366 NLRB No. 81, slip op. at 2-3 (2018) ("[W]here an employer undisputedly takes action against an employee for engaging in protected activity, a *Wright Line* analysis is not appropriate."). In such circumstances motivation is not at issue, and the question is whether, in the course of otherwise protected activity, the employee engaged in conduct so opprobrious as to lose the protection of the Act. Id. (citing *Nor-Cal Beverage Co.*, 330 NLRB 610, 611–612 (2000) (where an employer admits that it disciplined an employee for misconduct in the course of protected union activity, the only issue is whether the misconduct caused the employee to lose the protection of the Act; once that is decided in the negative, the causal connection between the discipline and the employee's protected activity is established, and the inquiry ends)). See also *Stanford Hotel*, 344 NLRB 558, 558 (2005) ("When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the perti-

tors to determine whether an employee's direct communications, face-to-face in the workplace, with a manager or supervisor in course of otherwise protected activity constituted conduct so opprobrious that the employee lost the protection of the Act.[26] As discussed in greater detail below, we find that Abbott and Tremper were engaged in protected activity on February 3, when Abbott requested union representation and when he and Tremper subsequently met with management in the workplace to address a departure from past practice and a safety concern that constituted a potential contract violation. We also find that the conduct for which Abbott and Tremper were each disciplined was part of the *res gestae* of their protected activity. Accordingly, we conclude that the allegations involving Abbott and Tremper are properly analyzed under *Atlantic Steel* and that the issue is whether, in the course of their protected activity, they "cross[ed] the line" separating protected from nonprotected conduct.[27]

B. Abbott did not lose the protection of the Act

Under *Atlantic Steel*, the Board "carefully balance[s]" four factors to determine whether an employee's alleged misconduct in the course of otherwise protected activity is sufficiently egregious or opprobrious to cause the employee to lose the Act's protection.[28] The four factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practices.[29]

Balancing the four factors articulated in *Atlantic Steel*, we find that Abbott did not lose the protection of the Act. The first factor, the place of the discussion, favors continued protection. The discussion began on a loud shop floor and continued in Zuzga's office. There is no evidence that it disrupted the work of any other employees or that any employee overheard the discussion, other than Tremper, who was acting as a union steward.[30]

The second factor, the subject matter of the discussion, weighs heavily in favor of continued protection. Abbott requested the assistance of his union representative and then participated in a discussion with management to informally resolve a latent grievance over a departure from past practice and a safety concern that was a potential violation of the collective-bargaining agreement.[31] As the Board has recognized, such discussions are "especially important to the effectiveness of contractual grievance-arbitration mechanisms" and are therefore protected as a critical aspect of collective bargaining under the Act, even when the technical procedures of the grievance-arbitration mechanism are not followed.[32]

nent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act.").

[26] *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311 (2014) (explaining that "the Board has applied the *Atlantic Steel* factors to analyze whether direct communications, face-to-face in the workplace, between an employee and a manager or supervisor constituted conduct so opprobrious that the employee lost the protection of the Act"), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015); *Atlantic Steel*, 245 NLRB at 816 (setting forth four-factor balancing test to determine whether "an employee who is engaged in concerted protected activity [has], by opprobrious conduct, los[t] the protection of the Act"). See also *Lion Elastomers*, 372 NLRB No. 83, slip op. at 1 (*Atlantic Steel* test governs "employees' conduct towards management in the workplace"); *Felix Industries,* 331 NLRB 144, 144 (2000) (holding that the *Atlantic Steel* test is applicable to determine whether an individual employee lost the protection of the Act by engaging in misconduct in the course of asserting a contractual right), enf. denied 251 F.3d 1051 (D.C. Cir. 2001), on remand 339 NLRB 195 (2003).

[27] 245 NLRB at 816.

[28] 245 NLRB at 816.

[29] Id. This framework balances employees' rights under Sec. 7 of the Act and the employer's interests in maintaining order and discipline in the workplace. *Lion Elastomers*, 372 NLRB No. 83, slip op. at 11 & fn. 54; see also *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994) ("[E]mployees are permitted some leeway for impulsive behavior when engaging in concerted activity, [but] this leeway is balanced against an employer's right to maintain order and respect.").

[30] *Postal Service*, 364 NLRB 701, 703 (2016) (finding the place of the discussion weighed in favor of continued protection where grievance meeting took place in a break room away from the work floor and was not overheard by any employees other than the participants in the discussion) (comparing *Overnite Transportation Co*., 343 NLRB 1431, 1437 (2004) (location did not favor loss of protection where there was no evidence that any employees overheard work-floor outburst), with *DaimlerChrysler Corp*., 344 NLRB 1324, 1329 (2005) (location favored loss of protection where "quite a few" employees overheard work-floor outburst)).

[31] The 2018 to 2021 collective-bargaining agreement included a grievance resolution procedure which provided, in relevant part:

> [A]n employee shall bring any question about his job with his supervisor first. If the question involves an alleged violation of this agreement, however, the employee may present the matter either to the immediate supervisor or to a union representative who will in turn present the matter to the supervisor.

[32] *Postal Service*, 364 NLRB at 703 (quoting *Postal Service*, 360 NLRB 677, 682 (2014)). See also *Postal Service*, 251 NLRB 252, 258 (1980) (recognizing that "'the informal resolution of latent grievances is a recognized, and indeed, essential component of . . . [a] grievance procedure. Without such informal resolutions, there is a risk of destroying the effectiveness of that procedure by weighing it down with formalized grievances.'") (quoting *Ryder Truck Lines, Inc.*, 239 NLRB 1009, 1011 (1978)), enfd. 652 F.2d 409 (5th Cir. 1981).

It is also well-settled that Sec. 7 protects an individual employee's attempt to enforce the provisions of an existing collective-bargaining agreement irrespective of whether the asserted claims are ultimately found meritorious and regardless of whether the employee expressly refers to the applicable contract. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840 (1984) ("[A]n honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated . . . . No one would suggest, for instance, that the filing of a grievance is concerted only if the grievance turns out to be meritorious. As long as the grievance is based on an honest and reasonable belief that a right had been violated, its filing is a concerted activity because it is an integral part of the process by which the collective-bargaining agreement is enforced."). See also *King Soopers, Inc*., 364 NLRB 1153, 1154-1155 (2016) (recognizing that an individual employee's assertion of a right grounded in a collective-bargaining agreement constitutes protected, concerted activity "'regardless of whether the employee turns out to have been correct in his belief that his right was violated'") (citing *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967); *NLRB v. City Disposal Systems*, supra), enfd. in relevant part 859 F.3d 23, 34–35 (D.C. Cir.

The third factor, the nature of the outburst, also weighs heavily in favor of continued protection. It is undisputed that Abbott did not engage in violent or threatening behavior or use abusive language. Rather, Abbott's alleged misconduct, described in his written warning, consisted of disagreeing with Zuzga's assertion that he did not need to lock out the Banbury, "ask[ing] for [his] Union Rep," and stating to Zuzga, "[i]f you would have come in earlier you would know what is going on." As discussed above, Abbott was clearly engaged in protected activity when he raised a departure from past practice and a safety issue that constituted a potential contract violation and "asked for [his] Union Rep." Accordingly, that conduct cannot serve as a lawful basis for his discipline. Abbott's comment that Zuzga would have known what was going on "[i]f he would have come in earlier" was part of the *res gestae* of Abbott's protected activity,[33] and although arguably disrespectful, it falls far short of the type of conduct the Board and courts have found to be sufficiently opprobrious or extreme to remove an employee from the Act's protection.[34]

Turning to Abbott's suspension, both Zuzga's contemporaneous written statement and his testimony suggest that Zuzga suspended Abbott because *Tremper* defied Zuzga's order to return to work and continued to verbally debate the merits of the informal grievance even after Zuzga made his position clear that a lock was not needed.[35] As discussed in greater detail below, Tremper was engaged in protected activity when he briefly refused to return to work; therefore, Tremper's activity cannot serve as a lawful basis for Abbott's discipline. Even assuming, moreover, that Abbott's suspension was motivated by his own failure to return to work when ordered, the Board has repeatedly held that an employee does not forfeit the protection of the Act by briefly disobeying an order to return to work or to leave the area while engaged in protected activity. The Board's decision in *Postal Service* is particularly instructive in this regard.[36] In *Postal Service*, the Board, applying *Atlantic Steel*, held that two employees did not forfeit the protection of the Act by continuing to dispute verbally the merits of a grievance after their supervisor twice ordered the employees to go back to work. In so finding, the Board rejected the Respondent's position that the protection of the Act ceased the moment the supervisor ended the meeting. The Board explained that it is unrealistic to believe that the parties involved in a heated exchange "can check their emotions at the drop of a hat"; therefore, to hold that the Act's protection ceases the moment an employer decides to end a grievance meeting "would enable an employer by its own whim to define the nature of protected activity."[37]

2017); *Omni Commercial Lighting, Inc*., 364 NLRB 612, 614 (2016) (same); *John Sexton & Co*., 217 NLRB 80, 80 (1975) ("The Board has consistently held that Sec[.] 7 of the Act protects employees' attempts . . . to implement the terms of bargaining agreements irrespective of whether the asserted contract claims are ultimately found meritorious and regardless of whether the employees expressly refer to applicable contracts in support of their actions or, indeed, are even aware of the existence of such agreements.").

[33] Abbott's comment was a direct and immediate response to Zuzga's statement that he wanted Abbott to explain "why he pulled so many resources away from the company for something that was unnecessary" by asking for union representation regarding a departure from past practice and a safety concern that constituted a potential contract violation.

[34] See, e.g., *Lion Elastomers*, 372 NLRB No. 83, slip op. at 11 (observing that the Act "imposes no obligation on employees to be 'civil' in exercising their statutory rights"), affirming 369 NLRB No. 88, slip op. at 1 fn. 3 & 18 (2020) (employee did not forfeit the protection of the Act by, among other things, speaking persistently and argumentatively and telling a manager that he was not doing his job) (citing *Consumers Power Co.*, 282 NLRB 130, 132 (1986) ("The protections Sec[.] 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.")). See also *Goya Foods, Inc.*, 356 NLRB 476, 478 (2011) (observing that "the Board distinguishes between true insubordination and behavior that is only 'disrespectful, rude, and defiant'") (quoting *Severance Tool Industries, Inc.*, 301 NLRB 1166, 1170 (1990), enfd. mem. 953 F.2d 1384 (6th Cir. 1992)).

[35] In his contemporaneous written statement, Zuzga explained his decision to suspend Abbott as follows:

> I said . . . [Tremper] will go back to work and [Abbott] and I will go out to the machine and he will explain what he did. [Tremper] refused to allow this to happen. He said I threatened [Abbott] . . . . I said no I didn't I simply informed you both of the repercussions of your actions. He [Tremper] still refused to go back to work or let [Abbott]. At this point I said enough is enough [Abbott] you are suspended go home and I told [Tremper] I was not going to allow the union to bully management.

Zuzga gave a similar description of the events leading to Abbott's suspension at the hearing. Thus, Zuzga testified that after Tremper initially refused to go back to work, he [Zuzga] said:

> [Tremper], this conversation is over. I have to end it. I have a lot of things I got to get to. I said, you need to get back to work. Mike Abbott, I said, you're temporarily suspended until we can resolve this because I can't work with you right now apparently . . . .

[36] 251 NLRB at 252.

[37] Id. Similarly, in *Goya Foods*, the Board held that an employee who was engaged in a heated discussion in the employee cafeteria concerning the union's bargaining positions and tactics did not lose the protection of the Act by disobeying several orders to leave the cafeteria. 356 NLRB at 478. A supervisor twice told the employee to leave the cafeteria, to which the employee replied, "come and take me out." The supervisor then directed the employee to punch out and go home. The employee initially refused but eventually got up and left. The Board found that while the employee's conduct was disrespectful, rude, and defiant, it did not rise to the level of insubordination that would forfeit the protection of the Act under *Atlantic Steel.* Id. See also *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 fn. 2 (2018) (employee did not lose protection by disobeying several "direct orders" to leave human resources department after becoming argumentative and raising his voice while attempting to file a concerted complaint over terms and conditions of employment), enfd. 763 Fed. Appx. 5 (2d Cir. 2019); *Mast Advertising & Publishing,* 304 NLRB 819, 819–820, 827, 829 (1991) (employee did not lose protection by twice refusing to leave human resources department while attending meeting as a witness for coworker).

As for the fourth factor, there is no evidence that Abbott's conduct was provoked by unfair labor practices. Therefore, this factor does not favor protection.

In sum, we find that the first *Atlantic Steel* factor weighs at least moderately in favor of continued protection, the second and third factors weigh heavily in favor of continued protection, and the fourth factor weighs against continued protection. We further find that the three factors favoring the retention of protection easily outweigh the fourth factor and that Abbott therefore retained the Act's protection. Accordingly, we reverse the judge, and we find that the Respondent violated Section 8(a)(3) and (1) by suspending Abbott and issuing him a disciplinary warning for his conduct on February 3.

We reject the judge's determination that it is unnecessary to find a violation or to remedy Abbott's suspension because he no longer works for the Respondent and the Respondent compensated him for the loss of pay he suffered as a result of the suspension. In *Passavant Memorial Area Hospital*, the Board held that a party may relieve itself of liability for unlawful conduct by repudiation, but to be effective, the repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct."[38] Furthermore, there must be adequate publication of the repudiation to the employees involved, and the employer must not engage in any further proscribed conduct after the publication.[39] Finally, the repudiation must include assurances that there will be no interference with employees' Section 7 rights in the future.[40] Applying these criteria, we find that the Respondent's conduct was ineffective to relieve it of liability and obviate the need for further remedial action. Although the Respondent reimbursed Abbott for his lost wages, it never acknowledged that Abbott's suspension was unlawful or provided assurances that its unlawful conduct would not be repeated. Additionally, 2 weeks after suspending Abbott, the Respondent unlawfully issued him a disciplinary warning.[41] On the same date, as discussed below, the Respondent unlawfully disciplined Tremper. Finally, as found in our original decision in this case, several weeks later, the Respondent unlawfully disciplined Tremper and union committeeman Pruccoli because of their protected union activity, including filing grievances over the Respondent's earlier unlawful discipline of Abbott and Tremper.[42] Accordingly, the Respondent did not satisfy the *Passavant* repudiation standard.

[38] 237 NLRB 138, 138–139 (1978).

[39] Id. at 138.

[40] Id. at 138–139.

[41] The Respondent contends in its answering brief that it rescinded the suspension and reimbursed Abbott for his loss of pay but maintained the disciplinary warning.

[42] *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 13–15.

C. Tremper did not lose the protection of the Act

We find that all four *Atlantic Steel* factors weigh in favor of continued protection of Tremper's conduct. As for the place of the discussion, the argument between Zuzga and Tremper took place in Zuzga's office, and there is no evidence that it disrupted the work of other employees or that it was overheard by any employee other than Abbott. The place of the discussion therefore weighs heavily in favor of continued protection.[43]

The subject matter of the discussion also weighs heavily in favor of protection. Tremper was initially representing Abbott in the presentation of an informal grievance concerning a departure from past practice and a potential contract violation, clearly a protected subject.[44] The meeting then quickly turned into a protest of Zuzga's threat to discipline Abbott and thereafter of Abbott's unlawful suspension, also protected subjects.[45] We therefore find that the subject of the discussion remained protected throughout the meeting, even assuming, as found by the judge, that Zuzga's rejection of Abbott's position regarding the need for a lock constituted a denial of the informal grievance at Stage 1.

As for the third factor, the nature of the outburst, Tremper's written warning states, in part, that he was "disruptive, verbally combative and imped[ed] the discussion regarding the work [Abbott] had done." However, that conduct occurred while Tremper was acting in his official capacity as a union steward. As the Board has explained, the Act clearly protects such conduct by an employee-representative in the course of dealing with the employer on behalf of employees.[46]

[43] See, e.g., *Plaza Auto Center, Inc.*, 360 NLRB 972, 978 (2014) (observing that the location where an outburst occurs is very significant in balancing the employee's right to engage in Sec. 7 activity against the employer's right to maintain order and discipline, and that "an employer's interest in maintaining order and discipline . . . is affected less by a private outburst in a manager's office . . . than an outburst on the work floor witnessed by other employees") (internal quotation marks and citations omitted).

[44] *Postal Service*, 364 NLRB 701, 703 (2016) (applying *Atlantic Steel* to alleged steward misconduct and finding that second factor weighed heavily in favor of protection where the alleged misconduct occurred during discussion about a pending grievance) (citing *Postal Service*, 360 NLRB at 682 (observing that informal grievance discussions are "especially important to the effectiveness of contractual grievance-arbitration mechanisms," and therefore are protected as a critical aspect of collective bargaining under the Act)).

[45] *Overnite Transportation*, 343 NLRB at 1437 (second *Atlantic Steel* factor favored protection where union steward was disciplined for outburst that occurred after supervisor refused to answer steward's questions regarding why employer discharged 10 or 11 employees). As discussed above, Tremper's testimony that he was attempting to ask Zuzga why Abbott was suspended and for how long is uncontradicted.

[46] "[F]or collective bargaining to succeed, it is essential that employee-union representatives 'be treated on a plane of equality' with their management counterparts and that, in spite of possible offense to the employer, they be permitted . . . to vigorously and robustly debate and challenge the statements of management representatives without fear of discipline or retaliation." *Lion Elastomers*, 372 NLRB No. 83, slip op. at 10 & fn. 52 (quoting *N.P. Nelson Iron Works, Inc.*, 80 NLRB 788, 795 (1948)). See also *Hawaiian Hauling Service, Ltd.*, 219 NLRB

The Respondent's main contentions are that Tremper lost the protection of the Act because he (1) refused to leave Zuzga's office and (2) threatened Zuzga by asking whether he was a man while standing in front of the door. We reject both contentions. As discussed, the Board has repeatedly held that an employee does not forfeit the protection of the Act by briefly disobeying an order to return to work or to leave the area while engaged in protected activity.[47] Tremper's asking "Are we men here? . . . We can't talk? . . . Are you a man?", cannot fairly be characterized as threatening or intimidating. Threatening statements may weigh against protection, but the Board uses an objective standard, rather than a subjective standard, to evaluate such statements.[48] Applying an objective standard, we disagree with the judge's finding that "Zuzga rightly felt challenged and threatened" by Tremper's behavior. Tremper was not threatening Zuzga with physical harm or challenging him to a fight. He was imploring Zuzga to continue the discussion of the informal grievance and Abbott's suspension. Although Tremper was standing,[49] he did not make any threatening gestures or physical contact, and there is no evidence that he had any history of violent or threatening behavior.[50] We therefore find that the nature of Tremper's "outburst" weighs heavily in favor of protection, particularly where Tremper was clearly acting in a representative capacity.[51]

As for the last factor, provocation by the employer's unfair labor practices, the conflict between Tremper and Zuzga escalated when Zuzga suspended Abbott. By unlawfully suspending Abbott and refusing to answer Tremper's questions about the suspension, Zuzga interfered with the exercise of protected rights and provoked Tremper's reaction, including his refusal to leave Zuzga's office.[52]

In sum, we find that all four *Atlantic Steel* factors weigh heavily in favor of Tremper retaining the Act's

765, 766 & fn. 6 (1975) (observing that allowing an employer to discipline employee representatives for giving offense during a grievance meeting "would destroy that essential relationship" and "so heavily weigh the mechanism in the employer's favor as to render it ineffective as an instrument to satisfactorily resolve grievances"), enfd. 545 F.2d 674 (9th Cir. 1976), cert. denied 431 U.S. 965 (1977).

[47] See cases cited above at fn. 37. See also *Postal Service*, 360 NLRB 677. In *Postal Service*, a union steward requested time to file a grievance, and his supervisor asked for more information. Id. at 681. The steward insisted he was not obligated to provide any more information, and the supervisor then gave the steward a "direct order" to go back to his workstation. The steward refused. The supervisor repeated that she was giving him a direct order, and the steward again refused. The steward then pointed his finger at the supervisor and said he was not going to follow her order. Only when the supervisor called the police did the steward leave. Id. The Board affirmed the judge's conclusion that the nature of the steward's outburst, including his defiant refusal to leave the area without filing the grievance, did not cause him to lose the protection of the Act. Id. at 677 fn. 2.

Piper Realty Co., 313 NLRB 1289 (1994), cited by the judge in support of his finding that Tremper's conduct caused him to forfeit the protection of the Act, is readily distinguishable. *Piper Realty*, unlike the instant case, involved a profane outburst and ad hominem attack which was overheard by other employees and threatened to undermine the employer's authority. In *Piper Realty*, the Board held that an employee's concerted protest of a change in work assignment lost protection when the employee ignored repeated orders to leave a manager's office; told the manager "in a loud and belligerent voice" that "he did not treat the men like men, but like animals," the manager "was 'fucking with his job,'" "a lot of employees thought [the manager] was 'a fucking asshole,'" and "nobody had the 'balls' to tell him"; and the employee's outburst was overheard by two other employees, who were "clearly shocked" by his conduct. Id. at 1289–1290. In this case, in contrast, Tremper did not direct obscenities or personal insults at Zuzga, and there is no evidence that the discussion was overheard by any employee other than Abbott.

[48] *Plaza Auto Center*, 360 NLRB at 974 (quoting *Kiewit Power Constructors v. NLRB*, 652 F.3d 22, 29 fn. 2 (D.C. Cir. 2011)).

[49] Although Tremper was standing in front of the door to Zuzga's office, the record does not support a finding that Tremper was intentionally blocking the exit. Zuzga testified that he never asked Tremper to move away from the doorway, and the record reflects that Abbott exited Zuzga's office immediately after he was suspended. There is no mention, moreover, of Tremper blocking the door in his written warning or in the contemporaneous written statements prepared by Zuzga and supervisor Hillman. Thus, the Respondent's reliance in this proceeding on that conduct to justify Tremper's discipline appears to be a post hoc rationalization. See, e.g., *Plaza Auto Center*, 360 NLRB at 977 (Board rejected judge's characterization of employee's conduct because, among other things, it was not supported by employer's contemporaneous written account).

[50] Id. at 976 (finding employee's conduct was not objectively threatening where he stood up and pushed a chair aside while telling employer he would regret firing another employee, but his conduct was not accompanied by threatening gestures or physical contact, and employee had no history of violent or threatening behavior); *Kiewit Power Constructors*, 355 NLRB 708, 710 (2010) (telling a supervisor that things could "get ugly" and that he should "bring his boxing gloves" did not constitute threats of physical harm, but only expressed resistance to a policy employees thought was unfair and unsafe), enfd. 652 F.3d 22 (D.C. Cir. 2011); *NLRB v. Southwestern Bell Telephone Co.*, 694 F.2d 974, 976-977 (5th Cir. 1982) (steward's repeated statements that he would see supervisor "fry" did not cause him to lose the protection of the Act)).

[51] In finding a loss of protection, the judge cited to *PAE Applied Technologies, LLC,* 367 NLRB No. 105 (2019), and *New Jersey Bell Telephone Co.,* 308 NLRB 277 (1992), cases addressing the conduct of *Weingarten* representatives during investigatory interviews. See *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). But those cases involved directives limiting the role of the *Weingarten* representatives, not the imposition of discipline as is the case here. Moreover, the Board has stated that "the role of the [*Weingarten*] representative is to provide assistance and counsel to the employee being interrogated"; however, "the presence of the representative should not transform the interview into an adversary contest or a collective-bargaining confrontation." *New Jersey Bell Telephone Co*., 308 NLRB at 279 (citing *Weingarten*, 420 U.S. at 258–259, 263). For the reasons explained herein, those limitations simply do not apply when, as here, a union representative is representing an employee in a grievance meeting.

PAE Applied Technologies and *New Jersey Bell Telephone* are readily distinguishable for the reasons stated above. Members Prouty and Wilcox therefore do not pass on whether they were correctly decided insofar as they upheld the limitations on the role of the *Weingarten* representatives at issue in those cases. Chairman McFerran dissented in relevant part in *PAE Applied Technologies*, and she adheres to the views she expressed there.

[52] See, e.g., *Overnite Transportation,* 343 NLRB at 1438 (fourth factor favored protection where supervisor provoked union steward by refusing to discuss the circumstances of the discharge of eight employees, which the steward was investigating as potential grievances).

protection. Accordingly, we reverse the judge and finding that the Respondent violated Section 8(a)(3) and (1) by disciplining Tremper for his conduct during the February 3 meeting.[53]

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Intertape Polymer Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

(a) suspending Mike Abbott on February 3, 2021;

(b) issuing Abbot a disciplinary warning on February 16 or 17, 2021; and

(c) issuing Robert Tremper a disciplinary warning and suspending him on February 16 or 17, 2021

3. The unfair labor practices described above 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, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully suspended and issued disciplinary warnings to Mike Abbott and Robert Tremper because they engaged in union and other protected concerted activities, we shall order the Respondent to remove from its files any references to the unlawful disciplinary warnings and suspensions and to notify them in writing that this has been done and that the unlawful disciplinary warnings and suspensions will not be used against them in any way.

We also shall order the Respondent to make Tremper whole, with interest, for any loss of earnings and other benefits suffered as a result of his unlawful suspension, in the amount set forth in the consolidated complaint and compliance specification.[54] Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Further, we shall order the Respondent to compensate Tremper for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 7, 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 year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In addition to the backpay allocation report, we shall order the Respondent to file with the Regional Director for Region 7 a copy of Tremper's corresponding W-2 form(s) reflecting the backpay award. *Cascade Containerboard Packaging – Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

Moreover, in accordance with *Thryv, Inc*., 372 NLRB No. 22 (2022), enf. denied on other grounds __ F.4th __ (5th Cir. May 24, 2024), the Respondent shall compensate Tremper for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful suspension. Compensation for these harms and expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

ORDER

The National Labor Relations Board orders that the Respondent, Intertape Polymer Corp., Marysville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing disciplinary warnings to or suspending employees because of their support for and activities on behalf of the Local 1149 International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL–CIO (the Union) or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warnings and suspensions, and within 3 days thereafter, notify Mike Abbott and Robert Tremper in writing that this has been done and that the disciplinary warnings and suspensions will not be used against them in any way.

(b) Make Robert Tremper whole for any loss of earnings and other benefits in the amount of $894.80, and for any other direct or foreseeable pecuniary harms suffered as a result of his unlawful suspension, plus interest ac-

[53] Even assuming arguendo that the third factor, the nature of the outburst, weighed against protection, we would find that this factor is insufficient to overcome the other three factors, which weigh heavily in favor of protection. See, e.g. *Felix Industries v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001) (finding, contrary to the Board, that the outburst factor weighed in favor of employee losing protection and remanding case to the Board to determine whether that factor sufficiently outweighed the other factors to tip the balance in favor of loss of protection), denying enf. to 331 NLRB 144 (2000), on remand at 339 NLRB 195, 196–197 (2003) (finding that the outburst factor was "insufficient to overcome the other factors" and so again finding the violation), enfd. mem. 2004 WL 1498151 (D.C. Cir. 2004). See also *Kiewit Power*, 652 F.3d at 27 fn. 1 ("It is possible for an employee to have an outburst weigh against him yet still retain protection because the other three factors weigh heavily in his favor.").

[54] In the consolidated complaint and compliance specification, the General Counsel alleged backpay for Tremper in the amount of $894.80. At the hearing, the Respondent admitted that if it was found to have violated the Act as to Tremper, it would owe the amount alleged in the compliance specification.

crued to the date of payment, and minus tax withholding required by Federal and State laws, in the manner set forth in the remedy section of this decision.

(c) Compensate Robert Tremper for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award(s) to the appropriate calendar year(s).

(d) File with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Robert Tremper's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days after service by the Region, post at its Marysville, Michigan facility copies of the attached notice marked "Appendix."[55] Copies of the notice, on forms provided by the Regional Director for Region 7, 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 3, 2021.

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

(g) Within 21 days after service by the Region, file with the Regional Director for Region 7 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. June 17, 2024

_____
Lauren McFerran, Chairman

_____
David M. Prouty, Member

_____
Gwynne A. Wilcox, 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 discipline, suspend, or otherwise discriminate against any of you for supporting Local 1149 International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL–CIO (the Union) or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary warnings and suspensions issued to Mike

[55] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

Abbott and Robert Tremper, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the disciplinary warnings and suspensions will not be used against them in any way.

WE WILL make Robert Tremper whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension in the amount of $894.80, plus interest accrued to the date of payment, and minus tax withholding required by Federal and State laws, and WE WILL also make him whole for any other direct or foreseeable pecuniary harms suffered as a result of our unlawful conduct, plus interest.

WE WILL compensate Robert Tremper for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 7, 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 year(s).

WE WILL file with the Regional Director for Region 7 a copy of Robert Tremper's corresponding W-2 form(s) reflecting the backpay award.

INTERTAPE POLYMER CORPORATION

The Board's decision can be found at https://www.nlrb.gov/case/07-CA-273203 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.

Steven E. Carlson, Esq., for the General Counsel.
Jeffrey A. Schwartz, Esq., for Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. A virtual zoom hearing in this case took place on September 28, 2021. The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees Robert Tremper and Mike Abbott because they engaged in union and protected activity. The complaint also alleges that Respondent violated Section 8(a)(4), (3), and (1) of the Act by issuing warnings to employees Tremper and Mario Pruccoli because of their union activities and because of their involvement in filing an unfair labor practice charge with the Board on the above suspensions. Respondent filed an answer denying the essential allegations in the complaint.[1] (Tr. 5–6.) After the conclusion of the trial, the General Counsel and the Respondent filed briefs, which I have read and considered.[2]

Based on the briefs and the entire record,[3] including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Marysville, Michigan, is engaged in the manufacture, non-retail sale and distribution of adhesive tapes. In conducting its operations during a representative one-year period, Respondent purchased and received, at its Marysville facility, goods valued in excess of $50,000 directly from points outside of Michigan. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find, as Respondent also admits, that the Charging Party (hereafter, the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Background

Respondent's Marysville facility operates on three shifts. The three employees whose disciplines are at issue in this case worked on the third shift, which begins at midnight and ends at 8 am. Respondent's roughly 140 employees have been represented by the Union for many years and the relationship of the parties has included successive collective-bargaining agreements, the last of which was negotiated shortly before the hearing in this case to replace the one that ran from May 3, 2018, to May 2, 2021. (Tr. 27.)

At the time of the events in this case, Tremper and Pruccoli were slitter operators working on separate parts of a large tape splitter machine, which takes jumbo rolls of product, breaks them down to a 16-inch roll, then slits that roll to smaller sizes and finally packages the material and puts it onto pallets for the product to be distributed. Tr. 24. Abbott was an electrician who tended to the machines at the facility. Pruccoli was a committeeman for the Union and Tremper was a steward for the Union. Joe Picarello is the supervisor on the midnight shift and John Zuzga is the overall maintenance manager for the

[1] The complaint includes a compliance specification addressed to backpay assertedly due to Tremper because of his lost wages for the 5-day suspension levied on him. Assuming the suspension is found to be unlawful, Respondent has no objection to the backpay figure set forth in the compliance specification. Tr. 19.

[2] At the outset of the hearing the General Counsel was permitted to amend the complaint to add an allegation that Respondent violated Section 8(a)(1) of the Act by refusing to discuss contractual grievances regarding the suspensions of Tremper and Abbott. Evidence was taken on that matter, but, in his brief, counsel for General Counsel moved to withdraw that allegation. See GC Br. p. 1, fn. 3. The motion is granted.

[3] The General Counsel filed an unopposed motion to correct transcript, which is hereby granted except for the alleged error at Tr. 214 line 9, which I could not verify.

Respondent. (Tr. 25, 146–147.)[4]

The Events of February 3, 2021 and the Following Disciplines

At about 2 a.m. on February 3, 2021, there was a fire in the facility at or near the Banbury machine, which processes and mixes additives to a rubber base that goes into the ultimate adhesive product. (Tr. 84.) Mike Abbott, an electrician in the maintenance department, was alerted to the fire. He and another electrician shut off the Banbury disconnect and tried to locate the source of the fire. (Tr. 85.) Once it was located and contained—by 3:30 or 4 a.m. in the morning, Abbott "locked it out," which meant that he put his personal padlock on the disconnect that controlled the Banbury. This was a safety precaution that prevented anyone from accidentally turning on the machine while maintenance was working on it. Abbott cleaned out burnt insulation on the wires at the source of the fire to prevent the fire from flaring up again; he then left the scene to perform other duties. He left further inquiry into the fire, repairs, and resumption of operations to the day shift. (Tr. 86–87.)

Maintenance Manager Zuzga, whose normal hours are 8 am to 5 pm on the first shift (Tr. 146), received notice of the fire in the early morning hours while he was at home. He left for the plant earlier than his normal starting time and arrived at about 6:15 a.m. (Tr. 148.) After arriving at the facility, he briefly inspected the area of the fire, which had been extinguished by then, but he had questions about the fire and its effects. He thereafter met and spoke with Mike Abbott about what had happened so he could pass the information on to contractors and others who had to deal with the aftermath of the fire. There was no intention or prospect of disciplinary action in that meeting, which took place on the work floor. (Tr. 148–150.)

At some point, Zuzga and Abbott started walking over to the source of the fire at the Banbury machine so Abbott could explain what he did to neutralize the area after the fire. Abbott then said that Zuzga should get his lock, presumably to put on the machine affected by the fire. Zuzga said he did not need a lock because he was not going to touch any of the equipment that would require him to lock anything. Abbott replied by repeating that Zuzga needed a lock, to which Zuzga again said he did not. At that point, Abbott asked for his union representative and Zuzga agreed. Shortly thereafter Union Steward Robert Tremper, joined Zuzga and Abbott. The three then engaged in a discussion as to whether Zuzga had to put his lock on the affected machine. Tremper and Abbott took the position that, in the past, a supervisor put his lock on a machine taken out of service. Zuzga, who had taken over his management duties some 4 or 5 months before, insisted that he did not need to put his lock on the machine for what he needed to do. He simply wanted to go to the affected machine and have Abbott show him the area of the fire and what had been done to remedy the situation. The interchange became argumentative and tense so Zuzga led the others to his office where they could speak in private without the interference of work floor noise. (Tr. 150–153.) At that point, all three, Zuzga, Abbott and Tremper, were wearing earplugs. (Tr. 67, 153.)

When the three reached Zuzga's office, they were joined by Shift Supervisor Dennis Hillman, whom Zuzga asked to join the meeting. (Tr. 153.) When Zuzga asked the others to sit down, Tremper responded, "I'm not here for some sit-down party." Zuzga was surprised at the comment but responded "okay" and Tremper remained standing throughout the meeting. (Tr. 153.) Then Zuzga turned to Abbot and asked him why he thought that Zuzga needed to get his lock before he went to the machine with Abbot to ask questions about the fire and how it was handled. Abbot responded that the previous maintenance manager had that practice. Zuzga asked what the reason was for that past practice but did not get an adequate reply. He stated his view that it was unnecessary to put his lock on the machine because of his assessment of company policy and what he had to do at that time. (Tr. 153–154.) Zuzga indicated that he was sticking with his view and asked that the meeting end because he needed "to get out there with Mike" in order for him to find out "what's going on with the machine." (Tr. 155.)

At that point, Tremper started to argue with Zuzga about the company policy, which was apparently based on an OSHA regulation with which Zuzga was very familiar. Zuzga asked if Tremper was familiar with the policy and Tremper replied "no, that's not my job. That's your job." Zuzga agreed and said that "neither one of you can show me how I'm making anybody unsafe. You need to get back to work." (Tr. 155–156.) Zuzga said that he needed to go out to the work floor with Abbott to discuss with him what was done there after the fire. Tremper continued to argue and insisted that Abbott was not going to go out to the work floor without Tremper. Zuzga held to his view that the meeting was ending and Tremper and Abbott should go back to work, noting that there might be repercussions if they did not. (Tr. 156, 171–173.) Tremper replied that this meant that Abbott would be disciplined so he had to be present. Zuzga denied Tremper's statement, saying that no one had even mentioned discipline. ()Tr. 156. Zuzga again tried to end the meeting. He also told Abbott he was "temporarily suspended until we can resolve this because I can't work with you right now apparently so you're going to have to go home." (Tr. 156–157.)

Abbott then left the meeting but Tremper kept arguing with Zuzga and he remained standing near the door blocking Zuzga and Hillman from leaving the office. Zuzga then said the meeting was over and asked Tremper to leave. Tremper refused. Zuzga again asked Tremper to leave the office and this time Tremper asked if that was a "direct order." Finally, after more such exchanges, Tremper left the office. At one point when Tremper was in the doorway arguing with Zuzga, Tremper said this: "Are we men here? . . .We can't talk? . . .Are you a man?" (Tr. 159.) Zuzga simply asked Tremper again to leave. Zuzga testified that he told Tremper to leave his office "at least four times." (Tr. 157–159.)

Zuzga testified that he felt that Tremper was challenging him in an aggressive way, especially when he stood in the doorway and refused to leave the office as directed. Zuzga viewed Tremper's behavior as threatening and an attempt to bully management. (Tr. 159, 185–191.)

The above is based mostly on Zuzga's clear and detailed testimony about the events of February 3. I was very impressed with his calm and forthright demeanor. His testimony also survived vigorous cross-examination. His contemporary notes, about which he was questioned by counsel for General Counsel, essentially confirmed his direct testimony, although he candidly conceded some differences, none of them serious enough to contradict the thrust of his direct testimony or other-

[4] Zuzga became the maintenance manager in September of 2020. He had not worked for Respondent before his appointment to that position.

wise to cause me to question his reliability as a witness. In contrast, Tremper was not as detailed in his testimony and his demeanor on the witness stand confirmed Zuzga's description of his contentious and confrontational persona in the February 3 incident. Actually, Tremper's account of what happened in the meeting in Zuzga's office did not differ much from that of Zuzga, except perhaps in attributing most of the heat to Zuzga rather than himself. I have no doubt that the exchange in Zuzga's office became heated, as Tremper testified (Tr. 71), but I believe Tremper was much more aggressive in his stance and tone than Zuzga. I also believe that Tremper viewed his interactions with Zuzga as a means of asserting some kind of psychological advantage over a newly installed management official: That likely explained Tremper's admitted refusal to sit when Zuzga invited the participants to sit at the beginning of the meeting in his office. Tremper confirmed (Tr. 33) that, at that point, he said "I am not here to sit down," although I believe he said something much more emphatic as Zuzga testified. That view probably also explained his disparaging remarks, while refusing to leave the office, that included asking Zuzga whether he was a "man," the essential facts of which Tremper did not deny. Nor did Tremper deny refusing to leave the office unless he received a direct order, although he attempted to minimize the matter. In fact, Tremper himself admitted he was told to leave 3 or 4 times. (Tr. 74.) Indeed, Tremper seemed unduly sensitive to the issue of status. All of this colored his testimony. Accordingly, as between Tremper and Zuzga, I found Zuzga to be the more reliable witness.

Although I viewed Abbott as a fairly honest witness and his account of how he handled the fire is uncontradicted, his testimony on the rest of the happenings on February 3 did not seriously deviate from Zuzga's, but it was not as complete or detailed. Neither Abbott nor Tremper disputed Zuzga's essential testimony that the two sides disagreed on the need for Zuzga to put his own lock on the out of order machine. The essence of Abbott's and Tremper's testimony seemed to be that Zuzga was insistent that he was right and they somehow took offense at that. Abbott also testified that he was preoccupied and did not listen to much of the interaction between Tremper and Zuzga in the office meeting because he was talking to his supervisor, Dennis Hillman, who was trying to "reinforce" what Zuzga "was saying." (Tr. 101.) And, of course, Abbott had left the office before the last part of the meeting where Tremper disparaged Zuzga and stood in the doorway refusing to leave the office despite being directed to do so. (See Tr. 101–102.)

Zuzga brought the February 3 incident to the attention of the HR department and recommended that Tremper be disciplined, which resulted in the 5-day suspension that is the subject of this case. Zuzga was not the sole decider as to the eventual decision on the 5-day suspension. (Tr. 160–161.) That was determined after discussions between Senior Human Resources Manager Amy Walton, John Zuzga, Operations Manager Brian Newman and perhaps Production Manager Bruce Mathews. (Tr. 242–244.) Aside from considering the statements of Zuzga and Hillman, there was no attempt by management officials to get the views of Abbott and Tremper about the incident on February 3. (Tr. 256–258, 260–261.) According to Respondent, Tremper's conduct violated Rule 36 of Respondent's rules, which prohibits threatening, intimidating or interfering with supervisors. The document, titled "Final Warning Disciplinary Action", was issued on February 16, 2021, by Production Manager Bruce Mathews. (GC Exh. 3.) Respondent's justification for the suspension was that Tremper intimidated Zuzga, particularly in refusing to leave Zuzga's office and by interfering with Zuzga's attempt to get information from Abbott about the status of a critical piece of equipment after the fire. (Tr. 261–262.) The written discipline was presented to Tremper in a meeting at 7:45 a.m. on February 16 in Zuzga's office. Also present in addition to Zuzga and Tremper, were Mario Pruccoli, the third shift union committeeman, and Bruce Mathews.

In a separate meeting, either on February 16 or a day or two later, Abbott was presented with a written document reflecting a verbal warning, essentially for Abbott's refusal to give Zuzga the information he needed and questioning Zuzga's determination that he did not need to place his lock on the affected machine. (GC Exh. 5.) The verbal warning indicates that it was issued by Zuzga but it was presented by Supervisor Hillman. Union Committeeman Pruccoli or another union official was also present when the document was presented to Abbott. Tr., 103-106. In this warning, Zuzga cited a violation of Rule 21 of the Respondent's rules, indirect insubordination by challenging the directions of a supervisor. But Abbott was paid for the brief time he missed for being sent home for the rest of his shift of February 3. (Tr. 161–162. GC) Abbott is no longer employed by Respondent, having left at some point before the hearing in this case. (Tr. 47.)

At the meeting in Zuzga's office on February 16, referred to above, Pruccoli stated that he would file an unfair labor practice charge over the matter. Tr. 43-45, 113–114. He did so on February 19, 2021. The charge was filed with Region 7 of the Board, alleging a violation of the Act in the disciplines issued to Tremper and Abbott with respect to the incident on February 3. On February 24, 2021, the Regional Director for Region 7 sent a letter to Respondent's Production Manager, Bruce Mathews, notifying him of the filing of the charge. (GC Exh. 1(a).) Senior Human Resources Manager Amy Walton testified that she was notified of the filing of the charge in an email from Mathews on March 1, 2021. (Tr. 235.)[5]

Also, on February 19, the Union filed grievances over the disciplines of Abbott and Tremper with Respondent under the applicable collective bargaining agreement. (GC Exhs. 6 and 7.) There was a discussion of those grievances, as well as others, at the regularly scheduled monthly grievance meeting between management and union representatives on March 18, 2021. (Tr. 135–139.)

The Disciplines of Pruccoli and Tremper for What Happened on February 26.

Employees Pruccoli and Tremper received warnings for not

[5] Tremper testified that the day after he received his 5-day suspension, which would have been on February 17, he was motioned into Picarello's office where Supervisor Aaron Jamison was also present. Tr. 45-47. According to Tremper, Picarello asked about the suspension and he handed both men the document he received about the suspension and both read it. Tremper responded that he was not worried about the suspension because "[w]e're just going to let the Labor Board deal with it." Tr. 47. Even though this testimony was uncontradicted, I do not credit it. The testimony does not have the ring of truth. Rather it seemed a strained attempt by Tremper to show Jamison's knowledge of the filing of the charge in support of the contention that a subsequent warning issued to him by Jamison, which is discussed later in this decision, was motivated in part by the filing of an unfair labor practice charge over the suspension. Jamison was, of course, not involved in the incident that led to the suspension and he worked on the first shift, not the midnight shift, as did Picarello and Tremper.

properly cleaning their parts of the multi-head slitter machine at the end of their shift on Friday, February 26.[6] That machine spans 3 levels and workstations—the front, the middle and back. It runs on all three shifts and requires 3 operators to run. (Tr. 120–121.) On February 26, the regular third-shift supervisor was not working and covering for him for the last four hours of the shift was the first shift supervisor, Aaron Jamison. (Tr. 121–122.) Pruccoli testified that, at the end of the shift on February 26, he was working in the middle section of the machine and did his usual clean-up, including wiping off the excess glue or tape, if any, on the 5 blades used on that section of the machine. (Tr. 122.) As he was performing his cleaning duties at the end of the shift, Pruccoli saw Jamison motion to Tremper, who was working on the back section of the machine to pick up rolls of tape on the floor of his workstation. He also saw Tremper pick up those rolls. (Tr. 123.) Pruccoli then finished cleaning the cutter and left. (Tr. 123.)

Tremper testified that he was working in the back section of the machine on February 26. At about 7:30 a.m., Jamison approached Tremper and told him to clean ups his area and he did so. (Tr. 49.)

Neither Tremper nor Pruccoli was notified that there was any problem with their work on February 26 until about two weeks later when they were both issued verbal warnings in written documents, as discussed below.

Jamison, who has been lead production supervisor in the converting department for 8 years (Tr. 195, 221), supported some of the above testimony from Pruccoli and Tremper. The main difference was that Jamison testified that, after the end of the night shift, he checked the slitter machine and found that the sections that Pruccoli and Tremper worked on were not cleaned properly. Jamison made it clear that he was not saying that the workstations were not cleaned, but rather that the cleaning job was not "satisfactory." (Tr. 213, 222.) After viewing the unsatisfactory cleanliness at the end of the shift, Jamison went to his office to pick up his i-pad, which he used to take photographs of the unsatisfactory cleaning on the sections of the machine that Tremper and Pruccoli had worked on. (Tr. 216–217, 227, R. Exhs. 1A-1C.) He sent those pictures to the HR department along with a direction that a verbal warning be issued on the matter to the two employees. This was done that same day, February 26. (Tr. 197–201, 205–207, 218.) See also Tr. 231–235.

Jamison testified, contrary to Tremper and Pruccoli, that Tremper did not pick up the tape on the floor at his workstation after he asked Tremper to do so near the end of the shift. (Tr. 219–220.) He conceded that he did not talk to Pruccoli at this time. Nor did he specifically instruct Pruccoli to clean his area. (Tr. 219–220.) According to Jamison, he checked the blades that Pruccoli was supposed to clean at the end of his shift when another employee on the first shift told him that the blades had not been cleaned, although he could not recall the name of that employee. (Tr. 221, 225–226.) He also testified that, although he walks through the department every day and checks every machine, he had never found "tapes that were not cleaned up or blades that were not cleaned up," at least on the slitter machine. (Tr. 221.) Jamison further testified that the third section of the machine was properly cleaned at the end of the third shift on February 26. (Tr. 219.) Jamison testified that, in his 8 years as a supervisor, he had issued disciplines for improper cleaning (Tr. 221–222), but none were introduced in evidence by Respondent. He also testified that he took photographs of other improprieties in support of his disciplines (Tr. 223), but, again, no such photographs were offered in evidence. Nor was there any other corroboration of Jamison's testimony with respect to previous similar disciplines or photographs.

Jamison further testified that, when he made the determination to discipline Tremper and Pruccoli, he was unaware that an unfair labor practice charge had been filed over the incident involving Tremper and Abbott on February 3. According to Jamison, he first learned of that charge the week before the hearing. (Tr. 201–202.) As indicated above, that charge was filed on February 19, 2021, and was communicated to Human Resources Manager Walton on March 1. Those objective facts support Jamison's testimony that he did not know of the filing of charges when he decided to discipline Tremper and Abbott.

In a meeting in Supervisor Picarello's office on March 8, 2021, Pruccoli and Tremper were presented with written documents reflecting verbal warnings issued by Jamison for failing to properly clean their work areas on February 26. The documents were presented to Tremper and Pruccoli by Picarello, but Jamison was not present. (Tr. 124–127, 47–52.) The verbal warnings cited violations of Rule 6 of Respondent's work rules, "failure to work efficiently and/or competently on work assigned." (GC Exhs. 4 and 8.) With the documents setting forth the verbal warnings were Jamison's photographs purporting to show the state of the slitter machine sections left by Pruccoli and Tremper at the end of their shift. (R. Exh.1A–1C, Tr. 124–127, 47–52.)

In the March 8 meeting, Pruccoli protested that the photograph about the blade he was accused of failing to clean simply had a piece of tape on it. Pruccoli testified that it is not unusual for a piece of tape to be stuck on the blade. According to Pruccoli, there is no reason to remove the tape unless it affects the cutting ability of the blade, in which case the tape is removed. (Tr. 125–126.) Pruccoli testified that he would normally remove any tape on a blade during the cleaning process at the end of his shift, but he candidly admitted that he could not recall if he did so on February 26. (Tr. 128.)(Tremper also protested his warning during the March 8 meeting and he wrote his handwritten protest on the warning. See GC Exh. 4.)

After he received his verbal warning on March 8, Pruccoli spoke separately with Jamison, questioning the basis of the warning, in the presence also of Tremper. (Tr. 128–129.) Jamison said that Pruccoli did not clean the cutter and Pruccoli insisted that he did, reminding Jameson that he saw Pruccoli cleaning it. According to Pruccoli, Jamison replied that the blades were "filthy and a mess," to which Pruccoli responded that he had seen the pictures and they showed only a piece of tape on a blade and some smudges on it. Pruccoli also told Jamison that hardly anyone cleans the smudges off the blades since a so-called "wick solution" was introduced about a year before, which acted as a lubricant between blade and the tape. (Tr. 129–130.) Pruccoli also testified that, as a union committeeman, he never previously saw any kind of discipline issued for not cleaning a cutter blade. (Tr. 130.)

Tremper corroborated Pruccoli's account of their meeting with Jameson after the receipt of their verbal warnings. (Tr. 53.) According to Tremper, when he and Pruccoli said their cleaning on February 26 was no different than it was on any other day, Jamison replied that then it was a consistency issue,

[6] Tremper returned to work on February 25 after his suspension ended. Tr.47.

implying that not all supervisors were enforcing the matter in the same way. (Tr 54.) Tremper testified that, in his experience as a union steward, he was not aware of any prior disciplines for inadequate cleaning. (Tr. 55–56.)

The testimony of Pruccoli and Tremper about their meeting with Jamison after they were issued their verbal warnings on March 8 was not only mutually corroborative in essence but uncontradicted because Jameson did not deny the meeting or refer to it at all in his testimony. I therefore credit their testimony about the meeting.

The day after he received his verbal warning, at the start of his shift, Pruccoli noticed smudges on all five blades in his section of the slitter machine. He pointed them out to his supervisor, Joe Picarello, who, upon noticing the smudges, laughed, and said he was not going "to get in the middle of this" and he walked away. (Tr. 130–131.) This is based on Pruccoli's uncontradicted testimony because Picarello did not testify in this proceeding.

Neither Tremper nor Pruccoli had any prior disciplines on their records prior to the March 8 verbal warnings for violating Rule 6 of the Respondent's rules, or, if they had such disciplines, they had been removed from their records, presumably based on Respondent's policy to remove disciplines after a certain period has elapsed after the date of the discipline. (Tr. 253.)

B. Discussion and Analysis

The Alleged Discriminatory Suspensions and Warnings

The touchstone of the analysis for the disciplinary suspensions of Tremper and Abbot for their actions and conduct on February 3 and the disciplinary verbal warnings of Tremper and Pruccoli for their failure to properly clean their workstations on February 26 is Respondent's motivation for those disciplines. The alleged improper motivation for the first set of disciplines is discrimination based on union or other protected concerted activity (Section 8(a)(3) and (1) of the Act). The alleged improper motivation for the second set of disciplines is the same, along with discrimination in connection with the filing of unfair labor practices (Section 8(a)(4)).

Such cases are analyzed under the dual motive causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). See also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. 7 (2019). Under *Wright Line,* the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee's protected activity was a motivating factor in a respondent's adverse action. If the General Counsel meets that initial burden, the burden shifts to the respondent to show that it would have taken the same action even absent the employee's protected activity. See *Hard Hat Services, LLC,* 366 NLRB No. 106, slip op. 7 (2018), and cases there cited.

As shown below, in applying these principles, I dismiss the discrimination allegations in this case.

The Disciplines for What Happened on February 3

The General Counsel asserts that the protected Section 7 right engaged in by Abbott and Tremper, his union representative, was the one set forth in the collective-bargaining agreement (GC Exh. 2). General Counsel Brief pp. 2–3, 20, and 21. More precisely, according to the General Counsel, Tremper and Abbott were enforcing the safety provision of the contract, which provides that Respondent "equip hazardous machinery with effective safety devices." Section 18.1 of General Counsel Exhibit 2. The General Counsel also asserts that Abbott and Tremper were bringing those safety concerns to the attention of Zuzga under Step 1 of the contractual grievance procedure. Section 4.1 of General Counsel Exhibit 2. See *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822 (1984).[7]

The General Counsel disavows any reliance on the protected Section 7 right defined by the Supreme Court's ruling in *NLRB v. J. Weingarten, 420 U.S. 251 (1971).* See General Counsel Brief at p. 23, fn. 16. However, I find that decision (and its progeny) instructive, in at least an analogous sense, in analyzing the issues in this case. In *Weingarten*, the Court stated that an employer violates Section 8(a)(1) of the Act when it denies an employee's request to have a union representative present at an investigatory interview that the employee reasonably believes might result in disciplinary action. The test for the latter determination is measured by an objective standard under all the circumstances in the case, rather than by the employee's subjective belief. See *Southwestern Bell Telephone Co.,* 338 NLRB 552 (2002), finding that the standard was not met. It is also clear that, even in a *Weingarten* situation, where a union representative is representing an employee in a meeting that may result in discipline, a union representative who engages in conduct that interferes with the proper interrogation of the employee or upends the employer's control of the meeting exceeds his or her role as a union representative. Indeed, an employer may, in those circumstances, lawfully eject the union representative from the interview. See *New Jersey Telephone Company,* 308 NLRB 278, 279–280 (1992); and *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op. at 3–4 (2019).

As an initial matter, I find that, in the exchange on the work floor and in the meeting in Zuzga's office, Abbott did not have an objectively based belief that he was in danger of being disciplined. In their first encounter on the work floor, Zuzga made it clear that he simply wanted Abbott to go with him to the source of the fire to point out what the problem was and what he had done to rectify it. Zuzga had to have that information to determine what kind of remediation had to be done. Abbott then asked whether Zuzga was going to put his lock on the affected machine, as a previous supervisor had done in similar circumstances. When Zuzga said he did not need to put his lock on the machine for what he needed to do, Abbott asked for his union representative. Even though, at this point, there was no objective evidence that discipline was even a possibility, Zuzga nevertheless permitted Tremper to assist Abbott and join the discussion.

[7] The record does not support a finding that Tremper and Abbott explicitly asked for a Step 1 grievance meeting or explicitly even raised a contract grievance either in the meeting on the work floor or the meeting in Zuzga's office. The dispute was over whether Zuzga should put his own lock on the affected machine for what he wanted to do—have Abbott explain at the site of the fire what he had done with respect to the fire. I am not sure that that amounts to a contractual grievance. Nor is there evidence that the alleged grievance over safety matters proceeded beyond Step 1. Nevertheless, I have no doubt that Tremper and Abbott were engaged in protected activity of some kind when they met with Zuzga on February 3. Accordingly, I will accept, for the purpose of my analysis, the General Counsel's explanation of the protected union activity involved in this case. That of course does not answer the question whether the discipline was motivated by that protected activity.

Assuming, in accordance with the General Counsel's theory of the case that Abbott and Tremper were attempting to enforce a contractual right and bringing a Step 1 contractual grievance to the attention of Zuzga, there is no evidence that Zuzga' ejection of Tremper from the meeting or the ultimate 5-day suspension of Tremper were motivated by Tremper's protected or union activity. To the contrary, Zuzga readily agreed to Abbott's request to involve a union representative in the discussion about whether he, Zuzga, should put his own lock on the affected machine. Moreover, Zuzga patiently listened to counter arguments from Tremper and Abbot. Indeed, when Zuzga cited company policy in support of his position, Tremper admitted that he had not read the policy and that was Zuzga's job. When Zuzga finally made it clear he was not convinced by Tremper's and Abbott's arguments and decided, in effect, to reject their position and end the meeting, that also ended Step 1 of the grievance procedure. That the meeting ended in the rejection of the position advanced by Tremper and Abbott surely does not mean Zuzga's decision to suspend Tremper was based on unlawful considerations.

Despite the legitimate end of the meeting and the rejection of any asserted grievance, Tremper nevertheless remained belligerent. He continued to argue and refused to go back to work as he was ordered. He became even more confrontational than he was at the beginning of the meeting when he refused to sit and remained standing as an act of defiance. He disparaged Zuzga by asking him whether he was a man and stood in the doorway refusing to leave even after three or four requests to leave, including asking if these were direct orders. Zuzga rightly felt challenged and threatened by such behavior. These were the real reasons for the proper ejection of Tremper and for Tremper's 5-day suspension.

Thus, I find that the General Counsel has not met the initial burden of showing that Respondent's 5-day suspension of Tremper was motivated by his union activity, including any activity on Abbott's behalf on February 3. As indicated, there is no evidence of union or protected activity animus either from Zuzga or any other official of Respondent who was involved in approving the suspension. There were no independent Section 8(a)(1) violations, normal indicia of animus, either alleged or found. And Respondent itself has had a long history of a successful bargaining relationship with the Union, including, as shown in this record, a policy of holding monthly grievance meetings with union representatives. Finally, as I also have indicated above, there is no causal connection between alleged unlawful animus and the reason for the discipline. In any event, even assuming that the General Counsel's initial burden was met, based on my findings with respect to Tremper's interference with Zuzga's attempt to get important information from Abbott and his other efforts to disrupt the meeting, Respondent would have disciplined Tremper for these other nondiscriminatory reasons notwithstanding his alleged protected activity. This is reinforced by the fact that Zuzga's recommendation for discipline was carefully considered by a group of management officials before it was approved and implemented. I therefore dismiss the complaint allegation that Tremper's suspension was violative of the Act.[8]

Turning to Abbott's suspension, which was basically for the rest of the shift on February 3, I also dismiss that allegation. For some of the same reasons mentioned above in the discussion of the Tremper suspension, I do not see any unlawful animus or related causation in Zuzga's ejection of Abbott from his office and the latter's brief suspension, which amounted to probably less than 2 hours. The decision to eject Abbott was based on Zuzga's decision to end the meeting, which, in the circumstances, was perfectly justified. The meeting had disintegrated to meaningless and repeated sharp exchanges once Tremper and Abbott persisted in insisting that Zuzga place his lock on the machine, even after Zuzga had considered their position and rejected it. Zuzga rightly ended the meeting at that point. The suspension of Abbott for the rest of the day was probably unnecessary, given that the shift was almost over, but it was not unlawfully motivated. In any event, Abbott was later paid for any lost time he suffered due to the suspension. And he is no longer employed by Respondent. Thus, even if the treatment of Abbott were viewed as technically unlawful, there is no reason, in these circumstances, to find a violation or certainly to remedy it. The matter has been "substantially remedied" or rendered moot by "subsequent conduct." See *Dish Network Service Corp*., 339 NLRB 1126, 1128 fn. 11 (2003).

The Verbal Warnings Issued to Tremper and Pruccoli

Much of Jamison's story about the verbal warnings issued to Tremper and Pruccoli for improperly cleaning their parts of the slitter machine on February 26 sounds fishy. It seems unusual for Jamison to have gone out of his way to take photographs of the alleged poor cleaning attributed to Tremper and Pruccoli. Despite Jamison's testimony that he took pictures of other derelictions of this type, we have only his word on this. If indeed he had done so on other occasions there certainly would be evidence of such use of photographs, but here, of course, there was no such evidence submitted. Nor was there any evidence submitted to corroborate Jamison's testimony that he had issued other disciplines in the past for improper cleanliness. The mutually corroborative testimony of Tremper and Pruccoli that they knew of no such prior disciplinary actions is more reliable, especially because of their obvious knowledge of such disciplinary history, given their positions with the Union. Then there is the anomalous testimony of Jamison that he was alerted to

[8] In his brief (GC Br. at p. 17, fn. 12) counsel for the General Counsel asserts that the proper question to ask in analyzing this case is whether Tremper lost the protection of the Act by his improper conduct during protected activity. It is acknowledged, however, that, under the present state of the law, *Wright Line* is the appropriate standard for such cases. See *General Motors, LLC*, 369 NLRB No. 127 (2020), which overturned the four-factor balancing test set forth in *Atlantic Steel Co.,* 245 NLRB 814, 816 (1979) and substituted the *Wright Line* test for those cases. Counsel for General Counsel also points out that the General Counsel is seeking to have the Board overturn *General Motors* and return to the *Atlantic Steel* standard for such cases. Should that happen, it is not clear to me that this case is one where, as in the past, *Atlantic Steel* would have applied. The theory in that type of violation is that the alleged misconduct and the alleged protected activity are inseparable so that a balancing of competing rights is required. That is not the case here. Assuming, however, that Tremper and Abbott were engaging in protected activity in bringing a safety-related grievance to the attention of management during the meeting with Zuzga in the latter's office, that meeting ended when the grievance was denied. Tremper's misconduct continued thereafter so he was not involved in protected activity when he engaged in the conduct for which he was disciplined. In any event, even if I were to consider this case under the *Atlantic Steel* standard, I would find, for the reasons stated in my analysis set forth above, that Tremper's misconduct was sufficient to forfeit any Section 7 right he was allegedly asserting. The result would therefore be the same—no violation. See *Piper Realty Co.*, 313 NLRB 1289 (1994), a remarkably similar case out of this same region.

the uncleanliness of the blades by a first shift employee, which seems to conflict with his testimony that he himself discovered that impropriety. Also unusual was that Jamison did not find that the third person who was working on the machine on that shift on that day failed to properly clean the machine or took a picture of that apparently clean workstation at least to provide a contrast to the alleged messiness of the rest of the machine. I also find it unusual that neither Tremper nor Pruccoli was told of the failure to properly clean their parts of the machine until two weeks later. One would think that, if the unsatisfactory cleaning was so important, the offending employees would be told immediately of their failings—and shown the pictures as well—so that the employees could be told in a timely manner how to improve and protect the machine from whatever problems the improper cleaning caused. Instead, Tremper and Pruccoli continued to work on the machine for the next 2 weeks risking further cleaning problems to an important machine until they were told of their improprieties in formal warning notices. Finally, according to Human Resources Manager Walton, neither Tremper nor Pruccoli had any prior disciplines for "failure to work efficiently and/or competently on work assigned," as set forth in Rule 6, which they allegedly violated in this case. In all the circumstances, I believe that the warnings issued to Tremper and Pruccoli were, at best, nit picking, and, at worse, arbitrary.

But here is the problem on this part of the case: As a matter of law, the General Counsel must prove, at least initially, that the motive for the verbal warnings issued to Tremper and Pruccoli was either union activity or filing of the unfair labor practice charge by Pruccoli on behalf of Tremper. That has not been accomplished on this record. Jamison may have been petty in his disciplines, but there is no evidence that he had a discriminatory motive in doing so—either because of union activity or the filing of an unfair labor practice charge. He specifically denied even knowing about the filing of the charge when he made his decision to discipline the two employees on February 26. And there is no evidence to contest or doubt that testimony. Moreover, in this case at least, it appears that no other supervisory or management officials were involved in the decision to issue the disciplinary warnings. And Jamison himself did not exhibit anything like anti-union animus. Accordingly, the General Counsel has failed to meet the initial burden of proving a violation and I must dismiss this aspect of the complaint.

Even though I have found no violations on this part of the case, based on my assessment of the situation as set forth above, including Jamison's apparent admission that there may have been inconsistent enforcement by different supervisors of machine cleaning protocols, I recommend that the Respondent expunge the verbal warnings issued to Tremper and Pruccoli. It appears that Respondent does have a policy of expunging warnings after the passage of a certain amount of time. (See Tr. 253.) This situation seems an appropriate application of that policy.

CONCLUSION OF LAW

Respondent has not violated the Act by suspending employees Tremper and Abbott, or by issuing verbal warnings to employees Tremper and Pruccoli

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended[9]

ORDER

The complaint herein is dismissed in its entirety.

Dated at Washington, D.C., November 2, 2021.

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[9] 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 waived for all purposes.