

Nos. 08-1153, 08-1197

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**MEDIA GENERAL OPERATIONS, INC.,
d/b/a THE TAMPA TRIBUNE**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD**

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TABLE OF CONTENTS

	Page(s)
Introductory Statement.....	1
Statement of the Case.....	2
Argument.....	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Americare Pine Lodge Nursing & Rehabilitation Ctr. v. NLRB</i> , 164 F.3d 867 (4th Cir. 1999)	2, 8, 10
<i>Atlantic Steel Co.</i> , 245 NLRB 814 (1979)	5, 12
<i>Beth Israel Hospital v. NLRB</i> , 437 U.S. 483 (1978).....	14-15
<i>Bettcher Manufacturing Co.</i> , 76 NLRB 526 (1948)	11-12, 13
<i>Chamber of Commerce v. Brown</i> , 128 S. Ct. 2408 (2008).....	1, 8
<i>Circuit-Wise, Inc.</i> , 306 NLRB 766 (1992)	9
<i>Community Hospital of Roanoke Valley v. NLRB</i> , 538 F.2d 607 (4th Cir. 1976)	9
<i>Eastern Omni Constructors, Inc. v. NLRB</i> , 170 F.3d 418 (4th Cir. 1999)	15
<i>Elano Corp.</i> , 216 NLRB 691 (1975)	9
<i>Every Woman’s Place</i> , 282 NLRB 413 (1986), <i>enforced</i> , 833 F.2d 1012 (6th Cir. 1987)	5
<i>Florida Power & Light Co. v. International Brotherhood of Electric Workers, Local 641</i> , 417 U.S. 790 (1974).....	9

TABLE OF AUTHORITIES

Cases --cont'd:	Page(s)
<i>Hawaiian Hauling Services, Ltd,</i> 219 NLRB 765 (1975), <i>enforced</i> , 545 F.2d 674 (9th Cir. 1976)	12
<i>Laborers' International U. of North America v. NLRB,</i> 503 F.2d 192 (D.C. Cir. 1974)	10-11
<i>Linn v. United Plant Guard Workers of America,</i> 383 U.S. 53 (1966)	8-9, 11
<i>Los Angeles Cloak Joint Board ILGWU (Helen Rose Co.),</i> 127 NLRB 1543 (1960)	10
<i>Media General Operations,</i> 351 NLRB 1324 (2007)	3, 4, 5, 6, 14
<i>Media General Operations, Inc. v. NLRB,</i> 560 F.3d 181 (4th Cir. 2009)	1, 3, 4, 6, 7, 11, 12, 14
<i>NLRB v. Pratt & Whitney Air Craft Division,</i> 789 F.2d 121 (2d Cir. 1986).....	2, 10, 12
<i>Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,</i> 418 U.S. 264 (1974).....	7-8, 9
<i>Television Wisconsin, Inc.,</i> 224 NLRB 722 (1976)	12
<i>Thor Power Tool Co.,</i> 148 NLRB 1379 (1964), <i>enforced</i> , 351 F.2d 584 (7th Cir. 1965)	9

STATUTES

Page(s)

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 7 (29 U.S.C. § 157) 1, 5, 10-11
 Section 8(a)(1) (29 U.S.C. § 158(a)(1))..... 12
 Section 8(b)(1)(B) (29 U.S.C. § 158(b)(1)(B))..... 10
 Section 8(c) (29 U.S.C. § 158(c)) 1, 8, 10, 11

Regulations

Fed.R.App.P. 35 1
 Fed.R.App.P. 40 1
 4th Cir. R. 35 1
 4th Cir. R 40 1

INTRODUCTORY STATEMENT

Pursuant to Federal Rules of Appellate Procedure 35 and 40, and Fourth Circuit Local Rules 35 and 40, the National Labor Relations Board respectfully petitions the Court to grant rehearing, and suggests rehearing *en banc*, of a split decision of a panel of this Court (Circuit Judge Duncan and District Court Judge Smith, sitting by designation; Circuit Judge King, dissenting), issued on March 13, 2009. *Media General Operations, Inc. v. NLRB*, 560 F.3d 181 (4th Cir. 2009).

The panel majority concluded that, as “a matter of law,” an employee is not entitled to protection for concerted but profane criticism of an employer’s negotiating tactics where the employee speaks away from the bargaining table and in response to the employer’s lawful, but provocative, statements about bargaining.

The panel majority’s decision raises an issue of exceptional importance in the administration of the National Labor Relations Act (“the Act”) because it weakens protection of speech about collective bargaining negotiations and undermines peaceful resolution of labor disputes. The legal standard announced by the panel majority is inconsistent with the Congressional policy, confirmed by the Supreme Court as recently as last year, that the Act’s protection of free debate among employees, unions, and employers is inextricably linked to industrial peace. *Chamber of Commerce v. Brown*, 128 S.Ct. 2408, 2413-14 (2008) (citing cases) (“*Brown*”). See 29 U.S.C. §§ 151, 157, 158(c). Rehearing, or rehearing *en banc*, is

warranted to correct the panel majority's error in failing to take proper account of the decisions of this and other circuits recognizing that, under national labor policy, dialogue between employees and their employers about ongoing negotiations is integral to resolving bargaining disputes. *Americare Pine Lodge Nursing & Rehabilitation Ctr. v. NLRB*, 164 F.3d 867, 875 (4th Cir. 1999); *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986).

The Board submits that, if the facts are evaluated under a proper legal standard—one that takes account of the Congressional policy to foster uninhibited debate—the Court should find, in agreement with Judge King's dissent, that the Board properly concluded that an employee's isolated profane comment about the Company's chief negotiator, in the context of ongoing correspondence between that negotiator and company employees about the bargaining, did not lose the Act's protection. As Judge King found, that judgment reflects a reasonable exercise of the Board's responsibility to appraise the conflicting legitimate interests at issue, and is entitled to deference by the Court.

STATEMENT OF THE CASE

1. The present case arises out of ongoing, contentious collective-bargaining negotiations between Media General Operations, Inc., d/b/a The Tampa Tribune ("the Company") and the Graphic Communications Conference of the International Brotherhood of Teamsters, Local 180 ("the Union"). Company Vice

President Bill Barker, the Company's negotiator, mailed a series of five letters directly to employees' homes, in which he explained the Company's view of the negotiations' progress and criticized the Union's behavior at the table. 560 F.3d at 183 (majority), *id.* at 190-96 (dissent).

Some of the employees interpreted Barker's letters as an attempt to encourage employees to decertify their Union. A few days after Barker sent his fifth letter on November 1, 2005, 25 employees sent him a strongly-worded response, complaining that pressroom employees had not received a raise and expressing frustration with hazardous working conditions. The employees' letter urged Barker, as the Company's negotiator, to sign the Union's proposal and "help us feel confident our management team is as thankful for our efforts" as Barker claimed in his five letters. *Media General Operations*, 351 NLRB 1324, 1324, 1329 (2007) ("D&O").

Gregg McMillen, a 16-year pressroom employee who had attended two bargaining sessions, signed the November 4 group letter to Barker. D&O 1321. During his November 10 shift, McMillen heard from a coworker that Barker had sent the pressmen another letter. While on a break, McMillen spoke with two foremen in their private office. One of them asked McMillen how he was, and McMillen replied that he was "[n]ot too good right now" because he had heard about Barker's new letter, which left him "a little stressed out." *Id.* at 1324, 1330.

None of the three men had read Barker's letter, but they all agreed that it was likely a response to the pressmen's November 4 letter.

McMillen asked why Barker could not simply post the letter on a bulletin board, rather than "harassing" and "threatening" the pressmen by sending letters to employees' homes. D&O 1330. One foreman responded that there was nothing McMullen could do. McMullen replied, referring to Barker: "I hope that [stupid] fucking [moron] doesn't send me another letter. I'm pretty stressed, and if there is another letter you might not see me. I might be out on stress." 560 F.3d at 183-84. In the same discussion, McMullen complained about the pace of negotiations and the Company's failure to give the pressmen a raise. D&O 1324 n.5. The conversation, which no one else heard, ended, and McMullen returned to his shift without further incident. A few days later, McMullen apologized to one of the foremen for his outburst. On November 16, however, the Company terminated McMullen for calling Barker a profane name.

2. Based on the foregoing facts, the Board, reversing the administrative law judge, found that McMullen's expression of frustration with Barker's antiunion communications was concerted protected activity despite his "use of a single profane and derogatory reference to Barker." D&O 1325. The Board explained that, in engaging the foremen about Barker's letters, McMullen acted concertedly with his coworkers "because it was part of an ongoing dialogue between [company

negotiator] Barker and the unit employees about the substance and process of the contract negotiations.” *Id.* Given McMillen’s involvement in the pressmen’s letter to Barker, his further comments to the foremen “were ‘a logical outgrowth’ of the prior collective and concerted activity in which he was already engaged.” *Id.* (quoting *Every Woman’s Place*, 282 NLRB 413, 413 (1986), *enforced*, 833 F.2d 1012 (6th Cir. 1987) (table)).

In determining that McMillen’s action was protected, the Board applied the four factors set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), “to assess whether [McMillen’s] admittedly impulsive and unwise conduct is so severe that it outweighs his . . . Section 7 rights.” D&O 1325-26. Balancing the factors, the Board adopted the administrative law judge’s unchallenged findings that the first two factors—the place and subject matter of discussion—weighed in favor of protecting McMillen’s comments, given that he made them in private, away from other employees, and that they concerned the employees’ ongoing criticism of Barker’s bargaining tactics. Also agreeing with the judge, the Board found that the fourth factor weighed against protection, but only slightly, because McMillen’s outburst was provoked by Barker’s letters, which were lawful, but controversial, communications. *Id.* at 1326.

Disagreeing with the judge, the Board found that the third factor, the nature of the employee’s outburst, weighed only moderately against protection because it

did not undermine employer discipline or productivity. As the Board explained, McMillen's isolated comment was made *about* Barker, not *to* Barker; McMillen did not refuse to perform or accept work assignments or directly challenge Barker's managerial authority; and McMillen subsequently apologized for his profanity. Balancing the factors, the Board found that McMillen's use of profanity did not cause otherwise protected activity to lose protection. *Id.* at 1326-27.

3. The panel majority upheld the Board's determination that McMillen was engaged in concerted activity, affirming "the finding that McMillen's conversation concerning Barker and Barker's letters was entitled to the Act's protection in the first instance." 560 F.3d at 186. The majority, however, concluded that "the Board overreached as a matter of law in finding that the conduct in question was not so egregious as to forfeit the protection of the Act." *Id.* at 187. In so holding, the majority laid down the following principle: An "opprobrious ad hominem attack on a supervisor made at a point temporally remove[d] from and concerned only with lawful behavior by the employer falls outside the zone of protection." 560 F.3d at 189. It therefore upheld the Company's discharge of McMillen for using profanity to criticize Barker's bargaining tactics.

In a dissenting opinion, Judge King concluded that "[t]he Board – the labor experts to whom we must defer – struck an appropriate balance in this dispute, and

its conclusion was both rational and consistent with applicable precedent.” *Id.* at 194.

ARGUMENT

The majority’s holding that the Board erred as a matter of law in finding McMillen’s profane criticism protected rests on two flawed premises: 1) that the Board expanded the law “to essentially create a buffer around employee conduct that would travel with the employee wherever he goes and for as long as some form of collective bargaining is taking place;” and 2) that McMillen’s comment was unworthy of legal protection because made in response to *lawful* communications by company negotiator Barker about the bargaining sessions and union negotiator. 560 F.3d at 188-89. The majority’s dual focus on McMillen’s distance from the actual negotiations and the lawfulness of Barker’s communications to employees conflicts with Supreme Court, in-circuit, and Board law, which properly recognizes that the statutory protections accorded all parties, including employees, to express lawful views about negotiations remain strong even away from the table.

1. a. In seeking to foster industrial peace, Congress intended the Act to encourage “free debate on issues dividing labor and management.” *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974) (internal citation omitted). Congress implemented that policy in the

Taft Hartley Amendments of 1947 by enacting a new provision, Section 8(c), to limit the power of the Board and the courts to restrict speech.¹ *See Brown*, 128 S.Ct. at 2413-14. The Supreme Court has “characterized this policy judgment, which suffuses the NLRA as a whole, as ‘favoring uninhibited, robust, and wide-open debate in labor disputes,’ stressing that ‘freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.’” *Id.* (quoting *Austin*, 418 U.S. at 272-73). Indeed, as this Court has similarly recognized: “[P]ermitting the fullest freedom of expression by each party’ nurtures a healthy and stable bargaining process.” *Americare Pine Lodge Nursing & Rehabilitation Ctr. v. NLRB*, 164 F.3d 867, 875 (4th Cir. 1999) (internal quotation omitted).

Because labor disputes “are ordinarily heated affairs . . . frequently characterized by bitter and extreme charges, countercharges, vituperations, personal accusations, misrepresentations and distortions,” the Act recognizes that affording the competing parties “wide latitude” in the language they use to communicate their positions is essential for resolving labor disputes in the workplace. *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 58, 60

¹ 29 U.S.C. § 158(c) (“The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”).

(1966). The protections due labor speech are so broad that otherwise defamatory,² insubordinate,³ or profane⁴ speech may enjoy immunity from sanction.

b. Consistent with those statutory policies, parties enjoy broad leeway in communicating about collective bargaining negotiations, including the right to criticize their opponent's tactics and representatives. As Congress was aware, conflicts between employees and their employer's negotiators have long been a part of industrial life, with unions and employees often directing their anger at the employer's designated bargaining representative, as McMillen did here. In the early days of the Act, unions commonly applied economic and other pressures to force employers to abandon negotiators the union disliked.⁵ As part of the Taft Hartley Amendments of 1947, Congress prohibited union action that attempted to

² *Linn*, 383 U.S. at 58; *Austin*, 418 U.S. at 272.

³ *Community Hospital of Roanoke Valley v. NLRB*, 538 F.2d 607, 609-10 (4th Cir. 1976) (finding protected a nurse's appearance on local television in which she criticized hospital staffing).

⁴ *See Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964) (employee's reference to plant superintendent during grievance proceeding as "horse's ass" protected), *enforced*, 351 F.2d 584 (7th Cir. 1965); *Circuit-Wise, Inc.*, 306 NLRB 766, 788 (1992) (employer's use of profanity to describe union representatives unobjectionable name-calling); *Elano Corp.*, 216 NLRB 691, 700 (1975) (same).

⁵ *See Florida Power & Light Co. v. International Broth. of Elec. Workers, Local 641*, 417 U.S. 790, 804 (1974) (discussing history).

coerce employers to abandon their bargaining representatives.⁶ But, consistent with the policy of Section 8(c), Congress continued to allow unions and employees to vocally oppose disliked management representatives.⁷

Similarly, as this Court has recognized, Section 8(c) provides scope for employers to communicate management's view of collective-bargaining negotiations directly to the bargaining unit, encompassing "the right of employers to tell their side of the story." *Americare Pine Lodge*, 164 F.3d at 876 (Section 8(c) privileged the employer's sharing with employees copies of contract proposals it had made to the union). Indeed, as the Second Circuit has noted: "Granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance." *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986).

⁶ 29 U.S.C. § 158(b)(1)(B) (prohibiting unions from "restrain[ing] or coerc[ing] . . . an employer in the selection of his or her representatives for the purposes of collective bargaining or the adjustment of grievances"); *Los Angeles Cloak Joint Board ILGWU (Helen Rose Co.)*, 127 NLRB 1543, 1544, 1547 (1960) (Section 8(b)(1)(B) barred union's picketing to force employer to dismiss industrial relations consultant thought to be hostile to the union).

⁷ *See Laborers' Int'l U. of North Am. v. NLRB*, 503 F.2d 192, 194 (D.C. Cir. 1974) ("[E]mployees may fully assert their legal right . . . through legal remedies as well as self-help measures protected by Section 7 of the Act, so long as they

Thus, debate away from the bargaining table among employers, unions, and employees about each other's bargaining representatives and tactics is integral to the Act's design. The panel majority's grant of dispositive weight to the fact that McMillen's concerted activity was "not physically or temporally connected to the site of the ongoing labor relations," 560 F.3d at 187, conflicts with judicial and Board precedent.

2. The panel majority's decision is further flawed because it fails to recognize that the rationale the Board has articulated for protecting intemperate and profane language during bargaining applies equally to exchanges about negotiations between employees and their employer away from the table. Consistent with Section 8(c)'s policy to give "wide latitude" to speakers in heated labor controversies, *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 60 (1966), the Board, with court approval, has long held that intemperate speech in connection with collective bargaining negotiations does not necessarily lose the Act's protection. In *Bettcher Manufacturing Co.*, 76 NLRB 526 (1948), the Board held that an employee who profanely accused the employer's president of "cooking the books" did not lose the Act's protection. The Board explained:

A frank, and not always complimentary, exchange of views must be expected and permitted the negotiators if collective bargaining is to be natural rather than stilted. The negotiators must be free . . . to debate and

protest the . . . treatment and do not demand the removal or appointment of a particular management 'representative.'").

challenge the statements of one another, without censorship If an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no method of retaliation), or employees would hesitate ever to participate in bargaining negotiations, leaving such matters entirely to their representatives.

76 NLRB at 527.⁸

In ruling that McMillen’s isolated profane insult about negotiator Barker lost the Act’s protection because it “was not a remark made in the heat of negotiation,” 560 F.3d at 189, the panel majority ignored that, wholly apart from what happens at the bargaining table, the separate debate away from the table between employers and employees about the bargaining process can be as heated and contentious as debates at the bargaining table, and deserves similar leeway, as the Board has held.⁹ Where, as here, an employer exercises the opportunity to provide employees with a “critique of their unions’ performance,” *Pratt & Whitney*, 789

⁸ The Board applied the standard set forth in *Bettcher Manufacturing* in formulating the general *Atlantic Steel* balancing test for determining when employees engaged in a broad range of protected, concerted activity lose the protection of the Act for opprobrious conduct. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) (citing *Hawaiian Hauling Svc.*, 219 NLRB 765, 765-66 (1975) (quoting *Bettcher Mfg.*, 76 NLRB at 527), *enforced*, 545 F.2d 674 (9th Cir. 1976)).

⁹ See *Hawaiian Hauling Services, Ltd*, 219 NLRB at 765-66 (applying *Bettcher Manufacturing* to employee’s calling employer official “a liar” during an informal grievance meeting); *Television Wisconsin, Inc.*, 224 NLRB 722, 763-64 (1976) (employer did not violate Section 8(a)(1) for “profane, derogatory, and degrading statements concerning union bargaining representative” made by supervisor on shop floor).

F.2d at 134, employees who vehemently disagree are likely to respond by expressing their anger and frustration, regardless of whether the employer's statements are lawful, and may well do so in the same intemperate language that occurs, and is permitted, at the bargaining table. Absent the *Bettcher* protection for outbursts away from the bargaining table, employee speech on bargaining issues will be vulnerable to employer discipline, and thus stifled in the same way, and for the same reasons, that the Board in *Bettcher* recognized it could be if subject to discipline at the bargaining table. In substituting its judgment for that of the Board, the majority has announced a rule of law ill adapted to the circumstances of industrial life and likely to retard the peaceful resolution of disputes by depriving employees of an equal voice in the expression of strongly held views about the collective bargaining process.

3. Evaluated under a proper standard informed by the Congressional policy favoring uninhibited debate in labor disputes, the majority should have respected the Board's reasonable determination that granting statutory protection to McMillen's speech outweighed the Company's legitimate interests in workplace discipline, productivity, and managerial authority. As Judge King properly concluded, the Board reasonably found that the factors militating against protection—the nature of the outburst and absence of unlawful provocation—were entitled only to moderate weight.

As the Board found (D&O 1326-27)—and the majority does not dispute—the nature of McMillen’s private remark, while “clearly intemperate,” was not confrontational (it was *about* Barker, not directed at him). Nor was it insubordinate in regard to production or work assignments or a challenge to Barker’s authority, and McMillen on his own initiative later apologized. Moreover, in according only slight weight to the absence of unlawful provocation, the Board reasonably recognized (D&O 1326 n.15, 1327) that in an uninhibited debate over collective bargaining, employees can be expected to respond even to lawful provocation, and that such was the case here, as McMillen’s outburst was a continuation of the pressmen’s earlier angry reaction to Barker’s series of letters.¹⁰

As Judge King correctly noted, 560 F.3d at 194, 196, the Board reasonably struck the balance in favor of protection. Under well-settled principles limiting judicial review of such agency determinations, the Board’s decision should be affirmed. *See generally Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) (“[T]he function of striking that balance [between conflicting legitimate interests] to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board,

¹⁰ For this reason, the majority also erred in focusing on the fact that McMillen had not yet read Barker’s final letter. As McMillen and the two foremen recognized, Barker’s letter was likely a response to the pressmen’s recent letter, and McMillen’s criticism thus encompassed all of Barker’s letters, not just the final mailing. D&O 1325 n.9.

subject to limited judicial review.’’) (internal quotes omitted); *accord Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 423 (4th Cir. 1999).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the case be reheard, and suggests rehearing en banc, and that, after rehearing, the Court enter a judgment enforcing the Board’s order in full.

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April 2009

ADDENDUM A

***Media General Operations, Inc. d/b/a/ The Tampa Tribune,
351 NLRB 1324 (2007)***

Media General Operations, Inc. d/b/a The Tampa Tribune and Gregg McMillen. Case 12–CA–24770

December 28, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

At issue in this case is whether the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged employee Gregg McMillen for making a profane and derogatory statement about the Respondent's vice president of operations, Bill Barker. McMillen made the statement at issue while criticizing a series of letters Barker sent to bargaining unit employees, which communicated a summary of the Respondent's view of ongoing contract negotiations and blamed the Union for delays in reaching a contract.¹

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Background

During the course of contract negotiations, Vice President Barker mailed to the Respondent's pressmen a series of letters that described the negotiations. The letters are not alleged to be either inaccurate or unlawful, but they were written from the Respondent's perspective and asserted that the Union was to blame for the slow pace of negotiations. Many pressmen were angered by the anti-union slant of Barker's letters. On November 4, 2005,²

¹ On February 22, 2007, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Respondent each filed exceptions and a supporting brief, as well as answering briefs to the other party's exceptions, and the General Counsel filed a reply brief.

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

The General Counsel also filed exhibits related to his request for subpoena enforcement and motion to reopen the record to admit additional evidence obtained pursuant to his subpoena. Because we conclude that the Respondent violated the Act as alleged based on the evidence already in the record, we need not reach the General Counsel's subpoena request, and we find moot the related motion to reopen the record. Finally, the General Counsel filed a motion to strike portions of the Respondent's brief in support of its exceptions because those portions of the brief relied on evidence that the judge excluded from the record. We grant the General Counsel's unopposed motion.

The Respondent excepts to the judge's finding that McMillen adequately asserted a *Weingarten* right to a union representative during the November 16, 2006 meeting at which he was discharged. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In view of the judge's unaccepted-to-dismissal of the alleged violation on the ground that *Weingarten* does not apply to noninvestigatory meetings, we find it unnecessary to pass on the judge's finding that McMillen's actions would have sufficed to assert such a right.

² All dates are in 2005, unless otherwise stated.

about 25 employees, including McMillen, signed a letter to Barker responding collectively to his most recent letter. The letter complained about working conditions, placed the blame on the Respondent's management for the lack of negotiating progress, and expressed discontent over the Respondent's refusal to agree to the Union's proposal. The letter also complained that Barker's earlier letters contained suggestions that the employees decertify the Union.

Barker responded to the employees in a letter dated November 9, expressing his understanding of the pressmen's working conditions and the need for patience in collective bargaining; reiterating the Respondent's belief in its collective-bargaining positions; expressing his view that "third parties interfere with both our collective as well as individual successes"; and explaining that "under a union structure" the Respondent could not negotiate with individual employees or a "subgroup" of employees, "as long as you have a third party representative."

On November 10, while working on the evening shift, McMillen heard from a coworker that Barker had sent the pressmen another letter. McMillen had not yet seen the letter, nor was he aware of its contents. During a lull between tasks, McMillen went to the pressroom office and spoke with Shift Foreman Glenn Lerro and Assistant Shift Foreman Joel Bridges, both admitted supervisors. When Bridges asked how McMillen was doing, McMillen answered, "[n]ot too good right now" because he had heard that Barker had sent the pressmen another letter. Lerro stated that Barker's new letter was probably a reply to the employees' November 4 letter. McMillen responded that he didn't feel it was right for Barker to be "harassing" and "threatening" the employees³ by sending the letters. He continued by saying, about Barker, "I hope that [stupid] fucking [moron]⁴ doesn't send me another letter. I'm pretty stressed, and if there is another letter you might not see me. I might be out on stress."⁵ No one else overheard the conversation. Although it is disputed whether Lerro and Bridges made any response to McMillen's statements, it is clear that Lerro and Bridges neither instructed McMillen not to curse nor

³ McMillen's testimony referred to Barker's letters harassing and threatening "us." Although he did not specify who "us" referred to, we conclude that he referred to all the employees who were receiving the letters from Barker.

⁴ Although McMillen testified that he said "fucking idiot," the judge found, consistent with the testimony of the Respondent's witnesses, that McMillen used the term "stupid fucking moron" or "fucking moron." We find no legally significant difference among the various phrasings.

⁵ During this conversation, McMillen also commented on the slow pace of negotiations, according to Lerro, and the Respondent's bargaining position on pay increases, according to Bridges.

gave him any indication that they thought the incident called for discipline. McMillen completed his shift without further incident.⁶

Later in the shift, however, Lerro sent an e-mail about the incident to Pressroom Manager George Kerr, Production Director George Stewart, and Barker. Lerro's e-mail message described not only McMillen's profane statement about Barker, but also McMillen's statements that Barker "was harassing them with these illegal letters," and that "it was against their [sic] rights to send out such trash and propaganda."⁷ Lerro did not recommend any disciplinary action against McMillen; he sent the e-mail to Kerr simply because he thought it was proper "to let him know of any incidents that happen."

Based on Lerro's e-mail, Kerr, Stewart, and Barker agreed that McMillen had engaged in gross misconduct and should be terminated for violating a pressroom rule stating:

Threatening, abusive, or harassing language, quarreling, boisterousness, wrestling, scuffling, horseplay, disorderly conduct, fighting, violence or threats thereof and all disturbances interfering with employees at work anywhere in the building are prohibited. Employees are expected to exercise common sense and display good manners in the presence of visitors and should refrain from offensive language on such occasions.⁸

When McMillen arrived at work on November 16, he was discharged.

Discussion

As discussed below, we agree with the judge's finding that McMillen's November 10 complaints to Lerro and Bridges were connected to ongoing protected concerted activity. In assessing whether McMillen's statements lost the Act's protection, we also agree with the judge that *Atlantic Steel*, 245 NLRB 814 (1979), sets forth the applicable standard. In disagreement with the judge, however, we find that McMillen's use of a single profane and derogatory reference to Barker was not sufficiently

⁶ McMillen apologized to Lerro for his comments several days later, which was apparently the next time he saw Lerro. Although Lerro did not mention the November 10 incident or make McMillen aware that the incident could have disciplinary consequences, McMillen apologized if anything he had said on November 10 was inappropriate, adding "[B]ut you know Bill gets to me."

⁷ On November 16, at Lerro's request, Bridges also sent an e-mail describing the incident. According to Bridges' e-mail, McMillen further made reference to the pressmen's wages and stated that even if they received a 6-percent pay raise, it would still be less than inflation.

⁸ At the hearing, the Respondent's witnesses testified to also relying on the companywide policy of "fairness, dignity, and respect" and on the "Conduct" rules found in the employee handbook, which state that "Employees should refrain from loud, profane or indecent language and name-calling."

opprobrious to cause him to lose the Act's protection. Thus, we conclude that McMillen's dismissal was unlawful.

I.

Although McMillen went to the pressroom office alone and without any authorization to do so by the Union or his coworkers, his conduct was nonetheless concerted because it was part of an ongoing collective dialogue between Barker and the unit employees about the substance and process of the contract negotiations. McMillen's statements were directly motivated by Barker's November 9 letter to all employees, which responded to the employees' plainly concerted group letter of November 4.⁹ By signing the pressmen's November 4 letter, McMillen had identified himself as a member of the group of employees protesting Barker's letters and the positions expressed in them. Thus, McMillen's further comments to Lerro and Bridges on November 10 were "a logical outgrowth" of the prior collective and concerted activity in which he was already engaged. See *Every Woman's Place*, 282 NLRB 413 (1986), and cases cited therein; see also *Midland Hilton & Towers*, 324 NLRB 1141 (1997); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995).¹⁰ Moreover, in his statements, McMillen spoke in the plural, not singular, stating that Barker, by his letters, was harassing and threatening "us."¹¹ In these circumstances, we conclude that McMillen's statements constituted concerted activity.¹²

II.

Longstanding Board precedent establishes that "employees are permitted some leeway for impulsive behavior when engaging in concerted activity," subject to the

⁹ Contrary to the Respondent's contention, the fact that McMillen had not yet read Barker's November 9 letter when he made the remarks at issue does not prevent us from concluding that McMillen's criticism of this letter was concerted activity, especially in view of Lerro's comment to McMillen that Barker's letter was probably a response to the pressmen's group letter.

¹⁰ We distinguish *K-Mart Corp.*, 341 NLRB 702 (2004), in which the Board found no evidence that an employee's profanity-laced comments about a new rule were concerted. In *K-Mart*, unlike here, there was no evidence of any related conduct by other employees, let alone evidence that the alleged discriminatee had participated in such conduct.

¹¹ Further, in response to his separate discipline a few days later, McMillen ironically thanked the Respondent "for not caring about are [sic; presumably 'our'] well being" in relation to Barker's letters.

¹² The General Counsel excepts to the judge's further conclusion that McMillen's statements were not union activity. We find it unnecessary to reach that issue, in light of the finding that the statements were protected concerted activity.

employer's right to maintain order and respect.¹³ *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994). To assess whether an employee's admittedly impulsive and unwise conduct is so severe that it outweighs his or her Section 7 rights, we apply the balancing test set forth in *Atlantic Steel*, supra.¹⁴ In deciding whether the employee's conduct crosses the line, we "must carefully balance" four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB at 816.

A.

We adopt the judge's unchallenged findings with regard to the first two factors. As the judge found, the discussion occurred in an office, away from any other rank-and-file employees, and thus could not have affected workplace discipline or undermined Barker's authority. And the subject matter was McMillen's criticism of the Respondent's bargaining tactics and positions, as well as Barker's repeatedly sending employees letters perceived to be one sided, involving issues that many pressmen had similarly commented on both critically and collectively. McMillen's expression of his opinion on these topics is a fundamental Section 7 right. Thus, for the reasons stated by the judge, we conclude that both the place of the discussion and the nature of the subject matter weigh in favor of protection for McMillen's remarks.

We further adopt the judge's finding that the fourth factor weighs slightly against McMillen retaining the Act's protection. McMillen's statements were provoked by Barker's letters, which were lawful communications. See *Verizon Wireless*, 349 NLRB 640, 642 (2007) (holding that provocation factor weighed against protection where employee's outburst was provoked by employer's lawful email criticizing the union).¹⁵

¹³ Consequently, the relevant legal issue is not whether (in the judge's words) "McMillen could have expressed his anger about the letters without defaming Barker as he did," or even whether McMillen should have done so.

¹⁴ Contrary to the Respondent's contentions, we do not apply *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 453 U.S. 989 (1982), in the absence of a dispute about the Respondent's motive for discharging McMillen. Nor do we consider the use of particular offensive words as a separate and independent basis for the discharge. See *Thor Power Tool*, 148 NLRB 1379 (1964), enf'd. 351 F.2d 584 (7th Cir. 1965) (the profanity is part of the res gestae of the otherwise-protected conversation).

¹⁵ Member Liebman and Member Walsh disagree with the Board's limitation of "provocation" evidence to conduct that constitutes an unfair labor practice. In this case, McMillen may reasonably have been provoked partly by Barker's repeated hints that the pressmen should decertify the Union. While the complaint does not allege that Barker's remarks are unlawful, their provocative effect on a prounion employee

B.

We part company with the judge, however, regarding the third *Atlantic Steel* factor, the nature of McMillen's outburst. Although McMillen's reference to Barker as a "stupid fucking moron" was clearly intemperate, we find that the nature of McMillen's remark weighs only moderately against his retaining the Act's protection.

First, we find it significant that McMillen's statement, although it was *about* Barker, was not *directed at* Barker (i.e., McMillen did not insult Barker to his face), and there were no other confrontational aspects to it, such as physical conduct or threats. Second, McMillen made the statement only once, and he later apologized and sought to explain himself, spontaneously and at his own initiative, not because of any realization of forthcoming consequences or hope of forestalling them. Indeed, at no time before his November 16 discharge was McMillen informed that his remark deserved any sort of official response or discipline, let alone termination.¹⁶ Further, although McMillen's private remark was disrespectful, it was not insubordinate in regard to production or work assignments, nor did it serve to directly challenge Barker's managerial authority. Based on the foregoing facts, we find this case distinguishable from cases cited by the Respondent.¹⁷

is neither unexpected nor unreasonable. In Member Liebman's and Member Walsh's view, Barker's statements tend to mitigate the egregiousness of McMillen's outburst, although to a lesser degree than had Barker's comments been litigated and found to be legally proscribed.

¹⁶ To the extent that the Respondent's own perception of the egregiousness of McMillen's remarks is relevant, we find that the evidence does not clearly establish how atypical his remarks were in the context of the pressroom work environment, which the evidence reflects was the locus of considerable profanity. We find it significant that Lerro did not recommend any discipline but merely reported the incident as a matter of duty. Moreover, Lerro himself had called his supervisor a "fucking idiot." (The judge gave this evidence little weight but did not discredit it.) McMillen's profane and derogatory statement about Barker arguably differed in quality or severity from the usual use of profanity in the pressroom, but it is not evident that the supervisors who actually heard it perceived it as egregious.

¹⁷ Compare, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005) (employee cursed repeatedly and loudly before witnesses, refused supervisor's repeated requests to move discussion into office, made threats toward supervisor, and was terminated in part for his refusal to follow orders); *Daimler Chrysler*, 344 NLRB 1324 (2005) (employee cursed repeatedly in front of many other employees, called supervisor an "asshole" to his face, and physically approached supervisor in an "intimidating" manner); *Trus Joist Macmillan*, 341 NLRB 369 (2004) (employee called supervisor names to his face in front of other managers, repeated his comments after being warned to stop, made sexually insulting gestures and statements to supervisor, and was terminated for insubordination); *Aluminum Co. of America*, 338 NLRB 20 (2002) (employee's "tirade" was repeated, sustained, and very public); *Piper Realty*, 313 NLRB 1289 (1994) (employee's cursing directly at supervisor was heard by other employees and occurred in the course of

Finally, for the purposes of assessing whether opprobrious statements may cause the loss of the Act's protection, we find no basis to draw distinctions based on the high-level position of the official to whom the reference is made. In any event, Barker's position as the Respondent's chief negotiator and his decision to criticize the Union in letters to employees over issues that directly relate to bargaining table disputes reasonably triggered a response directed at him.¹⁸ Neither Barker's position nor his choice to disseminate to employees his view on negotiations shield him from ill-tempered rejoinders.

C.

Because we weigh the third *Atlantic Steel* factor differently from the judge, we come to a different overall balance.¹⁹ We find that the location and subject matter of McMillen's statements, which weigh moderately to strongly in favor of his retaining the Act's protection, more than offset the nature of his outburst and the lack of provocation by unfair labor practices of the Respondent, which weigh slightly to moderately against protection. Thus, contrary to the judge, we find that McMillen's statements on November 10 retained the protection of the Act despite his profane and derogatory remark about Barker. Because McMillen's statements were protected, the Respondent's termination of his employment based on those statements violated Section 8(a)(1).

REMEDY

Having found that the Respondent discriminatorily discharged Gregg McMillen as indicated above, we shall order the Respondent to offer him immediate reinstatement to his former position or to a substantially equivalent one if his former position no longer exists. We shall also order the Respondent to make him whole for all loss of earnings and other benefits in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), along with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also remove from its files all references to the unlawful actions

employee's refusal to perform work assignment; also, employee refused to leave supervisor's office when he was told to).

¹⁸ The record indicates that the Union's chief negotiator had made essentially identical remarks directly to Barker during negotiations attended by several unit employees.

¹⁹ In any event, we disagree with the judge's tacit (and perhaps inadvertent) implication that the final outcome is determined simply by counting the number of factors favoring and disfavoring protection, and that an equal balance of two factors on each side dictates a conclusion that the conduct lost the Act's protection. See, e.g., *Success Village Apartments, Inc.*, 347 NLRB 1065, 1069 (2006) (finding employee's outburst protected, where location and subject matter of discussion weighed in favor of protection, while nature of outburst and lack of provocation weighed against protection).

taken against Gregg McMillen and advise him in writing that it has done so.

ORDER

The National Labor Relations Board orders that the Respondent, Media General Operations, Inc., d/b/a The Tampa Tribune, Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities.

(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, offer Gregg McMillen full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

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

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 12, 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 cus-

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tomarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 16, 2005.

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

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge any of you or otherwise discriminate against you because you engage in protected concerted activities.

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

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

WE WILL make Gregg McMillen whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Gregg McMillen, and WE WILL, within 3 days thereafter, notify him in writing that this has been

done and that the discharge will not be used against him in any way.

MEDIA GENERAL OPERATIONS, INC. D/B/A THE
TAMPA TRIBUNE

Rachel Harvey, Esq. and Christopher Zerby, Esq., for the General Counsel.

Glenn Plosa, Esq. and Ben Bodzy, Esq. (The Zinser Law Firm), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on December 4 and 5, 2006, in Tampa, Florida. The complaint herein, which issued on August 30, 2006, and was based upon an unfair labor practice charge and an amended charge that were filed on December 7, 2005,¹ and January 26, 2006, by Gregg McMillen, an individual, alleges that Media General Operations, Inc. d/b/a The Tampa Tribune (Respondent) violated Section 8(a)(1) of the Act on about November 16, by denying McMillen's request to be represented by Graphic Communications Conference of the International Brotherhood of Teamsters, Local 180, formerly known as Graphic Communications International Union, Local 180 (the Union), during an interview, even though McMillen had reasonable cause to believe that the interview would result in disciplinary action being taken against him, and the Respondent conducted the interview on November 16, despite the fact that it had denied McMillen's request for union representation at the interview. The complaint, as later amended, further alleges that on various dates between December 2004 and November, McMillen made concerted complaints regarding the wages, hours, and working conditions of Respondent's employees, including complaints protesting letters sent to the employees by Vice President of Operations Bill Barker, in December 2004, and on June 2, September 1 and 30, and November 1, regarding the collective-bargaining negotiations between the Respondent and the Union, and including complaints protesting Barker's letter dated November 9, replying to an employee group letter dated November 4, concerning the negotiations. Finally, the complaint alleges that the Respondent discharged McMillen on November 16 because of these union, and protected concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2005.

III. THE FACTS

A. *The Protracted Negotiations*

The Union and its predecessor have represented the Respondent's pressroom employees for many years. The most recent contract between the parties expired on October 31, 2004. The genesis of this case is the protracted collective-bargaining negotiations between the Respondent and the Union and letters that Barker sent to the unit employees between December 2004 and November, blaming the Union for the lack of progress in these negotiations.

The first letter that Barker sent to the unit members, dated December 28, 2004, stated that at the initial meeting the Respondent felt that the negotiations could be completed in 1 day, but because the Union's International representative, Sonny Shannon, was unfamiliar with the issues and history at the facility, the meeting adjourned without any agreement. The next letter, dated June 2, stated that at the negotiations that day and the prior day, Shannon called Barker a "fucking idiot," threatened a strike, an advertiser boycott and a circulation boycott, threatened to bury the Respondent and cursed and raised his voice throughout the negotiations. Further, at this meeting, the Respondent proposed a merit pay offer, which Shannon said he could never agree to. The letter concluded: "No further meetings are scheduled although I am certain some will occur in the near future. I must say that it appears from these meetings we will be negotiating for a long time. We would like to get a contract soon. But make no mistake about our resolve to achieve a good contract. We are willing to negotiate in good faith as long as it takes."

The next letter from Barker dated September 1, begins by saying: "It is a top priority of mine to make sure the lines of communication are open between Pressroom employees and your management team." The letter referred to the "unprofessional behavior" of Shannon at the prior meeting referred to in the June 2 letter "... and the consequences that you might face as a result of his behavior. We were very disappointed with the way he chose to approach negotiations and we knew you would want to hear it from us and not the grapevine. Also, since then, your union's representative has been unresponsive to our invitations to meet. However, on August 30, he finally agreed to meet with us on September 26 and 27—a total of one and one-half days." The next letter, dated September 30, dealt with the bargaining sessions conducted on September 26 and 27; these were the bargaining sessions that McMillen attended. The letter states that the first day was disappointing and unproductive. In addition, it states that Shannon was verbally abusive, again used profanity, threatened an advertising boycott, as well as making other threats. On the second day, "The union finally addressed our Management Rights Proposal" and the parties reached agreement on that issue. He continued: "Although progress was made, we are concerned about the slow pace of negotiations. . . . Threatening behavior and other unprofessional tactics will not result in your getting a quicker increase. Also, at this time we do not have any additional dates set for more negotiations." At the conclusion of the letter Barker states:

Finally, a few thoughts about these letters. The union's Pittsburgh based negotiator, Sonny Shannon, complained about

my last letter to you. He said he was going to file an "unfair labor practice charge" because of the letter. The only purpose for this action would be to try to censor or prevent my communications to you. That is neither right nor in your best interest. Mark Donoghue [Secretary of the Union] admits there is nothing untrue in the letters. The union is free to communicate. We, as a newspaper employer, stand for freedom of speech. The union needs to respect your right to be informed. Our sole purpose of these letters is to inform you of what we know and understand to be true. It is important to us that we have a common understanding of the truth. We also want to make sure you are informed and have answers to your questions.

Barker next wrote on November 1 "... to keep you informed of our progress with negotiations with Local 180." The letter states that the Respondent proposed bargaining dates of October 24 and 25, but these dates were not acceptable to the Union, and that Shannon stated that he was not available until after November 28. The Respondent then proposed the dates of December 14 and 15, giving Shannon until October 26 to reply; he had not replied by that date, but did call on October 28 to say that he was available on December 14 and 15: "We at least hope that, in the future, the Union will respond more promptly. The next time, the available dates may be lost, thus delaying us further."

By letter to Barker dated November 4, signed by more than 25 pressmen employed by the Respondent, including McMillen, the employees wrote, *inter alia*:

Thanks for your recent letter updating us on the status of the contract meetings. . . .

Here's the reality: You sit in your nice clean, quiet office, chat with people in business suits, and go out to lunch. We work in noise so loud we need hearing protection, breath chemical fumes and ink mist, handle hazardous MSDS listed chemicals and we are not allowed to leave the premises for lunch—not even to Publix. There are no carpets or pretty pictures on our walls, just steel plate floors and various warning labels attached to presses, doors and walls. We work with equipment that can strip the flesh off our bones, and mangle us. Will a pencil sharpener or stapler do that?

You get your raises, yet we are denied. For two years now. You seem to forget that there is more than one proposal on the table.

Please stop playing the Sonny/Zinser game and *sign the union proposal* [emphasis supplied]. Sign the union proposal and help us feel confident our management team is as thankful for our efforts as you say and write.

Barker responded to this letter on November 9, writing to the employees, *inter alia*:

I have received the attached November 4 letter in response to my recent letter informing you of upcoming negotiations. I appreciate your open communications which gives us an opportunity to address a couple of your points.

. . . Your letter indicates to me a frustration with the Collective Bargaining process. Patience is the model here.

We are going to be as patient as necessary to get a good Collective Bargaining Agreement.

Second, let me say I truly respect and honor what you do as press operators and apprentices. Having been a pressman for a few years, I indeed know first hand your contributions and I value them. I know the risk, the fun and the pride your work brings. I know the frustrations and the desire to be and to do your best at the Tampa Tribune. It is recognized and appreciated. We want to reward you. We believe this should be done on individual merit. Merit is what got me promoted and recognized for my abilities. That is why I believe that third parties interfere with both our collective as well as individual successes. . . .

Now let's review some of the concerns. As you well know, a contract is binding on both parties and it is the responsibility of all of us to come to a mutually acceptable agreement. We appreciate your letter but we cannot individually negotiate or negotiate with a sub-group. You have a committee representing you and you need to realize under a union structure they are accountable for your satisfaction with this process. As long as you have a third party representative, we are bound to bargain over these types of issues at the table. On occasion, that takes time. In your case we had hoped that time required would be short as your representatives have already signed a contract that contains the proposals currently on the table. . . .

In terms of being at the helm, folks, again understand, we are at the helm. It is our goal to lead everyone to a good Collective Bargaining Agreement. We believe we could have that Collective Bargaining Agreement really soon if only the union could see its way to agree to a Collective Bargaining Agreement substantially similar to the one your union signed a couple of years ago with the Paperhandlers at the Tampa Tribune. So far, the union has said, "no way." We believe in our proposals, and we are going to persevere. . . .

McMillen received each of Barker's letters, and on most of the occasions after receiving the letters, he spoke to the foremen about them complaining that Barker always blamed the Union for the lack of progress in negotiations, although he and other unit employees testified that there is nothing in the letters that is factually incorrect. Hale testified that he discussed Barker's letters with McMillen: "Well, he got pissed off getting these letters. . . He didn't like them. I got one too, and I didn't like mine either. . ." In addition, at a few of the negotiating sessions, Shannon complained to Respondent's counsel about these letters and said that they were written by a fucking idiot. Respondent's counsel responded that they had a constitutional right to write the letters.

B. The Events of November 10

McMillen reported for work on the second shift on November 10. At about 9 that evening another employee told him that he had received another letter from Barker, which McMillen had not yet received. McMillen testified that later that evening, at about 11:30, he went into the office in the pressroom; Glenn Lerro, the pressroom foreman, and Joel Bridges, the assistant foreman, were in the office at the time. McMillen closed the

office door and asked how they were doing, and they said pretty good. Bridges asked how he was doing, and he said, "Not too good right now. I am a little stressed out. I heard we got another letter from Bill Barker." Lerro asked him if he read the letter yet, and McMillen said that he hadn't read it yet. Lerro said that he probably didn't know what was in it, and it was probably a reply to the pressmens' November 4 letter. McMillen said that he didn't feel that it was right that Barker was "harassing" and "threatening" them by sending the letters. Lerro said that there was nothing that he could do about it, and McMillen said: "I hope that fucking idiot doesn't send me another letter. I'm pretty stressed, and if there is another letter you might not see me. I might be out on stress" and he left the office. He testified that neither Lerro nor Bridges commented on what he said, and he left work the following morning at about 3 a.m. without further incident, and later that day, November 11, he received Barker's November 9 letter. He testified that he was so unnerved by the letter that he could not sleep and took a sleeping pill, which resulted in him not awakening on time to report for work on November 11. He called Lerro, who told him that he would be a no-call, no-show, which meant that he would miss that shift and his next shift, without pay. On the evening of November 13, Lerro asked McMillen to sign the disciplinary record for his no call, no show 2 days earlier. McMillen signed the record, and wrote on the bottom: "If Billy BOB [Barker] would quit writing me lieing [sic] discrimination, harassing and threatening letters through the U.S. Mail I wouldn't have to take sleeping pills to go to sleep. Thank you Tampa Tribune for not caring about are [sic] well being." McMillen testified that he then told Lerro that he was sorry if anything he said on November 10 was inappropriate, "but you know Bill gets to me." He then returned to work.

Lerro testified that McMillen came into the pressroom office on the evening of November 10 at a time when he and Bridges were in the office. McMillen complained about the letters that Barker had sent to the pressroom employees and was upset about the slow progress of contract negotiations. He thought that the letters were a form of harassment and called Barker a "stupid fucking moron." McMillen appeared to be agitated and Lerro told him to calm down, because he wouldn't want what he said to get out. On the following morning, Lerro sent an e-mail to George Kerr, the pressroom manager, with copies to George Stewart, production director, and Barker, stating, *inter alia*:

Thursday night, Greg McMillen came storming into the office ranting and raving about the letter. What he said was that Mr. Barker is a "Stupid F—g Moron" and that he was harassing them with these illegal letters. He also said that it was against there [sic] rights to send out such trash and propaganda. He said that he had not checked his mail box before leaving for work, but if he had a letter waiting for him at home, he would not be coming back to work because he would "Go Out On Stress." He was very upset and literally shaking. I tried calming him down and defusing the situation, but he just walked out of the office.

Bridges testified that McMillen came to the office shortly before midnight on November 10. He did not walk all the way in

to the office; rather, he was by the door directly in front of Lerro, whom he appeared to be speaking to. He said that he was upset by the letter that was sent out and if he got one at home, he probably would not be coming back, and that Barker was a fucking moron. On the morning of November 16, Lerro asked Bridges to prepare an e-mail about the events of November 10. His e-mail to Kerr is similar to Lerro's, but also states that McMillen said that he was insulted that Barker referred to the pressmen as printers, and further stated that even if the pressmen received a 6-percent wage increase, it would still be lower than the rate of inflation.

Kerr testified that after receiving Lerro's e-mail on November 11, he discussed the incident with Stewart, then with Barker, and they decided to recommend that McMillen be terminated for what he said on November 10. Kerr testified that in making the recommendation that McMillen be terminated, he consulted the Respondent's pressroom office rules and determined that rule 9 applied. The preface of these rules states: "The following list of rules set forth the pressmen's principle office rules which, together with observing all other proper standards of conduct, employees are required to follow. Any employee who fails to maintain at all times proper standards of conduct or who violates any of the following rules shall subject themselves to disciplinary actions, up to, and including termination." Rule 9 states:

Threatening, abusive, or harassing language, quarreling, boisterousness, wrestling, scuffling, horseplay, disorderly conduct, fighting, violence or threats thereof and all disturbances interfering with employees at work anywhere in the building are prohibited. Employees are expected to exercise common sense and display good manners in the presence of visitors and should refrain from offensive language on such occasions.

On the afternoon of November 16, Kerr received a telephone call from Stewart saying that a final decision had been made to terminate McMillen, and that he should return to work to conduct the termination. Stewart testified that after seeing Lerro's e-mail, he discussed the situation with Kerr and they decided that McMillen's statement constituted gross misconduct, and that, as a result, McMillen would be terminated.

C. The Events of November 16

Stewart, Kerr, and Human Resources Manager Rick Sierra met with McMillen at about 6 p.m. on November 16 in Stewart's office. McMillen's card activated access to the Respondent's parking lot and building had been deactivated earlier that day, so he was brought to the office by one of the security guards at the facility who was employed by Wackenhut. Kerr testified that McMillen's security badge had been deactivated denying him access to the parking lot and the building because, by that time, "he was no longer an employee . . ." of the Respondent. When McMillen and the security guard came into the office, Donald Hale, another pressman employed by the Respondent was with them. Hale told them that he was there to represent McMillen. Kerr replied that this was not an investigation, and that his services were not needed. Hale then looked over to McMillen and asked, "Is that all right with you Gregg?"

and McMillen answered, "I guess." Hale then left. After Hale left, McMillen never requested to have a representative present with him at the meeting. Kerr testified that after everyone sat down he told McMillen that he had learned that McMillen called Barker a stupid fucking moron and "before I could finish, McMillen said: Yeah. I said it. I was pissed off." Kerr was asked by counsel for the General Counsel:

Q. During the meeting, Mr. McMillen admitted that he referred to Mr. Barker as a fucking idiot or moron, correct?

A. Yes, he did.

Q. He made that admission in answer to your question, right?

A. No, sir. He did not

At that point, Kerr told McMillen that he was terminated effective immediately. As stated above, the decision to terminate McMillen had been made earlier in the day, and if McMillen had not interrupted him at the meeting, he would have completed his statement by telling him that he was terminated effective immediately. McMillen responded by saying that Barker can send him harassing and threatening letters and he can't do anything about it, and Kerr responded by saying, "No, what I'm saying is that you are terminated effective immediately." McMillen was then escorted from the office and the building.

Stewart testified that prior to this meeting, he notified the security employees at the building that "we were in the process of fixing to terminate an employee" and that McMillen's security card had been deactivated and that when he came into the building that evening, he was to be escorted directly to Stewart's office. At 3:48 that afternoon, Stewart sent an e-mail to the security department stating: "I would like for the security folks who bring him up to my office stand by [sic] so that he can be taken to his locker and escorted to his vehicle and off the premises. Will that be a problem?" Fifteen minutes later, Stewart received an e-mail from security saying that it would not be a problem. At 6 p.m. a security officer brought McMillen and Hale to his office. Kerr asked Hale if he was there in the capacity of a union representative, and Hale said that he was. Kerr said, "Then you can leave. This is not an investigatory meeting." Hale then asked McMillen: "Are you okay with this?" McMillen replied, "I guess so" and Hale left the office. After Hale left, McMillen did not request any union representation at the meeting. Stewart testified:

Buddy [Kerr] began with a statement to try to . . . say a statement and complete it, but it was to the essence of he couldn't really believe that Gregg had actually called the vice president of operations a fucking moron. At that time Gregg broke in and interrupted and said, wait a minute I was really pissed off about the letters that Mr. Barker had been sending. He had no right to send harassing letters and kept on and then Buddy stopped him at that point and told him. He said, listen, I want . . . to make this perfectly clear to you that your employment with the Tampa Tribune is terminated at this point. Gregg answered back and said, you are going to try to fire me because I'm getting harassing letters from Mr. Barker and Buddy stopped him again and for the second time told him, I want to

make this very clear, your employment with the Tampa Tribune is terminated at this point.

Kerr then told the security guard to accompany McMillen to his locker and they left.

Sierra testified that the purpose of this meeting was to terminate McMillen. He had been told early that afternoon that they had made the decision to terminate McMillen, and he was asked to be in Kerr's office later that day as the human resources representative. The procedure that the Respondent employs is that when a decision is made to terminate an employee, the employee's security badge is deactivated, preventing him/her from gaining access to the parking garage and the building without assistance from the security guards at the building. Prior to the meeting, the security employees had been told that when McMillen arrived, he was to be escorted to Kerr's office. The meeting began at about 6 p.m. Hale came into the meeting with McMillen, and Kerr asked him why he was there. Hale said that he was asked to be there by McMillen, and Kerr said, "This is not an investigation. You have no right to be here." After Hale left the office, McMillen never said that he wanted a union representative present with him at the meeting. Sierra was asked by counsel for the General Counsel:

Q. What was the purpose of that meeting?

A. It was to terminate Mr. McMillen's employment.

Q. When asked, Mr. McMillen admitted that he called William Barker a "fucking idiot," correct? Or "moron?"

A. He wasn't asked.

Q. He did admit that, though?

A. He did admit it. . . .

McMillen testified that when he reported for work on November 16 he swiped his card in the Respondent's parking lot, but the gate did not open, so he pushed a button, and a security guard let him into the parking garage. When he got to the main building, two security guards were waiting for him, and told him that they were told to take him to Stewart's office. McMillen asked the guards if he could get a witness, Hale, one of the Union's chairpersons who was sitting nearby, to go with him. The guards said that he could not have a witness with him, and McMillen said that he was not going without a witness. The guards said that he could go with them, but it was up to the people upstairs whether he would be allowed to go into the meeting with him. McMillen asked Hale to go with him, and the four of them went upstairs to Stewart's office. When they walked into the office, Kerr asked Hale what he was doing there, and Hale said that he was the chairman. Kerr said that he didn't belong in the meeting, and would not be allowed to attend. Hale said that he wanted to be a witness and Kerr replied that he was not allowed to be there because it was not an ongoing investigation. At that point, Hale left the room. He testified that Kerr then asked him if he had called Barker a fucking idiot, and he said, "Yes, what's the problem? Everybody calls him one." Kerr then told him that he was fired, and McMillen asked if it was okay for Barker to send those nasty letters to them, and Kerr said that it was, and he was escorted out of the office by the security guards. McMillen was asked whether he asked to have a union representative present with him at any time during this meeting. He testified: "Did I state that? No.

That's why I brought Donny up there." On cross-examination, he testified that Kerr was the first one to speak at the meeting after Hale left:

Q. You would agree with me that you interrupted Mr. Kerr while he was talking, wouldn't you?

A. I can't say I did or not. I don't believe I interrupted him.

Q. Isn't it true that Mr. Kerr told you that you were terminated because you called Mr. Barker a stupid fucking moron?

A. No. He never told me why I was being fired.

Hale testified that on November 16, at about 5:30 p.m., as he was in the smoking area shortly before reporting for work, McMillen approached him and said that he needed his help. He went with McMillen and saw the security guards with their arms folded. Hale said that he was going to accompany McMillen to Stewart's office as the union chairman and the guard said that they would not let him go with them. Hale replied that since he was the union chairman he should be allowed to go with him, and the security guards relented, and let him accompany them to Stewart's office. When they arrived at the office, Kerr and Sierra asked Hale, "What are you doing here?" and Hale said that as the union chairman he was there to represent McMillen. He was told that it was "not a union matter so we don't need you here." Hale said that he would just be a witness, and they said, "You can't do that either." Hale then said to McMillen: "They don't want me in here. There's nothing I can do for you. I'm leaving, okay?" McMillen agreed and at that point, Hale left the office.

D. Profanity in the Pressroom

The Respondent alleges that its pressroom rules set forth above apply herein. In addition, on September 15, 2003, McMillen signed an acknowledgment that he had received a copy of the Respondent's employee handbook. The introduction states that employees who engage in misconduct, or violate rules and policies established by the Respondent, will be subject to discipline up to, and including, termination. Rule (b) states: "Employees shall refrain from loud, profane or indecent language and name-calling." McMillen testified that pressmen curse on a daily basis in the pressroom. The only time that he has heard a supervisor tell a pressman not to use profanity in the pressroom is when a field trip is touring the pressroom. Hale testified that in his 33 years employment as a pressman for the Respondent he has not witnessed a situation where an employee cursed directly at a supervisor, although it is fairly common to hear the pressmen cursing at the machines.

Jay Farris, who has been employed by the Respondent as a pressman for 18 years, testified that the pressmen curse in the pressroom all the time: "part of the normal conversation." In about November 2006, while he was in the midst of numerous medical visits and tests, he told his supervisor of the situation and said, "I can't wait until this fucking shit is over with" Farris also testified that he attended one of the negotiation sessions where Barker's letter was discussed. After seeing the letters, Shannon referred to Barker as a fucking idiot. He further testified that with the exception of what McMillen said

about Barker, he is not aware of any situation where a pressman directed profanity at, or about, a supervisor. Mark Donoghue, who has been employed as a pressman by the Respondent for 20 years, testified that it is a “common practice” to curse in the pressroom. The pressmen curse in front of the foremen on a regular basis, but he cannot remember any situation where a pressman cursed in the presence of the pressroom manager. Donoghue testified about an incident that occurred in either 2000 or 2001. The employees had completed their work for the night and, at the last minute when everyone was preparing to leave, the foreman told Lerro that he had to do something prior to leaving. Later, Lerro told Donoghue that he had called the foreman a fucking idiot. Donoghue was asked by counsel for the Respondent:

Q. You would agree with me that aside from Mr. McMillen you are unaware of any instance in the pressroom at the Tampa Tribune where an employee has directed profanity at a supervisor in the presence of other supervisors, correct?

A. Yeah. I would say . . . it wasn't done with two supervisors there, yeah. I would say that's probably correct.

Q. Okay. And you are unaware of any employee in the pressroom directing profanity at a supervisor to that supervisor's face, correct?

A. No. I can't agree with that.

Q. Calling a supervisor a name, a profane name?

A. No. Probably not. Yeah.

Q. That's what I'm referring—I'm not talking about you are stressed because the press is having problems and you let something loose and there's a supervisor standing next to you. I'm talking about a different situation, where you go up to a supervisor. You look the supervisor in the eye and you say: You are something?

A. No. I have never witnessed something like that.

Q. And you have never done that yourself, have you?

A. No.

Lerro testified that, occasionally, he has heard pressroom employees using profanity. While employees have cursed at him, it was in a joking manner. Other than the situation with McMillen, he is not aware of any instance where an employee directed profanity at a supervisor. Bridges testified that during his tenure as a supervisor, no employee has ever directed profanity at him, or at a supervisor. Kerr likewise testified that other than McMillen, he is unaware of any situation where an employee directed profanity at a supervisor. In addition, while he was a rank-and-file employee for the Respondent he never directed profanity at a supervisor. Stewart testified that in his 30 years of employment with the Respondent he is unaware of any situation where an employee cursed at a supervisor, or directed profanity at a supervisor, in the presence of other supervisors.

IV. ANALYSIS

There are two distinct, yet connected issues herein. Did the Respondent violate Section 8(a)(1) of the Act by denying McMillen the right to have a union representative present at the meeting on November 16, where he was terminated, and did the

Respondent violate Section 8(a)(1) and (3) of the Act by terminating him on November 16?

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court found that employees have a Section 7 right to request union representation at an investigatory interview where they could reasonably believe that the investigation will result in disciplinary action. In *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977), the Board found that the rights associated with *Weingarten* applied to any interview, whether it was labeled as investigatory or disciplinary, as long as the employee involved reasonably believed that it might result in disciplinary action being taken against him. The court, at 587 F.2d 449 (9th Cir. 1978), refused to enforce the Board's Order finding that *Weingarten* did not require a right to union representation when the purpose of the interview was merely to inform the employee that he was being disciplined. In *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979), the Board reexamined its decision in *Certified* and decided that it was wrongly decided and that it should be overruled: “We now hold that under the Supreme Court's decision in *Weingarten*, an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision.” In addition, the Board's decision in *Baton Rouge* contains further language that is helpful in the instant matter:

We stress that we are *not* holding today that there is no right to the presence of a union representative at any “disciplinary” interview. Indeed, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded to the employee under *Weingarten* may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach. In contrast, the fact that the employer and the employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the *Weingarten* protections apply.

In summary, as long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation under Section 7 exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline.

In that case the Board found that because the employer had reached its decision to discharge the employee 3 days before the meeting where she was informed of the discharge, and the

sole purpose of the meeting was to inform her of the discharge, the employee had no Section 7 right to union representation simply because she insisted on continuing the meeting in order to obtain an explanation for the reasons for her discharge.

Texaco, Inc., 251 NLRB 633, 636-637 (1980), is interesting because it involved two distinct situations. In the first, although the employer had evidently decided prior to the meeting that the employee would be given a reprimand, at the meeting he secured an admission from the employee of his wrongdoing. The Board found that the employee was entitled to union representation at the meeting because the employer "went beyond the act of imposing discipline and sought and secured an admission of possible misconduct. Such an inquiry indicated that Respondent was continuing, on a substantive basis, its investigation of the incident." In the second situation, the employer decided, 3 days prior to meeting with the employee, that he would be given a 3-day suspension. At the meeting, the employee was informed that the meeting involved discipline and was handed the suspension letter. When the employee claimed his innocence, the employer's representative began to respond, but stopped, saying that it had no bearing on the issue. The Board decided that no right to representation attached in this situation because the Respondent was ". . . engaged in the simple ministerial act of imposing upon Slater discipline which had been determined in a final and binding manner prior to the interview. . . . At no time did Fair cross the line between an investigatory interview and one solely for the purpose of imposing discipline by seeking or securing information from Slater concerning his alleged misconduct." In *Gulf States Manufacturers, Inc.*, 261 NLRB 852 (1982), the employer decided prior to meeting with the employee (Scott) that he would be given a written warning. Upon meeting with the employee, the employer's representative informed him that he would be given a written warning, but when Scott started to argue the issue, the employer's representative questioned him further about the incident underlying the warning. The Board decided that Scott was entitled to union representation at this meeting: "Respondent's conduct constituted more than merely a conversation concerning its reasons for the previously determined discipline. Rather, Respondent delved further into the circumstances surrounding Scott's justification for his conduct and, in effect, sought further facts in support of its action against Scott."

Applying these cases to the instant matter, it is clear that if, as testified to by McMillen, Kerr opened the meeting by asking him if he had called Barker a fucking idiot, or some similar term, the right to representation under Section 7 would immediately attach. On the other hand if, as testified to by Kerr and Stewart, McMillen interrupted Kerr, as he was about to tell him that he was terminated for calling Barker a stupid fucking moron, and said that he did say it, no right of representation would attach, as long as Kerr did not question him further about the incident. This is a difficult credibility determination because none of the individuals involved in this meeting were either clearly credible or clearly incredible. In addition, there were no obvious discrepancies in the testimony of any of these witnesses that would assist in this determination. With some difficulty, I credit the testimony of Kerr, Stewart, and Sierra over that of McMillen. Kerr had e-mails from the two supervisors

who were present when McMillen made the offending statement on November 10, so there was no valid reason for him to ask McMillen whether he really said it. Additionally, the Respondent had spent the prior 5 days deciding how to deal with the situation. After all of that time, I find it highly unlikely that Kerr would begin the meeting by asking McMillen if he had made the statement as alleged. I therefore find that Kerr began the meeting by saying that he had learned that McMillen had called Barker a stupid fucking moron (as testified to by Kerr), or that he couldn't believe that he had made the statement (as testified to by Stewart). Either way, Kerr was not seeking an admission from McMillen, and after McMillen interrupted Kerr and said that he did make the statement, Kerr did not question him further about it; he simply told him that he was fired. *Texaco*, supra. I therefore recommend that this allegation be dismissed.²

The principal issue herein is whether McMillen was terminated in violation of Section 8(a)(1) and (3) of the Act. This boils down to two separate issues. Was he engaged in protected concerted or union activities on November 10 when he complained to Lerro and Bridges about Barker's letters and, if so, was the language that he employed so egregious that he lost the protection of the Act?

In *Holling Press, Inc.*, 343 NLRB 301, 302 (2004), the Board quoted from *Meyers I* and *Meyers II*,³ stating:

The Board reaffirmed that concerted activity included "circumstances in which individual employees seek to initiate or to induce or to prepare for group action," and "activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization," so long as what is being articulated goes beyond mere griping.

The underlying question is often whether the employee was simply making a personal complaint (a "gripe") or whether his/her complaint was meant to inure to the benefit of all the employees. If the latter, it comes within the "mutual aid and protection" clause of Section 7. Counsel for the Respondent, at the hearing and in his brief, stressed the fact that McMillen did not say on November 10 that he was there in some capacity on behalf of the Union or that other employees had asked him to speak to Lerro and Bridges at that time. Although that may be a factor in determining whether he was engaged in union or protected concerted activities at that time, it is certainly not controlling of the issue. I find more significant that many of the other pressmen employed by the Respondent were also unhappy about these letters, although they did not react in the same way that McMillen did. In excess of 25 pressmen signed a

² Although I recommend the dismissal of this allegation, I should note that if I had found that this was an investigatory interview I would have found that McMillen need not have requested representation. He arrived at the meeting with Hale as his stated representative. Hale was refused admission by the Respondent on the ground that it was not an investigatory meeting. There would be no need or reason to require McMillen to request to have a representative present for the second time.

³ *Meyers Industries*, 268 NLRB 493 (1984), and *Meyers Industries*, 281 NLRB 882 (1986).

sarcastic letter to Barker, in response to his letters, telling him to agree to the Union's proposal, Shannon, at the negotiations, strongly objected to these letters on two occasions, and Hale testified that he also did not like receiving these letters. Therefore, while McMillen was alone in the room with Lerro and Bridges when he made the offending remark, he was not alone in his feelings about Barker's letters. In addition, prior to his remark about Barker, McMillen complained about the slow progress of the negotiations as well as Barker's letters. In *Holling Press*, supra, the Board dismissed the complaint because they found that the charging party's complaint was "personal" and "individual in nature" and was "not made to accomplish a collective goal. Rather their purpose was to advance her own cause. . . . Her goal was a purely individual one."

In *K-Mart Corp.*, 341 NLRB 702, 703 (2004), the Board found that an employee who had used obscenities in response to being notified that he could no longer take his breaks in the lobby, as had been his practice, was not engaged in concerted activities. The Board found that there was no evidence that he was acting on the authority of, or with other employees in protesting the break rules, and that there was no evidence that the union had taken a position on the break room rules. On the other hand, in *Salisbury Hotel*, 283 NLRB 685 (1987), the charging party was discharged because of her complaints about the change in the employees' lunch hour. Although all the employees complained about the change, the charging party was the most vocal one, and had made a telephone call to the Department of Labor complaining about the change, although the Board found no evidence that any other employee knew that she was going to make the call, nor did they authorized her to call on their behalf. The Board, in finding that the charging party was engaged in concerted activities, stated that her complaints "cannot be considered in isolation." In finding a violation, the Board stated:

The employees complained among themselves and most, including Resnick, brought the complaint directly to LaPenta. Accordingly, we find the employees were engaged in a concerted effort to convince the Respondent to change its lunch hour policy. Resnick's complaints to the other employees, as well as her individual complaints to the Respondent, were part of that concerted effort.

In the instant matter, McMillen was raising issues with Lerro and Bridges that were shared by the Union and his coworkers—their resentment toward Barker's letters about the negotiations, as well as the slow progress of the negotiations. Although these complaints were spoken in the first person, they were part of the concerted efforts by the other employees, and therefore constituted concerted activities on his part.⁴

The evidence establishes that McMillen was discharged for calling Barker a stupid fucking moron on November 10.⁵ The

⁴ I find no evidence to support the claim that McMillen was terminated because of his union activities. Although he was a union member and attended one series of bargaining sessions, there is no evidence connecting this with his termination.

⁵ I find that it was the language that he employed, rather than simply his complaints about the letters, that caused his discharge. In excess of 25 employees, including McMillen, signed the November 4 letter to

question therefore is whether this language was so egregious that he lost the protections of the Act that would otherwise protect his concerted activities. I find that it was. Barker's letters, while inflammatory, were not untruthful. McMillen could have expressed his anger about the letters without defaming Barker as he did.

There is a very thin line between statements that will be considered protected, and language that is so profane and uncalled for that the speaker loses the protection of the Act. *Aluminum Co. of America*, 338 NLRB 20 (2002). The Board stated in *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994): "Thus, although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." In *Honda of America Mfg., Inc.*, 334 NLRB 746, 747 (2001), the Board, quoting from *Webster Men's Wear*, 222 NLRB 1262, 1267 (1976), and *American Hospital Assn.*, 230 NLRB 54, 56 (1977), stated: "An employee's Section 7 rights 'may permit some leeway for impulsive behavior.' Nevertheless, an employee's otherwise protected activity may become unprotected 'if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language.'" The accepted test for whether the language warrants the loss of protection is set forth in *Atlantic Steel Co.*, 245 NLRB 814 816 (1979). The four factors in this determination 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 the employer's unfair labor practices.

The first factor, the place of the discussion, weighs in favor of protection. It took place in the office with only the supervisors, Lerro and Bridges present. I find it likely that McMillen closed the door after entering the office, but even if he didn't there is no evidence that any other employee overheard what he said or that it was disruptive to the operation of the pressroom. The second factor, the subject matter of the discussion, also favors protection. McMillen was complaining to Lerro and Bridges about the slow progress of the negotiations and Barker's latest letter to the bargaining unit employees about negotiations. These letters had also been the subject of complaints by employees and Shannon and resulted in the November 4 letter to Barker from more than 25 employees expressing their anger at his letters, and I have found that the initiation of the discussion with Lerro and Bridges about this subject therefore constituted concerted activities.

The third factor, the nature of the outburst, is the most difficult of these factors. In *Daimler Chrysler Corp.*, 344 NLRB 1324 (2005), after the supervisor suggested that the grievance discussion take place the following week, the employee called the supervisor an "asshole" and said, "Bullshit, I want this meeting now." He also said, "Fuck this shit" and that he did not "have to put up with this bullshit." During this period there were quite a few other employees in the area. The Board found that because he was "insubordinate and profane" during this

Barker, which was critical of their working conditions in a cynical tone, but there is no evidence that any of the signers were disciplined because of it.

discussion, and because “the profanity involved more than a single spontaneous outburst,” the third factor in *Atlantic Steel* weighed against protection. In *Winston-Salem Journal*, 341 NLRB 124, 126 (2004), enfd. denied 394 F.3d 207 (4th Cir. 2005), a supervisor, at a crew meeting, told the employees that their teamwork needed improvement. The charging party, interrupted him by saying that he did not treat all the employees equally, and called him a racist and said that the employer was a racist place to work. In its analysis, the Board found that the third factor weighed in the charging party’s favor because, although he interrupted the supervisor and called him a racist, “this conduct was not so inflammatory as to lose the protection of the Act.” In *Stanford Hotel*, 344 NLRB 558 (2005), the supervisor asked the charging party why he wanted to become a member of the union, told him that he was a supervisor and could not be in the union, and threatened to fire him unless he told the union agent that he was a supervisor. The charging party called the supervisor a liar and a bitch, and loudly called him a “fucking son of a bitch.” The Board found that because the charging party’s outburst was “profane and offensive” this third factor weighed against a finding that his outburst was protected. However, because this outburst was provoked by the employer’s unlawful threat of discharge, the Board found that the fourth factor, in addition to the first two factors, weighed in favor of protection. With three factors in favor and one against protection, the Board found that the charging party did not lose the protection of the Act by his conduct.

In *Felix Industries*, 331 NLRB 144 (2000), enforcement remanded 251 F.3d 1051 (D.C. Cir. 2001), remanded 339 NLRB 195 (2003), in response to a question of whether he would be paid the night differential, the supervisor told the charging party that he would get every penny that he was entitled to, but that he could not believe that he was making an issue of it, that the company had never beat anybody out of any money, and that he was tired of “carrying” the employee. The charging party responded, “You’re a fucking kid. I don’t have to listen to a fucking kid. Things were a lot different before you were here.” When the supervisor asked what he had called him, he repeated, “fucking kid.” The majority of the Board, in finding the resulting discharge a violation, in the discussion of the third factor, stated that it “consisted of a brief, verbal outburst of profane language, unaccompanied by any threat or physical gesture or contact” and therefore weighed in the favor of protection. The court at 1055, remanded the case to the Board stating: “If an employee is fired for denouncing a supervisor in obscene, personally denigrating, or insubordinate terms—and Yonta here managed all three with economy—then the nature of his outburst properly counts against according him the protection of the Act.” The court then stated: “Yonta’s statements do weigh against protection. Whether they weigh enough to tip the balance in that direction is for the Board to decide on remand.” On remand, a majority of the Board again found that the termination violated the Act, noting that the court agreed with the Board that none of the three other *Atlantic Steel* factors

(1, 2, and 4) weighed in favor of him losing the protection of the Act:

After careful consideration in light of the court’s instructions on remand, we find that although the nature of Yonta’s outburst must be given considerable weight toward losing the Act’s protection, this one factor is insufficient to overcome the other factors weighing against Yonta losing the Act’s protection. . . . A careful examination of these factors reveals that they clearly outweigh the one factor weighing in favor of Yonta losing the Act’s protection, the nature of the outburst.

On the basis of the above cases, I find that the nature of the conduct that McMillen engaged in on the evening of November 10 weighs in favor of his losing the protection of the Act under *Atlantic Steel*. Although there were no threats or physical gestures directed at Lerro or Bridges, his comments directed at Barker were profane, offensive, and personally denigrating. The evidence establishes that while profanity in the pressroom was fairly common, it was usually directed at machinery that was not operating properly, and none of the witnesses could recall a situation where an employee directed profanity at a supervisor such as McMillen did on November 10. Donoghue’s testimony that in either 2000 or 2001 Lerro told him that after a foreman gave him a last minute assignment, he called him a fucking idiot is too indefinite to overcome this evidence. It is not clear whether Lerro was a pressman at the time, to whom he made the statement and whether it was made in jest. Finally, the fourth factor, whether the outburst was provoked by unfair labor practices, favors McMillen losing the protection of the Act. While the letters were clearly partisan, and angered many of the employees, as well as Shannon, there was nothing untruthful in them and Barker clearly had a right to express his opinion about the negotiations, as the employees had the right to respond to Barker’s letter in their November 4 letter. As there were no unfair labor practices to provoke his outburst, this fourth factor weighs in favor of his losing the protection of the Act. As I find that the first two factors weigh in favor of protecting McMillen’s conduct, while the third and the fourth factor weigh against protecting him, it tips the balance in favor of the loss of protection. I therefore recommend that the allegation that the Respondent violated Section 8(a)(1) of the Act by discharging McMillen on November 16, 2007, be dismissed.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The Respondent did not violate Section 8(a)(1) of the Act by refusing to allow McMillen to have union representation at the November 16 meeting, and did not violate Section 8(a)(1) and (3) of the Act by discharging McMillen on November 16.

[Recommended Order omitted from publication.]

ADDENDUM B

Media General Operations, Inc. v. NLRB,
560 F.3d 181 (4th Cir. 2009)

H

United States Court of Appeals,
 Fourth Circuit.
 MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a The Tampa Tribune, Petitioner,
 v.
 NATIONAL LABOR RELATIONS BOARD, Respondent.
 National Labor Relations Board, Petitioner,
 v.
 Media General Operations, Incorporated, d/b/a The Tampa Tribune, Respondent.
Nos. 08-1153, 08-1197.

Argued: Dec. 4, 2008.
 Decided: March 13, 2009.

Background: Employer, through its parent company, petitioned for review of an order of the National Labor Relations Board (NLRB), 2007 WL 4661205, finding that employer's dismissal of employee for making derogatory remarks about his supervisor violated the National Labor Relations Act (NLRA). Employee cross-petitioned for enforcement of the order.

Holdings: The Court of Appeals, Duncan, Circuit Judge, held that:

- (1) ALJ's finding that union employee's derogatory statement about his employer's vice president was the reason for employee's firing was not a credibility determination entitled to deference, and
- (2) union employee's opprobrious ad hominem attack on a supervisor was not protected by the NLRA.

Petition granted; cross-petition denied.

King, Circuit Judge, filed a dissenting opinion.

West Headnotes

[1] Labor and Employment 231H  1870

231H Labor and Employment
 231HXII Labor Relations
 231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
 231HXII(J)1 Review by Courts

231Hk1869 Deference to Board
 231Hk1870 k. In General. Most

Cited Cases
 Legal determinations by the National Labor Relations Board (NLRB) must be upheld by a reviewing court if they are rational and consistent with the National Labor Relations Act (NLRA). National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

[2] Labor and Employment 231H  1878

231H Labor and Employment
 231HXII Labor Relations
 231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
 231HXII(J)1 Review by Courts
 231Hk1877 Questions of Law or Fact;
 Findings
 231Hk1878 k. In General. Most
 Cited Cases

Labor and Employment 231H  1880

231H Labor and Employment
 231HXII Labor Relations
 231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
 231HXII(J)1 Review by Courts
 231Hk1877 Questions of Law or Fact;
 Findings
 231Hk1880 k. Substantial Evidence.
 Most Cited Cases

A reviewing court has a responsibility to correct any errors of law that are made by the National Labor Relations Board (NLRB) in reaching its conclusions; mixed questions of law and fact are reviewed under a substantial evidence standard where the NLRB's legal interpretations are otherwise valid.

[3] Labor and Employment 231H  1870

231H Labor and Employment
 231HXII Labor Relations
 231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
 231HXII(J)1 Review by Courts
 231Hk1869 Deference to Board

231Hk1870 k. In General. Most Cited Cases

Labor and Employment 231H 1883(5)

231H Labor and Employment
231HXII Labor Relations
231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
231HXII(J)1 Review by Courts
231Hk1877 Questions of Law or Fact; Findings

231Hk1883 Particular Findings
231Hk1883(5) k. Discharge. Most

Cited Cases
ALJ's finding that union employee's derogatory statement about his supervisor was the reason for employee's firing was a legal conclusion based upon facts in the record, rather than a credibility determination, and therefore finding was not entitled to any special deference by the National Labor Relations Board (NLRB) in reviewing whether employee's dismissal was lawful under the National Labor Relations Act (NLRA). National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

[4] Labor and Employment 231H 1473(1)

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1471 Expression of Views
231Hk1473 Particular Statements or Expressions

231Hk1473(1) k. In General. Most

Cited Cases
Union employee's opprobrious ad hominem attack on a supervisor, in which he called supervisor a "fucking idiot," was not protected by the National Labor Relations Act (NLRA), even though the discussion in which employee's derogatory remark was made took place in a semi-private room, and occurred in the context of a discussion involving the supervisor's letters, which dealt with ongoing contract negotiations between the employer and the union, where employee initiated the discussion with two supervisors, employee's remark was a response to a undisputedly legal letter issued in exercise of the employer's rights, and, furthermore, employee had not even read the letter in question. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

[5] Labor and Employment 231H 1370

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)3 Nature of Activity
231Hk1370 k. In General. Most Cited

Cases
Even concerted actions that are assumed to be protected by the National Labor Relations Act (NLRA) may forfeit such protection if they are egregious or flagrant. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

[6] Labor and Employment 231H 1351

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)1 In General
231Hk1350 Activities of Individual

Employees
231Hk1351 k. In General. Most

Cited Cases
Insulting, obscene personal attacks by an employee against a supervisor need not be tolerated, even when they occur during otherwise protected activity under the National Labor Relations Act (NLRA). National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

[7] Labor and Employment 231H 1427

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1427 k. In General. Most Cited

Cases
The National Labor Relations Act's (NLRA) protections are not limitless, and where they do not reach, employers cannot be compelled to tolerate language or behavior that undermines workplace discipline. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.
***182 ARGUED:** Glenn Edward Plosa, Zinser Law Firm, P.C., Nashville, Tennessee, for Media General Operations, Incorporated, d/b/a The Tampa Tribune. Fred B. Jacob, National Labor Relations Board, Washington, DC, for the National Labor Relations

Board. **ON BRIEF:** L. Michael Zinser, Zinser Law Firm, P.C., Nashville, Tennessee, for Media General Operations, Incorporated, d/b/a The Tampa Tribune. Ronald Meisburg, General Counsel, John E. Higgins, Jr., Deputy General Counsel, John H. Ferguson, Associate General Counsel, Linda Dreeben, Deputy Associate General Counsel, Jill A. Griffin, Supervisory Attorney, William M. Bernstein, Senior Attorney, National Labor Relations Board, Washington, DC, for the National Labor Relations Board.

Before KING and DUNCAN, Circuit Judges, and REBECCA BEACH SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

Petition for review granted; cross-petition for enforcement denied by published opinion. Judge DUNCAN wrote the majority opinion, in which Judge SMITH concurred. Judge KING wrote a dissenting opinion.

DUNCAN, Circuit Judge:

The Tampa Tribune (“the Tribune”) appeals from a judgment of the National Labor Relations Board (“the Board”) that it violated the National Labor Relations Act (“the Act”) when it fired employee Gregg McMillen for making derogatory remarks about the Tribune’s Company Vice President. The administrative law judge (“ALJ”) found that McMillen’s dismissal was lawful because his statement was so profane and offensive that it was not protected by the Act. On review, the Board reversed the ALJ’s decision. The Tribune petitioned this court for review; and the NLRB brought a cross-petition for enforcement of the Board’s decision. We find that the Board erred as a matter of law concluding that the law protects McMillen’s use of profanity regarding his employer, which was directed to his supervisors, during work hours and in the work place, in a conversation McMillen initiated *183 regarding an undisputedly accurate and legal letter he had admittedly never read, and the setting of which was physically and temporally removed from the site of the ongoing collective bargaining negotiations. We therefore reverse its decision and reinstate the decision of the ALJ.

I.

A.

The National Labor Relations Act, 29 U.S.C. §§ 151-69, ensures that employees are not discriminated against for engaging in collective action in the workplace. Its provisions protect the rights of employees to organize and engage in collective bargaining and associated activities. 29 U.S.C. § 157. Its protections prevent employers from retaliating against their workers for undertaking “concerted activities” and provide a process for enforcement of the rights guaranteed by the Act. 29 U.S.C. §§ 157, 160.

After Gregg McMillen was fired from his job as a journeyman pressman at the Tribune, he individually filed charges with the General Counsel of the Board, claiming that his dismissal contravened the Act’s protections. The charging statement issued by the General Counsel alleged two violations of the Act: (1) a violation of section 8(a)(1) for not allowing McMillen to be accompanied by a union representative at his disciplinary meeting, 29 U.S.C. § 158(a)(1); and (2) a violation of sections 8(a)(1) and 8(a)(3) for terminating McMillen as a result of protected concerted activities, 29 U.S.C. § 158(a)(1), (3).

The facts of this case as found by ALJ are not disputed, and contrary to the dissent’s characterization, we take them as true. Gregg McMillen was a pressman for *The Tampa Tribune*, a daily newspaper published by Media General Operations, Inc. d/b/a The Tampa Tribune (“the Tribune”).^{FN1} On October 31, 2004, the contract between the Tribune and the Graphic Communications Conference of the International Brotherhood of Teamsters, Local 180 (“the Union”) expired. McMillen belonged to the Union, which represented the pressroom employees of the Tribune, and was covered by the expired contract.

FN1. Hereinafter references to “the Tribune” will be to the publisher unless otherwise noted.

Following the expiration of the previous agreement, the Tribune and the Union began the process of renegotiating their contract. The negotiations were rancorous and were ongoing at the time of the events that led to McMillen’s dismissal in November 2005.

During these negotiations, Bill Barker, Company Vice President of the Tribune, sent a series of letters to the pressroom workers describing what was occur-

ring from his perspective. Significantly for purposes of our decision, there is no dispute in this case that the letters were *legal and accurate*. However, many of the pressmen took exception to them, and McMillen was among roughly 25 signatories to a letter sent to Barker on November 4, 2005 that protested Barker's letter-writing and characterization of the negotiations. On November 9, Barker wrote to the employees in response to their letter of November 4, again expressing his view that the Union was the major source of delay in the process.

On the night of November 10, 2005, McMillen arrived for his third-shift job at the press. During that shift, he went into the office that is located in the pressroom. Two supervisors—Glenn Lerro, the pressroom foreman, and Joel Bridges, the assistant foreman—were the only other people in the office. While there, McMillen stated in response to a question about how he ***184** was doing that he was “stressed out” as a result of the latest letter from Barker. Lerro asked if McMillen had seen the latest letter, and McMillen replied that he had not. Lerro informed him that it was likely a response to the employees' letter of November 4. McMillen then said: “I hope that fucking idiot [Barker] doesn't send me another letter. I'm pretty stressed, and if there is another letter you might not see me. I might be out on stress.” J.A. at 372.

Lerro and Bridges made no response to the statement at the time, but the following morning Lerro did send an email to George Kerr, the pressroom manager, informing him of McMillen's statement. Barker and George Stewart, the production director, were copied on the email. Lerro also asked Bridges to send Kerr an email relating his version of the events, which Bridges did.

McMillen failed to show up for his next shift, which was scheduled on November 11. He claimed this absence was due to the sleeping pill he was forced to take to calm down after reading Barker's letter following his arrival home on November 10. As a result of the missed shift, McMillen was informed that he would be suspended from two shifts without pay. When he returned to work on November 13, he signed the resulting disciplinary report and added an editorial comment to the effect that it was Barker's “lieing [sic] discrimination, harassing and threatening letters” which caused him to miss his shift. J.A. at

373. At that time, he also told Lerro he was sorry if any of his remarks on November 10 were inappropriate, reiterating that that Barker “gets to [him].” *Id.*

Meanwhile, Kerr, George, and Barker met to discuss the report of the incident that they had received from Lerro. As a result of McMillen's statement, the Tribune's management decided to fire him for a violation of Pressroom Office Rule 9.^{FN2} When he arrived at the Tribune on November 16, McMillen was escorted into Stewart's office to meet with Stewart, Kerr, and Rick Serra, the Tribune's Human Resources Manager. Donald Hale, another Tribune pressman, attempted to accompany McMillen into the office but was told that the meeting was not for the purpose of an investigation and so McMillen had no right to union representation. Kerr stated that he had been informed that McMillen had referred to Barker in derogatory terms; McMillen interrupted the comment to acknowledge having made the statement.^{FN3} Kerr then informed McMillen that he was fired, and McMillen was subsequently escorted from the building.

FN2. The Pressroom Office Rules make violation of any rule an offense punishable by “disciplinary actions, up to, and including termination.” Rule 9 bars, among other things, the use of “[t]hreatening, abusive, or harassing language ... disorderly conduct ... and all disturbances interfering with employees at work anywhere in the building.” J.A. at 373.

FN3. The ALJ found that McMillen made this admission in an unprompted response to a statement by Kerr and not in response to a question. Because the decision had already been made to terminate McMillen before the meeting began and because Kerr did not question McMillen about his statement, the ALJ concluded and the Board agreed that McMillen had no right to union representation at the meeting and that the Tribune therefore did not violate section 8(a)(1) of the Act with respect to the denial of representation. J.A. at 379-80, 394. This holding is not challenged on appeal.

B.

The case was first heard by ALJ Joel Biblowitz. Fol-

lowing a full hearing and fact-finding, the ALJ dismissed both *185 charges against the Tribune. The ALJ concluded that McMillen had no entitlement to representation and therefore that there was no violation of his right to representation. In analyzing whether McMillen's dismissal was wrongful, the ALJ concluded that McMillen was engaged in concerted activity at the time of his statement but that his statement was so "profane, offensive and personally denigrating" as to be unprotected by the Act. J.A. at 383.

The General Counsel entered exceptions to the ALJ's decision. On appeal, the Board upheld the ALJ's decision as to the first charge but reversed the ruling on the second, finding that McMillen's dismissal violated the Act. J.A. at 397. The Tribune filed a petition for review with the Fourth Circuit and the Board brought a cross-appeal for enforcement of the Board's decision.

II.

The Tribune appeals the decision of the Board through Media General Inc., the parent company of *The Tampa Tribune*. Media General is incorporated in the Commonwealth of Virginia and transacts business in this circuit. We therefore have jurisdiction over the petition for review and cross-petition for enforcement pursuant to §§ 29 U.S.C. 160(e) and (f).

On appeal, the Tribune contends that the Board impermissibly overturned credibility determinations of the ALJ; that McMillen was not engaged in a concerted activity protected by the Act when he made the derogatory statement about Barker; and that even if the activity in question were protected, the Board misapplied its precedent in finding that McMillen's statement was not so egregious as to lose the Act's protection. We address each of these arguments in turn below.

[1][2] Legal determinations by the Board must be upheld by a reviewing court if they are "rational and consistent with the Act." *Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 211 (4th Cir.2007). However, the reviewing court has a responsibility to correct any errors of law that are made by the Board in reaching its conclusions. *Id.* Mixed questions of law and fact are reviewed under a substantial evidence standard "where the Board's legal interpreta-

tions are otherwise valid." *NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 210 (4th Cir.2005).

A.

[3] The Tribune argues that the Board impermissibly overturned credibility findings of the ALJ in reaching its decision. Specifically, the Tribune contends that the ALJ's finding that McMillen's derogatory statement about Barker was the reason for his firing is a credibility determination that should be insulated from the Board on review. Appellant's Br. at 41-42 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), for the proposition that the Board owes considerable deference to the ALJ on findings of fact because the latter has "heard the evidence and seen the witnesses"). The Tribune's argument on this point is misguided.

The determination of the nature of the outburst is not properly a "credibility determination" made by the ALJ but a legal conclusion based upon the Board's inferences from facts in the record. The ALJ made clear in his opinion the points at which he was making credibility determinations. *See, e.g.*, J.A. at 379. But his analysis of the application of the law to the fact he found does not qualify as a credibility determination. Therefore, the ALJ's determination is not entitled to any special deference by the Board. The Board was *186 not constrained by the ALJ's findings in determining whether McMillen's conduct had and retained the protection of the Act and was free to find, subject to review by this court, that it did.

B.

The Tribune also contends that McMillen was not engaged in protected concerted activity when he made his derogatory statement about Barker. The ALJ found and the Board affirmed that McMillen's conduct was concerted activity within the meaning of the Act because "it was part of an ongoing collective dialogue between Barker and the unit employees about the substance and process of the contract negotiations." J.A. at 395. Specifically pointing to the letters that were exchanged between Barker and the pressroom employees, the Board found that McMillen's derogatory statement was "a logical outgrowth of the prior collective and concerted activity." *Id.* (internal quotation marks omitted) (citing *Every Woman's Place v. Doran*, 282 N.L.R.B. 413 (1986)).

While we do not find that this conclusion is wrong as a matter of law, we do note that the conduct in question skirts the outer bounds of that which can be considered concerted activity under the Act's auspices. McMillen's derogatory comment was part of a conversation he individually initiated; it was not temporally associated with the actual negotiations in question or the actions that prompted it; and it could not have been directly responsive to the Tribune's negotiating positions, since McMillen prefaced the remark by stating that he had not yet read Barker's letter. *Cf. Stanford N.Y., LLC*, 344 N.L.R.B. 558, 559 (2005) (spontaneous outburst in direct response to discussion about union activities); *Trus Joist MacMillan*, 341 N.L.R.B. 369, 369-70 (2004) (employee requested meeting specifically to discuss an illegal firing). Nevertheless, we decline in this case to overturn the finding that McMillen's conversation concerning Barker and Barker's letters was entitled to the Act's protection in the first instance. This does not, however, settle the inquiry about whether McMillen retained the Act's protection when he launched an ad hominem attack against his supervisor.

C.

[4][5] Even concerted actions that are assumed to be protected by the Act may forfeit such protection if they are "egregious or flagrant." *Care Initiatives, Inc.*, 321 N.L.R.B. 144, 151 (1996) (quoting *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1288 (10th Cir.1980)). The Tribune contends, and the ALJ found, that even if McMillen's statement was made in the context of concerted activity, he forfeited the protection of the Act because he engaged in "vulgar, profane, and obscene language directed at ... [an] employer," *Care Initiatives*, 321 N.L.R.B. at 151, in responding to his employer's legal acts. We agree.

The test for whether an employee has forfeited the protection of the Act as a result of the nature of his conduct was set forth by the Board in its decision in *Atlantic Steel Co. v. Chastain*, 245 N.L.R.B. 814 (1979). There, the Board held that a reviewing body must balance four factors to determine whether the Act's protection applies: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id.* at 816. If the bal-

ance is such that the conduct crosses the line from "protected activity ... [to] opprobrious conduct," the worker loses the protection of the Act. *Id.*

*187 In the instant case, the ALJ found and the Board agreed that the first two factors weighed in favor of McMillen retaining the Act's protections. J.A. at 396. The discussion during which the derogatory remark was made took place away from the pressroom floor in an office that was used by pressroom supervisors and thus was at least semi-private.^{FN4} In addition, McMillen's comment occurred in the context of a discussion of Barker's letters, and those letters dealt with the ongoing contract negotiations between the Tribune and the Union. The Board also agreed with the ALJ that the fourth factor militated against extending the protection of the Act, since McMillen never claimed that he was responding to an unfair labor practice. Instead, his outburst was in response to a series of admittedly legal and truthful letters written by Barker. J.A. at 383, 396.

FN4. In balancing the *Atlantic Steel* factors, the Board has in general found that remarks made in private are less disruptive to workplace discipline than those that occur in front of fellow employees. *See, e.g., Stanford N.Y.*, 344 N.L.R.B. at 558 (finding that "[t]he relatively secluded room and ... [the employee's] efforts to maintain the privacy of the conversation weighs in favor of [the Act's] protection"). We note, however, that when a discussion is instigated for the express purpose of making vulgar remarks, the privacy of the location may factor into the balance differently. *Compare id., with Trus Joist MacMillan*, 341 N.L.R.B. at 370 (noting that while "[i]n one respect the [private] locus of ... [the] outburst was one that would have a less disruptive effect than it would have if it had occurred on the plant floor[,] in another respect, the locus accentuated and exacerbated the insubordinate nature of ... [the employee's] offensive outbursts" because the employee's purpose in requesting a meeting was to "embarrass" his supervisor in front of management).

Where the two adjudicators parted ways was on the significance of the third factor. The ALJ determined that the nature of the outburst was "so egregious" that

it removed McMillen's statement from the Act's protection. J.A. at 381. The Board disagreed. Analyzing the record, it found that the nature of the remark was only moderately prejudicial to McMillen's retention of the Act's protection. The Board based this determination on the fact that the remark was not made directly to Barker, that it was an isolated statement for which McMillen later apologized, and that it was neither a direct challenge to Barker's authority nor did it undermine employee discipline. J.A. at 396. Because of this different weighting of the third factor, the Board overturned the ALJ's conclusion and found that on the balance of the factors McMillen was entitled to the protection of the Act. J.A. at 396-97.

We disagree. The Board overreached as a matter of law in finding that the conduct in question was not so egregious as to forfeit the protection of the Act. The dissent accuses us of engaging in de novo fact-finding to arrive at this conclusion. *See infra* at 190-91. It is, however, tellingly unable to point to a single instance in which such fact-finding occurs despite progressively more expansive rhetoric. It does not and cannot dispute, for instance, that McMillen had never read Barker's November 9 letter or that McMillen's comment concerning Barker was made in a meeting he initiated during an ordinary shift and not physically or temporally connected to the site of the ongoing labor negotiations.^{FN5} The dissent's repeated (and heated) mischaracterization of our opinion attempts to mask the fact that what it *188 actually disputes is our *interpretation* of the facts and the legal conclusions of the Board. Our opinion today finds that the Board erred as a matter of law—which is precisely the sort of review we, as a circuit court, are required to conduct.

FN5. We note, in passing, that in its recitation of the “facts” that we “find,” the dissent also makes the same analytical mistake of which it accuses us: namely, it conflates facts concerning whether or not an individual is engaged in concerted activity with those concerning whether or not a particular statement maintains the protection of the Act.

[6] The lack of concurrence between Barker's lawful letter and McMillen's comment particularly disfavors protection. This was not a spontaneous outburst in response to an illegal threat but an ad hominem attack

made in the context of a discussion McMillen initiated with two supervisors. It was a response to an undisputedly legal letter issued in exercise of the company's rights. In addition, McMillen had not even read the letter in question, which further divorces his derogatory remark from the context of the ongoing labor dispute and thus makes the remark of a nature less eligible for protection. *See Trus Joist MacMillan*, 341 N.L.R.B. at 371 (no protection for “offensive outburst [that] was not a spontaneous or reflexive reaction”). “[I]nsulting, obscene personal attacks by an employee against a supervisor need not be tolerated,” even when they occur during otherwise protected activity. *Care Initiatives*, 321 N.L.R.B. at 151 (internal punctuation omitted) (quoting *Caterpillar Tractor Co. v. Wagner*, 276 N.L.R.B. 1323, 1326 (1985)).

It is also of particular significance, as we have noted, that McMillen made his derogatory remark in response to a series of *lawful* letters sent by his employer. Thus, the fourth factor of the *Atlantic Steel* test weighs more than slightly against extending the Act's protection. *See* J.A. at 396. The lawfulness of the employer's actions also distinguishes this case from others in which the Board has extended much greater latitude to employees who are reacting to patently unlawful actions by their employers. *See Care Initiatives*, 321 N.L.R.B. at 152 (“[A]n employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee.”(quoting *NLRB v. SW. Bell Tel. Co.*, 694 F.2d 974, 978 (5th Cir.1982))); *see also Stanford N.Y.*, 344 N.L.R.B. at 559 (brief profanity was protected where it was a “direct and temporally immediate response” to unlawful threats by a supervisor). *Compare Severance Tool Indus., Inc.*, 301 N.L.R.B. 1166, 1170 (1991) (holding that, notwithstanding his “disrespectful, rude, and defiant demeanor and the use of a vulgar word,” an employee was not denied the protection of the Act where such actions were a direct response to threats made against unionized employees by the supervisor to whom the disrespect was shown), *with Fibracan Corp. v. Amalgamated Clothing and Textile Union*, 259 N.L.R.B. 161, 161 (1981) (upholding the dismissal of a worker for “repeated and blatant use of profanity” toward her supervisor where it was used in response to an inquiry about prior profanity, not in response to the employer's illegal suspension of workers following a lawful walk-out).

[7] The Board has “expressly disavowed any rule whereby otherwise protected activity ‘would shield any obscene insubordination short of physical violence’ ” from legal disciplinary action. *Felix Indus. v. NLRB*, 251 F.3d 1051, 1055 (D.C.Cir.2001) (quoting *Atlantic Steel*, 245 N.L.R.B. at 817). The balancing test set forth by the Board in *Atlantic Steel* recognizes that “in the heat of discussion” employees may use strong language that would be wholly inappropriate in other contexts where there is greater leisure for reflection. 245 N.L.R.B. at 816. The Act’s protections are not limitless, however, and where they do not reach, employers cannot be compelled to tolerate language or behavior that undermines workplace discipline. *189 *Trus Joist MacMillan*, 341 N.L.R.B. at 371 (“Employers and employees have a shared interest in maintaining order in the workplace, an order that is made possible by maintaining a certain level of decorum.”); cf. *Felix Indus.*, 251 F.3d at 1054-55 (explaining that words alone can be sufficiently violative of these concerns so as to lose the protection of the Act). It was not a remark made in the heat of negotiation-or even in direct response to Barker’s legal communications, for McMillen had not even read the latest letter. We do not disparage the importance of the protections provided for employee speech by the Act. But in this case, McMillen’s opprobrious ad hominem attack on a supervisor made at a point temporally remove from and concerned only with lawful behavior by the employer falls outside the zone of protection.

III.

Because of the inexplicably hyperbolic tenor of the dissent, we think it useful to reiterate the confines of our decision. Characterized accurately, it is far from the ukase the dissent apparently believes it to be.

We do not, for instance, say, as the dissent suggests, that employee conduct is protected only at the physical site of labor negotiations. Nor do we define the parameters of an employee’s protected response to illegal conduct by his or her employer. Those cases are simply not before us.

Rather, we base our decision in this case on the totality of the *undisputed facts as found by the ALJ*. On that basis, we hold that there is no protection for McMillen’s profane remark regarding his employer,

which was directed to his supervisors, during work hours and in the work place, occurred in a conversation McMillen himself initiated regarding an accurate and legal letter he had never read, and the setting of which was physically and temporally removed from the site of ongoing collective bargaining negotiations.

The Board did not, in this case, merely apply the law as it existed. Rather, it expanded the *Atlantic Steel* factors to essentially create a buffer around employee conduct that would travel with the employee wherever he goes and for as long as some form of collective bargaining can be said to be taking place. That ruling would significantly expand the parameters of our extant law, pushing its borders beyond the language of the Act. The principles of *Atlantic Steel* remain valid and provide important protections for employees. In this case, however, McMillen’s action in response to the legal expression of his employer simply is of such a nature that it forfeits those protections.

IV.

For the reasons set forth above, we reach the conclusion that the Board erred as a matter of law in finding McMillen’s conduct protected by the Act. We therefore reverse the judgment of the Board and reinstate the opinion of ALJ Biblowitz. As a result, we deny the cross-petition for enforcement of the Board’s decision.

PETITION FOR REVIEW GRANTED; CROSS-PETITION FOR ENFORCEMENT DENIED

KING, Circuit Judge, dissenting:

The panel majority has today overruled the Board and denied legal protection to an employee’s one-time use of profane language concerning a supervisor-referring to him as a “stupid fucking moron”-in a private setting during intense labor negotiations. Unfortunately, my colleagues have misconstrued the facts and failed to accord the Board the considerable deference it is *190 due under the law. See *NLRB v. Truck Drivers Union*, 353 U.S. 87, 96, 77 S.Ct. 643, 1 L.Ed.2d 676 (1957) (“[T]he function of striking [a] balance [between the conflicting interests of employers and employees] to effectuate national labor policy is often a difficult and delicate responsibility which Congress committed primarily to the [Board], subject to limited judicial review.”).^{FN1}

FN1. Indeed, the Supreme Court has long recognized the considerable deference we must accord the Board. *See, e.g., Auciello Iron Works v. NLRB*, 517 U.S. 781, 787-88, 116 S.Ct. 1754, 135 L.Ed.2d 64 (1996) (concluding that reviewing courts must give “considerable deference” to the Board “by virtue of its charge to develop national labor policy” (internal quotation marks and citations omitted)); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980) (observing that “we accord great respect to the expertise of the Board when its conclusions are ... consistent with the Act”).

In enforcement proceedings such as this, we are always obliged to defer to the Board “where it has chosen ‘between two fairly conflicting views, even [if we] would justifiably have made a different choice had the matter been before [us] de novo.’ ” *Smithfield Packing Co. v. NLRB*, 510 F.3d 507, 515 (4th Cir.2007) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). We have recognized that the Board’s legal rulings are entitled to deference when they are “rational and consistent” with the Act. *NLRB v. Air Contact Transp., Inc.*, 403 F.3d 206, 210 (4th Cir.2005). Importantly, the Board’s findings on factual issues are conclusive if they are supported by “substantial evidence on the record considered as a whole.” *Indus. Turnaround Corp. v. NLRB*, 115 F.3d 248, 251 (4th Cir.1997); *see also NLRB v. Southland Mfg. Co.*, 201 F.2d 244, 245 (4th Cir.1952) (recognizing that Board’s legitimately drawn conclusion in discharge proceeding is “binding upon the courts” because courts “are without power to find facts or to substitute their judgment for that of the Board” (internal quotation marks omitted)).

Put simply, the panel majority today has embarked on an unjustifiable reach-making de novo findings and conclusions in this case-and substituted its judgment for a decision reserved by law to the Board. I strongly disagree and therefore dissent.

I.

As an initial matter, the panel majority’s recitation of the relevant facts fails to capture the appropriate pic-

ture of the labor negotiations underlying this enforcement proceeding. Thus, the majority fails to place in proper perspective McMillen’s one-time reference to Vice President Barker as a “stupid fucking moron.” When the collective bargaining agreement (“CBA”) between the Tribune and the Union expired on October 31, 2004, the parties began negotiating on a new labor contract. Between December 2004 and November 2005, Barker prepared and distributed a series of letters to the Tribune’s employees, describing the contract negotiations from the company’s point of view. The contents and tone of those communications are crucial to assessing the propriety of McMillen’s single challenged comment, and to deciding whether the Board’s ruling that he could not legally be terminated is entitled to considerable deference:

- Barker’s first letter, dated December 28, 2004, asserted that the negotiations could have been completed in one day at the first bargaining session and blamed the lack of an agreement on the Union representative;
- The second letter, dated June 2, 2005, asserted that, during the negotiations, the Union representative had called Barker a “fucking idiot” and had *191 threatened a strike and boycott. *Media Gen. Operations, Inc.*, No. 12-CA-24770, slip op. at 2, 2007 WL 601571 (N.L.R.B. Feb. 22, 2007) (the “ALJ Decision”). Barker then stated that it appeared the parties would be negotiating for a long time;
- The third letter, dated September 1, 2005, alleged “unprofessional behavior” by the Union during the June meeting, and spoke of “consequences that [the employees] might face as a result of this behavior.” ALJ Decision at 2;
- The fourth letter, dated September 30, 2005, referred to labor negotiations on September 26 and 27, criticizing the Union’s behavior and expressing concern about the slow pace of such negotiations; and
- The fifth letter, dated November 1, 2005, discussed proposed bargaining dates. Barker criticized the Union representative’s lack of availability on certain dates and stated, “We at least hope that, in the future, the Union will respond more promptly.” ALJ Decision at 3.

Not unexpectedly, the Union employees reacted angrily to the letters' antiunion slant. In response, on November 4, 2005, twenty-five pressroom Union employees prepared their own letter, criticizing Barker and the Tribune's bargaining posture. The employees' letter observed that Barker sat in a "nice clean, quiet office, chat[ting] with people in business suits" and "go[ing] out to lunch," while the Union employees "work in noise so loud we need hearing protection, breath [sic] chemical fumes and ink mist, handle hazardous ... chemicals" and "are not allowed to leave the premises for lunch." ALJ Decision at 3. The Union employees pointed out that there was no carpet on the floor nor pictures on the walls, and the equipment with which the employees work "can strip the flesh off our bones and mangle us." *Id.* Finally, they urged Barker to sign the Union proposal and "help us feel confident our management team is as thankful for our efforts as you say and write." *Id.*

Barker's sixth and final letter, dated November 9, 2005, was written in response to the Union employees' letter. Barker wrote that he appreciated the employees' work and realized their frustration, and the Tribune would be "as patient as necessary to get a good [CBA]" and was "going to persevere." ALJ Decision at 3-4. Barker asserted that third parties interfere with "collective as well as individual successes," and added that, under the Union structure, the Company could not individually negotiate with employees or a subgroup of employees "as long as [they had] a third party representative." *Id.* at 4.

McMillen was by no means a passive observer to the labor negotiations regarding a new CBA. He had received Barker's first five letters and, on several occasions after receiving and reading them, spoke with his foremen and voiced dissatisfaction with Barker. He also voiced his dismay in conversations with fellow employee Donald Hale, who shared a negative opinion of the letters.^{FN2} Not surprisingly, McMillen was one of the twenty-five Union employees who signed the November 4 letter protesting the Company's bargaining posture.

FN2. Fellow employee Donald Hale testified that McMillen "got pissed off getting those letters.... He didn't like them. I got one too, and I didn't like mine either." ALJ Decision at 4.

On November 10, 2005, while working the evening shift, McMillen first learned from another employee that Barker had sent his final November 9 letter. During a lull at work, he went to the pressroom *192 office and spoke with his shift foremen, Lerro and Bridges. When Bridges asked McMillen how he was doing, McMillen complained about the slow pace of the labor negotiations and about the letters Barker had been sending. McMillen said, "I am a little stressed out. I heard we got another letter from Bill Barker." ALJ Decision at 4. McMillen admitted he had not read Barker's latest letter, but Lerro told him it was probably a response to the employees' letter. McMillen then opined it was not right for Barker to be "harassing" and "threatening" the workers by sending letters. *Id.* He added, in reference to Barker, "I hope that [stupid] fucking [moron] doesn't send me another letter. I'm pretty stressed, and if there is another letter you might not see me. I might be out on stress." *Id.*^{FN3} As a result, Lerro sent an email to pressroom manager Kerr the following morning, reporting the incident and describing McMillen as "very upset and literally shaking." *Id.* at 5.

FN3. Although McMillen testified that he said "fucking idiot," other testimony was that he said "stupid fucking moron." See ALJ Decision at 5, 7-8. The Board found no legally relevant difference between the two versions of his statement, but used the words "stupid fucking moron" in its decision.

After missing work the next day, McMillen signed a disciplinary record documenting his absence. He continued to voice his displeasure with the labor negotiations by writing on the record,

If [Barker] would quit writing me lieing discrimination, harassing and threatening letters through the U.S. MAIL I wouldn't have to take sleeping pills to go to sleep. Thank you Tampa Tribune for not caring about are well being.

ALJ Decision at 5 (misspellings in original). McMillen thereafter apologized to foreman Lerro if anything he had said on November 10 was inappropriate, and said "you know Bill gets to me." *Id.* at 5. When pressroom manager Kerr spoke to McMillen on November 16, McMillen, without being asked, admitted to the outburst and was immediately terminated from

his employment with the Tribune.

This picture—which we are obliged to accept as the relevant factual background of this case—shows that, at the time of McMillen's comment, intense labor negotiations were ongoing with the Company, and the Union employees were upset about the progress of those negotiations and the letters written by Barker. Assessing McMillen's comment in that context, the Board ruled that the Tribune had violated the Act by terminating McMillen for making the comment, and it therefore ordered his reinstatement as a Tribune employee. *See Media Gen. Operations, Inc.*, 351 N.L.R.B. No. 96, slip op. at 4-5 (2007) (the “Board Decision”). That ruling should not—under controlling precedent—be disturbed by a reviewing court.

II.

A.

The Supreme Court has long recognized that the Act does not protect all concerted activities. For example, the Act does not protect activities that are unlawful, violent, or in breach of contract. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962).^{FN4} In the context¹⁹³ of labor negotiations, however, employees are generally entitled to use “accusatory language” that is “stinging and harsh,” or even display “a certain amount of salty language or defiance.” *CKS Tool & Eng'g*, 332 N.L.R.B. 1578, 1586 (2000); *Am. Tel. Co. v. NLRB*, 521 F.2d 1159, 1161 (2d Cir.1975). Such broad protection is a reflection of the fact of industrial life that, during labor disputes, “[b]oth labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.” *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966); *see also Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 354 (4th Cir.2001) (recognizing that “[t]here would be nothing left of [the Act's] rights if every time employees exercised them in a way that was somehow offensive to someone,” they were subject to the threat of discipline).

FN4. The Supreme Court has also recognized an exception for “disloyalty against an employer.” *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 472, 74 S.Ct. 172, 98 L.Ed. 195 (1953).

However, McMillen's comment is a far reach from the “disloyalty” exhibited in *International Brotherhood*, where employees, while still on the payroll, launched a handbill campaign to undermine the quality of the company's television broadcasts. *Id.* at 467-69 & n. 4, 74 S.Ct. 172.

Of course, as the panel majority points out, “the Act's protections are not limitless, ... and where they do not reach, employers cannot be compelled to tolerate language or behavior that undermines workplace discipline.” *Ante* at 188. The Board recognized as much in its *Atlantic Steel Co.* decision, laying out four factors to be reviewed and balanced to determine if employee conduct is protected by the Act: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.” 245 N.L.R.B. 814, 816 (1979).^{FN5}

FN5. *Atlantic Steel* establishes the Board's seminal test for determining whether an employee who has engaged in concerted activity can, by opprobrious conduct, lose the Act's protection. *See, e.g., Beverly Health and Rehab. Servs.*, 346 N.L.R.B. 1319, 1322 (2006); *Waste Mgmt. of Ariz., Inc.*, 345 N.L.R.B. 1339, 1340, 1353-54 (2005) (“Where profane and other offensive conduct occurs in the context of a protected concerted activity that potentially removes the conduct from the protection of the Act, the *Atlantic Steel* test is used.”). At least one other circuit has utilized the test. *See Felix Indus. v. NLRB*, 251 F.3d 1051, 1053-54 (D.C.Cir.2001). We agree with the majority and the Board that *Atlantic Steel* supplies the proper legal test for this analysis.

Here, the Board recognized that McMillen's comment constituted a “profane and derogatory” statement, but also recognized that “employees are permitted some leeway for impulsive behavior when engaged in a concerted activity.” Board Decision at 2-3. In applying the *Atlantic Steel* test, the Board concluded that factors one and two weigh “moderately to strongly” in favor of protection for McMillen's comment under the Act. *Id.* at 4. The Board explained, on factor one, that “the discussion occurred in an office, away from

any other rank-and-file employees, and thus could not have affected workplace discipline or undermined Barker's authority." *Id.* at 3. With respect to factor two, the Board observed that

the subject matter was McMillen's criticism of the [Tribune's] bargaining tactics and positions, as well as Barker's repeatedly sending employees letters perceived to be one-sided, involving issues that many pressmen had similarly commented on both critically and collectively. McMillen's expression of his opinion on these topics is a fundamental [right under the Act].

Id.

Although the Board further concluded that factor three of *Atlantic Steel* should weigh against the Act's protection, the Board specified that "the nature of McMillen's remark weighs only moderately against his retaining the Act's protection." Board Decision at 3. In so ruling, the Board relied on several pertinent aspects of this dispute: (1) the McMillen comment *194 was *about* Barker, but was not directed *at* him; (2) there were no other confrontational aspects, such as physical conduct or threats; (3) McMillen made his comment only once, promptly and spontaneously apologized for it, and, on his own initiative, sought to explain himself; (4) the comment was not insubordinate in regard to production or work assignments; and (5) the comment did not serve to directly challenge Barker's managerial authority. *See id.* Finally, the Board also concluded that *Atlantic Steel's* factor four should weigh against the Act's protection-but only "slightly" so, even less than factor three-because McMillen's comment was "provoked by Barker's letters, which were lawful communications." *Id.*

In making its ultimate assessment of the McMillen comment under the *Atlantic Steel* test, the Board closed with the following analysis and conclusion, which we owe considerable deference:

We find that the location and subject matter of McMillen's statements, which weigh moderately to strongly in favor of retaining the Act's protection, more than offset the nature of his outburst and the lack of provocation by unfair labor practices of the [Tribune], which weigh slightly to moderately against protection. *Thus, ... we find that McMillen's statements on November 10 retained the protection*

of the Act despite his profane and derogatory remark about Barker.

Board Decision at 4 (emphasis added).

The Board-the labor experts to whom we must defer-struck an appropriate balance in this dispute, and its conclusion was both rational and consistent with applicable precedent. *Cf., e.g., Felix Indus., Inc.*, 339 N.L.R.B. 195, 196-97 (2003) (concluding that although "nature of [employee's] outburst must be given considerable weight towards losing the Act's protection, this one factor is insufficient to overcome the other [two] factors weighing against" loss of such protection, i.e., that outburst occurred during discussion of employee's CBA rights and in response to employer's provocative and hostile remarks about employee's protected activity). Indeed, McMillen's comment is readily distinguishable from those more egregious cases where an employee might lose the protection of the Act. For example, the Board's precedent shows that an employee should only lose the Act's protection in serious situations, such as threatening in-your-face confrontations, or occurrences in working areas with other employees present, thereby disrupting the work environment. *See Waste Mgmt. of Ariz.*, 345 N.L.R.B. 1339, 1340, 1353-54 (2005) (finding no protection under Act, even though discussion concerned possible unfair wage alterations, where employee engaged in unprovoked tirade, cursed repeatedly and loudly before witnesses, refused supervisor's request to move discussion into office, and made threats toward supervisor); *DaimlerChrysler Corp.*, 344 N.L.R.B. 1324, 1328-30 (2005) (finding no protection, though discussion concerned scheduling of grievance meeting, where employee cursed repeatedly in front of many other employees, called supervisor "asshole" to his face, physically approached supervisor in "intimidating" manner, and was not provoked by any unlawful conduct on part of employer); *N. Am. Refractories Co.*, 331 N.L.R.B. 1640, 1642-43 (2000) (finding no protection, though employee was engaged in protected activity, where employee angrily approached supervisor and called him "stupid mother fucker" in front of ten other employees).

B.

Notwithstanding the deference that we are mandated to afford the Board, the panel majority "find[s] that

the Board *195 erred as a matter of law” in concluding that the Act protects McMillen’s comment, “which was directed to his supervisors, during work hours and in the work place, in a conversation McMillen initiated regarding an undisputedly accurate and legal letter he had admittedly never read,” and which was made in a “setting ... physically and temporally removed from the site of the ongoing collective bargaining negotiations.” *Ante* at 183. In so ruling, the majority improperly substitutes its judgment for that of the Board on the assessment and balancing of at least three of the four *Atlantic Steel* factors, and it disregards facts relied on by the Board in favor of its own de novo findings.^{FN6}

FN6. The panel majority also seems to undertake an indirect challenge to the Board’s determination that McMillen was, on the occasion of his comment, engaged in concerted activity. *See* Board Decision at 2. Although the majority “do[es] not find that [the Board’s concerted activity] conclusion is wrong as a matter of law,” it admonishes that “the conduct in question skirts the outer bounds of that which can be considered concerted activity under the Act’s auspices.” *Ante* at 186. Notably, the facts the majority cites in support of such a dubious proposition—that “McMillen’s derogatory comment was part of a conversation he individually initiated; it was not temporally associated with the actual negotiations in question or the actions that prompted it; and it could not have been directly responsive to the Tribune’s negotiating positions, since McMillen prefaced the remark by stating that he had not yet read Barker’s letter,” *id.* at 186—are many of the same facts conjured up by the majority in rejecting the Board’s analysis of the *Atlantic Steel* factors. *See, e.g., id.* at 187-88 (asserting that McMillen’s comment was “divorce[d] ... from the context of the ongoing labor dispute” and “lack[ed] ... concurrence” with Barker’s final letter). In any event, the majority declines to disturb the Board’s concerted activity determination—and rightfully so, in view of the solid legal and factual ground on which it stands.

1.

Even accepting the panel majority’s version of the facts, its conclusion that the Board misapplied the *Atlantic Steel* test cannot withstand the slightest scrutiny. First of all, the majority explicitly rejects the Board’s assessment of *Atlantic Steel*’s factor four—whether McMillen’s comment was, in any way, provoked by the Tribune’s unfair labor practice—which the Board deemed to weigh against the Act’s protection (albeit only “slightly” so), because McMillen’s comment was “provoked by Barker’s letters, which were lawful communications.” Board Decision at 3. The majority concludes that, because “McMillen made his derogatory remark in response to a series of *lawful* letters sent by his employer,” the Board should have weighed factor four “more than slightly against extending the Act’s protection.” *Ante* at 188. The majority cites no apposite authority, however, for its conclusion that employee conduct in response to legal employer activity *must* weigh “more than slightly” against protection. Rather, the majority invokes inapposite Board decisions weighing factor four in favor of the Act’s protection because the employee conduct in question was provoked by illegal employer activity. Significantly, the majority ignores precedent reflecting that, even where the employee responded to legal employer activity, the Board can indeed account for the nature of the employer activity in assessing factor four. *Cf. Overnite Transp. Co.*, 343 N.L.R.B. 1431, 1437-38 (2004) (concluding that factor four weighed in favor of Act’s protection where employer’s “hostile refusal” to discuss circumstances of employee discharges, although potentially lawful, provoked employee conduct); *Felix Indus.*, 339 N.L.R.B. at 196-97 (weighing factor four in favor of protection where employer’s “extremely hostile remarks” about employee’s protected activities, though not alleged *196 to be unfair labor practice, provoked employee conduct).^{FN7}

FN7. The Board recognized in *Felix Indus.* that it is “free, under *Atlantic Steel*, to consider [employer] conduct that would have been found to be an unfair labor practice had it been so alleged.” 339 N.L.R.B. at 196 n. 5. Here, the Board did not suggest that Barker’s letters constituted an unalleged unfair labor practice. Nevertheless, a majority of the Board observed that Barker’s letters’ “provocative effect on a prounion employee is neither unexpected nor unreasonable,” and that “McMillen may reasonably have been provoked partly by Barker’s repeated hints

that the pressmen should decertify the Union.” Board Decision at 3 n. 15. Accordingly, the Board majority recognized that “Barker’s statements tend to mitigate the egregiousness of McMillen’s outburst, although to a lesser degree than had Barker’s comments been litigated and found to be legally proscribed.” *Id.*

With further respect to *Atlantic Steel’s* factor four, the panel majority asserts a “lack of concurrence between Barker’s lawful letter and McMillen’s comment,” deeming the comment to be “an ad hominem attack”-in contrast to “a spontaneous outburst”-“temporally removed from the site of the ongoing collective bargaining negotiations.” *Ante* at 182-83, 187-88. The majority also emphasizes that McMillen did not read Barker’s final letter, and concludes that this fact “further divorces his derogatory remark from the context of the ongoing labor dispute.” *Id.* at 188. In concluding that this factual scenario “makes the remark of a nature less eligible for protection,” the majority relies on a wholly distinguishable Board decision: *Trus Joist MacMillan*, 341 N.L.R.B. 369, 371-72 (2004) (concluding that, although employee’s outburst was provoked by unfair labor practice, factor four did not favor Act’s protection because employee “deliberately launched into a vituperative personal attack” during “confrontational, face-to-face meeting” orchestrated by him three days after employer’s illegal activity). *Ante* at 187-88. In any event, even if factor four is given greater weight against protection than the “slight[]” weight deemed appropriate by the Board, McMillen is yet entitled to protection from termination, on the basis of the Board’s assessment of the other three *Atlantic Steel* factors-by which it weighed factors one and two “moderately to strongly” in favor of the Act’s protection, and factor three “moderately” against such protection. Board Decision at 3-4.

Of course, the panel majority also seems to reject the Board’s analysis of at least two other *Atlantic Steel* factors (factors one and three). The majority’s analysis of these factors, however, is just as problematic and unconvincing as its assessment of factor four. For example, the majority suggests that factor one, i.e., the place of the discussion, should weigh against the Act’s protection because McMillen’s comment was made in a “setting ... physically ... removed from the site of the ongoing collective bargaining negotia-

tions.” *Ante* at 182-83; *see also id.* at 189 (criticizing Board Decision for “expand[ing] the *Atlantic Steel* factors to essentially create a buffer around employee conduct that would travel with the employee wherever he goes”). The majority thereby indicates that, although it was permissible for Barker to send his letters to the union employees’ homes, the employees were not entitled to discuss those letters outside formal CBA negotiations. The majority’s apparent view-that only employee conduct occurring at the physical site of labor negotiations should be accorded protection-is not only grossly unfair, but also completely at odds with precedent. That is, the typical factor one assessment focuses on whether the employee conduct, because of the place where it occurred, somehow undermined*197 workplace discipline. *See, e.g., DaimlerChrysler*, 344 N.L.R.B. at 1329 (concluding that factor one weighed against protection in light of place where outburst occurred, in that employee’s “sustained profanity would reasonably tend to affect workplace discipline by undermining the authority of the supervisor subject to his vituperative attack”). Here, the majority does not-and cannot-identify anything in this record supportive of the notion that McMillen’s comment undermined workplace discipline. To the contrary, Lerro’s email to pressroom manager Kerr reporting McMillen’s comment did not even recommend disciplinary action against McMillen; he sent the email because he thought it was proper “to let [Kerr] know of any incidents that happen.” Board Decision at 2. Significantly, McMillen’s comment was a “private remark,” *id.* at 3, made to men with whom he frequently spoke about the letters and the labor negotiations. *Cf. Stanford N.Y.*, 344 N.L.R.B. 558, 558 (2005) (“The relatively secluded room and [the employee’s] efforts to maintain the privacy of the conversation minimized the potential that [the employee’s] outburst would impair [the employer’s] ability to maintain discipline in the workplace.”)^{FN8}.

FN8. The panel majority commendably acknowledges that “the Board has in general found that remarks made in private are less disruptive to workplace discipline than those that occur in front of fellow employees.” *Ante* at 187 n. 4. Nevertheless, it then injects that, when conversations are “instigated for the express purpose of making vulgar remarks,” the situation is vastly different. *Id.* This legal proposition, however, simply has no application or relevance to the underlying

facts of this proceeding.

The panel majority further suggests that factor three—the nature of the employee's outburst—should be given more than the “moderate[]” weight against protection assigned to it by the Board. Board Decision at 3. More specifically, the majority invokes the Board's decision in *Care Initiatives, Inc.*, which observed that “insulting, obscene personal attacks by an employee against a supervisor need not be tolerated,” even where such attacks were made during protected activity. 321 N.L.R.B. 144, 151 (1996) (internal quotation marks and alterations omitted). The *Care Initiatives* decision emphasized, however, that “care must be exercised in evaluating employee language uttered in the course of engaging in activity protected by ... the Act,” and that an employee's exercise of rights under the Act “must not be stifled by the threat of liability for the over enthusiastic use of rhetoric.” *Id.* (internal quotation marks omitted). Strikingly, the Board observed in *Care Initiatives* that “it has been held that calling an employer's president a ‘son-of-a-bitch’ was not ‘so outrageous as to justify discharge.’ ” *Id.* at 152 (quoting *NLRB v. Cement Transp., Inc.*, 490 F.2d 1024, 1029-30 (6th Cir.1974)). In light of this and other precedent, it was entirely rational and consistent with the Act for the Board to rule that McMillen's comment should weigh only moderately against the Act's protection. Indeed, McMillen's comment was less like outbursts that have been denied protection, *see, e.g., DaimlerChrysler*, 344 N.L.R.B. at 1328-29 (concluding that factor three weighed against protection for employee who, in intimidating manner, called supervisor “asshole” to his face and used other profanity, in “more than a single spontaneous outburst,” including “bullshit” and “fuck this shit”), and more like outbursts that have been deemed not to weigh against protection at all, *see, e.g., Alcoa, Inc.*, 352 N.L.R.B. No. 141, 2008 WL 4056272 (N.L.R.B. Aug. 29, 2008) (concluding that factor three did not weigh against protection for employee who referred to supervisor, across meeting table, *198 as “egotistical fucker,” because employee's “conduct consisted of a single verbal outburst of profane language” that “was simply a forceful and momentary expression of his frustration”).

In these circumstances, the Board has neither expanded the *Atlantic Steel* factors nor the “parameters of our extant law,” as the panel majority contends. *Ante* at 189. The Board's disposition of this dispute

was well within the parameters of its legal authority and binding precedent, and it is instead the panel majority that has reached beyond its bounds.

2.

Finally, the panel majority asserts that it has not made any de novo findings in overruling the Board decision, and that it has accorded appropriate deference to the Board's findings on the underlying facts. To the contrary, multiple findings of the majority were neither made nor contemplated by the Board, and many of the majority's findings flagrantly contradict those of the Board. For example:

- According to the majority, there was a “lack of concurrence” between Barker's final letter and McMillen's comment. *Ante* at 188. To the contrary, the Board found that McMillen's comment was “directly motivated” by Barker's final letter and a “logical outgrowth” of McMillen's membership in “the group of employees protesting Barker's letters and the positions expressed in them.” Board Decision at 2.
- According to the majority, that McMillen had not read Barker's final letter before he made the comment “further divorces his derogatory remark from the context of the ongoing labor dispute.” *Ante* at 188. To the contrary, the Board directly addressed this point and found that the fact that McMillen had not read the letter when he made his comment “does not prevent us from concluding that McMillen's criticism of this letter was concerted activity,” especially in view of the fact that McMillen's comment came in response to foreman Lerro's remark about the likely content of the letter. Board Decision at 2 n. 9.
- According to the majority, McMillen's comment was “temporally removed from the site of the ongoing collective bargaining negotiations.” *Ante* at 183. To the contrary, the Board found that McMillen's conversation with foremen Lerro and Bridges, when the comment was made, “was part of an ongoing collective dialogue between Barker and the unit employees about the substance and process of the contract negotiations.” Board Decision at 2; *see also* ALJ Decision at 13 (“McMillen was raising issues with Lerro and Bridges that were shared by the Union and his co-workers—their resentment to-

ward Barker's letters about the negotiations, as well as the slow progress of the negotiations.”).

- According to the majority, McMillen launched an “ad hominem attack” against Barker. *Ante* at 188. Although the Board recognized McMillen's comment as “intemperate,” “profane,” and “derogatory,” it never suggested that he made the comment to launch a personal attack on Barker. Board Decision at 2, 3. Rather, the Board characterized McMillen's comment as an “ill-tempered rejoinder[]” to Barker's positions on the contract negotiations and his choice to air those views in his letters to the employees. *Id.* at 4.

In the context of all this, I am reminded of our founding father John Adams, who successfully***199** argued on behalf of the British soldiers charged in the Boston Massacre more than two centuries ago. President-to-be Adams emphasized the time-honored proposition that “[f]acts are stubborn things ... and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.” David McCullough, *John Adams* 52 (Simon & Schuster 2001).

III.

Pursuant to the foregoing, this is not a close case and we should readily defer to the Board Decision. I respectfully dissent, therefore, from the majority's surprising decision to substitute its judgment for that of the Board.

C.A.4,2009.
Media General Operations, Inc. v. N.L.R.B.
560 F.3d 181, 185 L.R.R.M. (BNA) 3377

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEDIA GENERAL OPERATIONS, INC.,
d/b/a THE TAMPA TRIBUNE

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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* Nos. 08-1153, 08-1197
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* Board Case No.
* 12-CA-24770
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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2009, I electronically filed the foregoing “Petition for Rehearing and Suggestion for Rehearing En Banc” on behalf of the National Labor Relations Board with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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Dated at Washington, DC
this 27th day of April, 2009