UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HARBOR RAIL SERVICES COMPANY

and **Case 25–CA–174952**

ERIC SCHULTZ

Caridad Austin, Esq.,
for the General Counsel.
John J. Michaels, Esq.,
for the Respondent.

DECISION

I. INTRODUCTION

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This case was tried before me on March 15, 2017, in Rockford, Illinois. The complaint alleges that Harbor Rail Services Company (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act) when it discharged Eric Schultz because of his protected, concerted activity of requesting that he and his coworkers be allowed to take their lunchbreak. Respondent denies the allegations, contending it discharged Schultz because of his job performance, insubordination, and using obscenities toward his lead person, Kenyada Clark, during a January 8, 2016 confrontation. The General Counsel contends that if Schultz used obscenities during his confrontation with Clark, his statements were not so opprobrious as to cause him to lose the protection of the Act. Additionally, the General Counsel argues that Respondent's proffered reasons for discharging Schultz were pretext, and that Respondent would not have discharged him had he not engaged in protected activity.

Based upon the credible evidence, I find that Schultz was engaged in protected, concerted activity prior to the confrontation, but his statements and insubordinate conduct caused him to lose the protection of the Act, and that Respondent's decision to discharge him did not violate Section 8(a)(1) of the Act. As a result, I recommend dismissing the complaint.

II. STATEMENT OF THE CASE

On April 27, 2016, Eric Schultz filed an unfair labor practice charge against Respondent, which was docketed as Case 25–CA–174952. Schultz filed an amended unfair labor practice charge in Case 25–CA–174952 on October 28, 2016. Based on its investigation of these charges, on November 30, 2016, the Regional Director for Region 25 of the National Labor Relations Board (Board) issued a complaint alleging that Respondent violated Section 8(a)(1) of the Act by discharging Schultz. On December 13, 2016, Respondent filed its answer to the complaint, denying all alleged violations of the Act. On March 1, 2017, the Acting

Regional Director issued an amendment to the complaint. On March 14, 2017, Respondent filed its answer to the amendment to the complaint.[1]

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and General Counsel both filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following[2]

III. FINDINGS OF FACT[3]

A. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent has been a corporation with an office and place of business in Belvidere, Illinois, and has been engaged in the repair of railroad cars. During the calendar year ending December 31, 2015, Respondent performed services valued in excess of $50,000 directly to customers located outside the State of Illinois. During the calendar year ending December 31, 2015, Respondent purchased and received goods at its Belvidere, Illinois facility valued in excess of $50,000 directly from points outside the State of Illinois. 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. Based on the foregoing, I find this dispute affects commerce and the Board has jurisdiction over this case, pursuant to Section 10(a) of the Act.

B. RESPONDENT'S OPERATIONS & HIERARCHY

Respondent performs railcar repair, inspection, cleaning, and pretrip services for railroad companies at various locations, including at its Belvidere, Illinois location, where it performs these services for Union Pacific. Respondent began operations at the Belvidere rail yard in October 2015. Prior to that, a company by the name of Road & Rail Services handled the railcar work at that location. There are nine track lines in the Belvidere rail yard.

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[1] Prior to the hearing, the General Counsel served a subpoena duces tecum on Respondent. Respondent filed a timely petition to revoke the subpoena. R. Exh. 1(a)-(b). The parties resolved all of the issues, except for the items requested in pars. 12 and 14 of the subpoena. Par. 12 of the subpoena sought "[d]ocuments showing all disciplinary actions, including oral warnings, issued to employees at Respondent's facility during the period covered by the subpoena, for the same or similar reasons as the reasons for the discharge of Eric Schultz, together with the personnel file of each disciplined employee showing all other discipline to that employee." Par. 14 sought "[d]ocuments that reflect or indicate the hire date, completed tenure, work history, and disciplinary record for individuals whom the Respondent discharged for any reason during the period covered by the subpoena. The parties agreed to modify the temporal scope of the subpoena to September 2015 to the present." Respondent articulated in its petition to revoke the reasons for why it still believed pars. 12 and 14 remained overbroad. At the hearing, I rejected Respondent's arguments and concluded that the requests at issue, as modified, sought relevant information and were not overbroad or unduly burdensome.

[2] Abbreviations in this decision are as follows: "Tr.___" for transcript; "GC Exh.__" for General Counsel's Exhibit; "R. Exh. __" for Respondent's Exhibit; "GC Br.____" for General Counsel's brief; and "R. Br. ___" for Respondent's brief.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

At all material times, Respondent had approximately 15 employees working at its Belvidere location. They include pretrip laborers, a repairman, a welder, and an inventory clerk. Respondent also has a location supervisor and a lead person. The location supervisor primarily works out of an on-site office, whereas the rest of the employees work outside, in the rail yard.

Respondent's general manager is Albert DeLeon, who is located in Dallas, Texas. He oversees five locations, including the Belvidere rail yard. When Respondent began operations in October 2015, it hired Steve Ostenson to be location supervisor and Adam Gamblin to be the lead person. Both had been working for Road & Rail Services in Belvidere. Both worked for Respondent in their respective positions for about 2 months, before quitting.

After Ostenson quit, Respondent promoted Ryan Schanfish to be the location supervisor. Schanfish began working for Respondent in November 2013 at a location in Texas. In November 2015, Respondent reassigned Schanfish to Belvidere to train the new repairmen working there. In December 2015, Respondent promoted Schanfish to be the location supervisor for the Belvidere location, and he remained there until resigning in August 2016.

Kenyada Clark began working for Respondent as a pretrip laborer at the Belvidere location in October 2015. On January 1, 2016, Respondent promoted him to the lead person position. He was later promoted to interim supervisor after Schanfish resigned. As a lead person, Clark is responsible for helping the other employees, filling in if they are shorthanded, and watching to make sure everybody is doing what they are supposed to be doing in accordance with the company's standards.

IV. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Eric Schultz began working for Respondent at the Belvidere location on around October 20, 2015.[4] He was hired as a pretrip laborer, which also is referred to as a railcar prepper. These individuals work outside in the rail yard, cleaning the railcars and getting them ready for use. Some of the railcars are divided into two levels or decks. These railcars are used to transport automobiles from the nearby Chrysler plant. As part of their duties, the pretrip laborers are responsible for installing, removing, or replacing wheel "chocks" to keep the automobiles from moving around during transit. The pretrip laborers also maintain the edging on the railcar doors to protect the cars from getting damaged.

[4] When Respondent began operations at the Belvidere location, it hired most of its employees through a temporary employment agency. Schultz was one of those employees. According to Schanfish, a new employee remained a "temporary employee" for 90 days. After that, the employee was evaluated, and, if retained, he/she received a raise and other benefits. (Tr. 130–131).

The employee handbook states that all hourly employees receive two 15-minute paid rest breaks during any day in which the employee works 5 hours or more. If an hourly employee worked less than 5 hours, he/she would only receive one paid 15-minute rest break. The provision states that, "[i]n any case, the employees' supervisor will establish the rest period time schedule for each employee." (GC Exh. 4, pg. 11.) The handbook provision addressing meal periods states that all hourly employees working 5 or more hours in a day receive one 30-minute unpaid meal period. That provision further states that "management will establish the meal time schedule for each employee." (GC Exh. 4, pg. 11.) The timing of lunchbreaks depended upon the amount of work that needed to be completed.

Pretrip laborers began their work day at around 7 a.m., and they worked until all the railcars were finished. Union Pacific would determine how many railcars were needed on a daily basis. There were some days that the pretrip laborers would work more than 8 hours. They would usually receive a lunchbreak after 5 hours of work.

Each work day began with a "starter shift briefing" led by location Supervisor Ryan Schanfish. At this morning meeting, lead person Kenyada Clark would announce the daily job assignments. The job duties and tasks remained largely the same day to day. One of the jobs assigned was the supply buggy. This person drove an all-terrain vehicle up and down the rail lines, determining what tools, supplies, and equipment were needed, obtaining those needed items, handing them out to the laborers working on the railcars, and completing all the related paperwork. The supply buggy person also was responsible for assisting the other pretrip laborers with their prep work inside the railcars.[5]

Clark testified that while he rotated who was assigned to the supply buggy job, it seemed that Schultz always seemed to be the one performing it. According to both Clark and Schanfish, there were times Schultz would fail or refuse to proactively help out the other pretrip laborers with their prep work. He would, instead, remain seated on the supply buggy, as opposed to going on the railcars to help, despite being instructed to do so. According to Schanfish, when Schultz was assigned to actually go and prep railcars, he would argue that he needed to stay on the supply buggy. Schanfish further noted that Schultz "would not keep pace with other coworkers and always did as little as work as possible, exhausting the other workers." (R. Exh. 2.) Schultz, however, was never disciplined for any of these issues prior to his termination.

B. January 8, 2016

1. Overview

The critical events took place on January 8, 2016. Schultz and Clark offered conflicting versions of what occurred, but there are certain facts that do not appear to be disputed. Schultz and Clark were both working on January 8, 2016. It was a cold and rainy day.[6] Clark assigned Schultz to work prepping railcars, as opposed to operating the supply buggy. Schultz and the others then went to work out in the rail yard. At some point during the shift, Schultz spoke to other employees about the weather conditions. Clark came out to where these men were working. There was a verbal confrontation between Schultz and Clark, during which Schultz directed obscenities at Clark. At some point following the confrontation, two individuals came out to where Schultz was working in the rail yard to take him back to the office. Upon arriving at the office, Schanfish informed Schultz that he was being terminated. Respondent never gave Schultz any documentation explaining why he was being terminated.

2. Schultz' version of events

On the day in question, Schultz was working out in the rail yard, prepping railcars. At about 12:30 p.m. there was "a general conversation" between Schultz and other employees about getting hungry, and what everybody was going to do for lunch. Schultz recalled "the

[5] According to Schultz, the supply buggy was assigned at the start of the shift, and, if the person assigned opted out, somebody else could do the job. (Tr. 94.) According to Clark, the supply buggy was considered by the others to be boring, and those who wanted to do it were the "lazier" people. (Tr. 163.)

[6] There was no specific evidence offered regarding the extent of the cold or rain on this day.

employees" then used the two-way radio to call into the office to ask Schanfish if they could take their lunchbreak. (Tr. 75.) A few moments later, Clark arrived in his truck. When he got out of his truck, Schultz asked him if the employees could take a break, because they were hungry and that they had not taken a break up to that point in the day. Clark responded that they needed to finish the line of railcars they were working on at the time. Schultz asked Clark if they could stop where they were at, take their lunch, and then come back and finish their work. Clark again said the employees needed to finish the railcars they were working on, and possibly go on to another line of cars, before any breaks. Schultz testified there were six employees standing around during the confrontation.

After Clark said this, Schultz and the other employees "started to get a little irritated" because they were cold and wet and believed they were not going to get a break for another hour or 2. (Tr. 87; 90.) Schultz testified that things "kind of escalated from there." (Tr. 87.) Schultz recalled that employees started cursing,[7] but "not in a threatening fashion." (Tr. 87.) Schultz acknowledged using obscenities toward Clark during this confrontation, but he could not recall what he actually said. Schultz also could not recall who else used obscenities, or what they said. Schultz could only recall that obscenities were said, including by Clark. (Tr. 100.)

Shortly thereafter, Clark got into his truck and made a telephone call. The windows were up, so Schultz could not hear the conversation. (Tr. 76.) About 2 minutes later, Clark got out of his truck and informed the employees that they could go take their lunchbreak, and then return to work. Schultz and the other employees then went to lunch.[8] Schultz believed he and the others took their lunchbreak at Respondent's office/facility. (Tr. 99.) Following their 30-minute lunchbreak, they all returned to work out in the rail yard. (Tr. 77–78.)

About 45 minutes later, two people came out in a truck to where the men were working. Schultz recalled that one of them was an individual by the name of Zach, but he could not recall who the second person was. (Tr. 91.) The two men took Schultz back to Respondent's office. Schultz met with Schanfish. Schanfish told Schultz that his services were no longer needed, and that they were ending his employment. Schultz asked why. Schanfish responded that if Schultz wanted answers, he would need to contact Albert DeLeon. (Tr. 92.) Schultz never received any further explanation, and never received anything in writing, for why he was being discharged. Schultz never contacted DeLeon for an explanation.

3. Clark's version of events

On the day in question, Clark assigned Schultz to work with the other laborers prepping the railcars, rather than the supply buggy. Later, Schultz was out in the yard, opening the doors to the railcars, near where Schultz and others were working. From where Clark was standing,

[7] Schultz testified employees frequently cursed in the rail yard, stating "[i]t was all day every day." (Tr. 80.) He explained that a majority of the employees were friends outside of work, so it was "just a bunch of friends hanging out" at work, but he stated that the cursing "wasn't insulting or in an insulting manner towards anybody …" (Tr. 80–81.) Steven Ostenson, the former supervisor, testified that employees cursed while speaking out in the rail yard, but he does not recall an employee directing profanity or obscenities at another person while he worked for Respondent. (Tr. 110.)

[8] Employees are supposed to sign out and in for their lunchbreak. On the day in question, Schultz could not recall if he signed out and in for his lunchbreak, but he believed he did not. He also did not know if any of the other employees signed out or in for their lunchbreak that day. (Tr. 99–100.) No documentation was introduced as to whether any of the employees signed out or in for lunch on this day.

he could overhear Schultz talking to the other employees, trying to "rowdy up the team." (Tr. 165.) There were four employees present—two on the A deck of the railcar, and two on the B deck of the railcar. From what Clark observed, Schultz was "just walking along, taking a very slow pace, complaining about the weather, because it was rainy and kind of cold." (Tr. 171.) Schultz "was trying to get everybody in an uproar" and was "really just fussing about working out there and being on the train, versus being in a buggy." Schultz also "was making comments loud enough for everybody to hear him, to get everybody to come and stand around him to listen, which was stopping people from doing their job." (Tr. 174–175.)

Since it was not breaktime, Clark climbed up on to the railcar and asked Schultz if he could "refrain from making those comments and just continue to work." (Tr. 165.) At that point, Schultz "confronted" Clark, yelling, cussing, and calling Clark out by his name. Schultz yelled, "fuck this shit!" and "fuck you and fuck this job!" Clark testified Schultz also called him a "fat fucker" and a "fucking nigger."[9] Clark did not respond. He, instead, radioed in to Ryan Schanfish, told him what had occurred, and asked him to come out and remove Schultz.

Thereafter, Schanfish and another individual, Zach, a trainer from Texas, came out in a pickup truck to get Schultz. When Schanfish and Zach arrived, Schultz continued to yell and use profanity. Schanfish and Zach took Schultz back with them to the office. Clark did not go with them, but he later learned that Schultz had been terminated.[10]

V. CREDIBILITY

Clark and Schultz were the only witnesses who testified about this critical confrontation out in the rail yard and, as explained above, they offered very different versions of what was said.[11] Therefore, as the trier of fact, I must decide whose testimony was more credible.

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[9] When called as a rebuttal witness, Schultz denied making either of these statements.

[10] On November 16, 2016, Clark signed an affidavit regarding the events of January 8, 2016. (G C Exh. 8.) Clark's affidavit states, in relevant part, that:

> ….
> 3. On January 8, 2016, I directed Schultz to "pre-trip" rail equipment awaiting loading. This was a task Schultz is expected to undertake in his capacity as a Prepper.
> 4. Schultz refused to comply with my instructions, yelling "Fuck this shit!" and telling me, "Fuck you and fuck this job!" Schultz refused to follow subsequent instructions.
> 5. I asked my supervisor, Ryan Schanfish, to remove Schultz from the site. Mr. Schanfish approached and Schultz continued cursing and yelling at both me and Mr. Schanfish. Mr. Schanfish took Schultz to his office, where he continued arguing and refused to do his assigned work. At no time did Schultz involve anyone else in the discussion, nor did he talk about anyone else's job, the working conditions, or anything else other than refusing to work his assignment.
> …..

(GC Exh. 8.)

[11] There were at least four other employees present for this confrontation, but none were called to testify. Although either party could have called these witnesses, the General Counsel has the ultimate burden of proof regarding the allegations, and this was a critical confrontation in proving whether Schultz was discharged in violation of Sec. 8(a)(1) of the Act. Although the Board has held an adverse inference cannot be drawn based upon the failure to call a neutral employee witness, the failure to call a potentially corroborating witness may be considered in deciding credibility and, in certain circumstances, in determining whether a violation has been established. See *Port Printing Ad & Specialties*, 344 NLRB 354, 357 fn. 9 (2005); *C&S Distributors*, 321 NLRB 404 fn. 2 (1996); and *Queen of The Valley Hospital*, 316 NLRB 721 fn. 1 (1995). As stated below, I have several concerns regarding the veracity of Schultz'

Credibility determinations may rely on a variety of factors, including the content of the witness' testimony, the weight of the evidence, established or admitted facts, the impact of bias on the witness' testimony, the detail and specificity of the witness' recollection, testimonial consistency, the presence or absence of corroboration, the witness' demeanor while testifying, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction/ Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997), cert. denied 522 U.S. 948 (1997). Credibility findings need not be all-or-nothing propositions, and it is common for the finder of fact to credit some, but not all, of a witness' testimony. *Daikichi Sushi*, supra at 622.

After carefully considering the record, I credit Clark over Schultz regarding the contents and context of their January 8 confrontation.[12] At the hearing, Clark testified in a confident, candid, and largely credible manner. His overall recollection of events was fuller and more inherently probable and logical. That being said, I do not credit his testimony that Schultz called him a "fucking nigger" during this confrontation. Clark was Respondent's only witness, and when he testified about this statement at the hearing, everyone present in the hearing room was visibly surprised, including Respondent's attorney. None of the other witnesses who testified

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testimony, and the General Counsel's failure to call any of these other witnesses means his dubious testimony is unsupported.

[12] The General Counsel also called Steve Ostenson, Albert DeLeon, and Ryan Schanfish. I found Ostenson to be a credible witness who did his best to testify based upon his recollection. However, because he worked for Respondent for around 2 months before quitting, and was not employed at the time of the January 8 confrontation, he provided minimally relevant testimony. He had a general, vague recollection of Schultz being a good employee, but offered no specifics. Additionally, he testified about the duties and responsibilities of the lead person position, but he did so based upon his personal experiences when he was Respondent's location supervisor and Adam Gamblin was the lead person. Ostenson testified that he and Gamblin were very familiar and developed a trust with one another because they worked together at Road & Rail Services for a year before coming to work for Respondent. Schanfish and Clark, on the other hand, worked together as location supervisor and lead person for a week before the January 8 confrontation. Based on these key differences, I find that Ostenson's opinion regarding the role and authority of the lead person does not necessarily apply to Clark when he assumed the lead man position.

I also found DeLeon to be a largely credible witness who made a sincere effort to answer questions fully and honestly. But because he primarily works in Dallas, Texas, he had limited first-hand knowledge of the day-to-day occurrences at the Belvidere facility. His testimony about the critical events, including Schultz' performance, the events of January 8, and why Schultz was discharged, was based on reports he received from Schanfish. As a result, I have given his testimony limited weight.

Schanfish, in contrast, could not recall the critical events of January 8. It was unclear if this was due to a sincere lack of memory or discomfort in having to testify against his former employer. For example, Schanfish knew that Schultz was terminated, but he could not recall why. (Tr. 136-137.) He recalled having a conversation with Clark on the day in question, but he could not recall what was discussed. He also could not recall if Clark called and asked him to come out and remove Schultz. (Tr. 137–138.) He could not recall if he spoke at all to Schultz on the day of his termination. (Tr. 138.) He also could not recall if anyone directed profanity at him, or if Schultz refused a work assignment. (Tr. 138.) Schanfish, however, did recall (after reviewing a prior statement he had given to Respondent) that Schultz was an employee that "did as little as possible." He also recalled (after reviewing his prior statement) that when Schultz was assigned to actually prep railcars, he would argue that he needed to stay on the supply buggy. (Tr. 141–142.) Schanfish also confirmed from his statement that Schultz and several other employees had lied during an investigation about how a company vehicle had been damaged while employees were engaged in horseplay.

before Clark, including DeLeon, testified that this statement was made during the confrontation. I believe that if this statement had been made at the time, DeLeon would have learned about it, and he would have discussed it during his testimony. Additionally, as referenced above, Clark provided an affidavit to Respondent on November 16, 2016, regarding Schultz and what transpired on the day in question. There is no reference in the affidavit of Schultz calling him a "fat fucker" or a "fucking nigger." At the hearing, Clark testified he reported the statements to Schanfish when he called and asked him to come out and remove Schultz,[13] and Clark later discussed the statement with some unidentified individual in Respondent's human resources department, but he requested that no further action be taken based on Schultz' use of that racial epithet. The reasons Clark gave for this were because (1) he did not want any sympathy for having those words directed at him, and (2) in his opinion, Schultz' yelling and cussing at him for telling Schultz to do his job, and Schultz' refusal to return to work when directed to do so, were enough to warrant discharge. Assuming both were true, that does not explain why Clark failed to mention these alleged statements in the affidavit he gave Respondent 10 months after Schultz' discharge, presumably as part of the company's response to Schultz' August and October 2016 unfair labor practice charges. I find it highly implausible that if the statements were actually made on January 8, and Clark reported them to management, Respondent would not have addressed them in Clark's affidavit, or raised them earlier in the hearing.

And while I don't credit Clark's recollection that Schultz called him a "fucking nigger" during the January 8 confrontation, I credit the rest of his testimony.

In contrast, I do not credit Schultz because, in general, he did not strike me as being a completely honest and forthright witness. To begin with, his testimony, at times, seemed contrived, self-serving, and calculated to neatly fall within the parameters of what the law requires. An example of this was when he described what led up to the confrontation with Clark. Schultz stated there was a "general conversation between me and the other employees about getting hungry" and "me and the other gentlemen had discussed, you know, what everybody was going to do for lunch and what our plans were for that day." (Tr. 74.) He then said, "So we called on the two-way radio back in the office for either Ken or Ryan to let them know that we would like to take a break." (Tr. 74.) When Clark arrived, Schultz told Clark, "We're cold, fatigued from working in the weather, and we would all like to at least go back for . . . 15 minutes, grab a cup of coffee, hot cocoa or something, just to warm up and kind of refresh ourselves a little bit because it was inclement weather." (Tr. 75.) This testimony, which I do not credit, struck me as an exaggerated effort by Schultz to portray his actions as concerted, as opposed to personal griping.

Also, Schultz omitted, minimized, or feigned ignorance of key events that caused me to question his veracity. A notable example of this was over his use of obscenities toward Clark during the confrontation. On direct examination, Schultz went through his version of events, never mentioning that he directed obscenities at Clark. It was not until cross-examination that Schultz reluctantly admitted to doing so. And even then, his responses were vague, evasive, or nonresponsive. Initially, Schultz stated he and the other employees "started to get a little

[13] On direct examination, Schanfish could not recall the contents of his conversation with Clark. He was later recalled as a rebuttal witness by the General Counsel, and he testified that he recalled a situation in which an employee called Clark a "fucking nigger" but he did not recall it being Schultz. Schanfish recalled that it happened when an employee was sent home for the day, and the employee blew up, started cussing, and punching things. On his way out, the employee called Clark a "fucking nigger." Schanfish could not recall if the employee was terminated for that incident. (Tr. 182.)

irritated" when Clark denied the request for a break, and that things "kind of escalated from there." When asked to explain, Schultz stated that employees started cursing, but "not in a threatening fashion." When asked if he directed obscenities at Clark, Schultz acknowledged that he did, but he never testified as to what he actually said. When asked whether he said "fuck this, or fuck you, or fuck this job" to Clark, Schultz replied, "Specifically towards him, no." When asked if he said that to anybody, Schultz said, "I say the F word countless times per day. Not once have I ever said F this job or specifically directed towards him in a demeaning fashion or any fashion for this matter." (Tr. 88.) Then, when asked if he ever said that, Schultz said that he did not. (Tr. 88–89.) Schultz was then asked that, if obscenities were used in the course of the confrontation, who was using them? Schultz' response was, "There was multiple people standing around me. I could not tell you who said what, what was being said. There was a lot of obscenities being said. And to pinpoint exactly who was doing it, I don't know." (Tr. 89.)[14] But later, on redirect examination, the General Counsel directly asked Schultz if Clark had used obscenities during this confrontation, and Schultz responded that Clark had, but Schultz never testified as to what Clark allegedly said. I find that Schultz' inability or unwillingness to testify about this critical aspect of the confrontation significantly undermines his overall credibility.

Another example was Schultz' recollection (or lack thereof) regarding who the individuals were that came out to the rail yard to remove him and bring him back to the office following his confrontation with Clark. As previously stated, I credit that the two individuals were Schanfish and a trainer named Zach. During his testimony, Schultz confirmed that there were two people, and one of them was Zach, but he did not recognize who the other person was. (Tr. 91–92.) Yet, Schultz testified that he knew who Schanfish was, and that Schanfish was the person who told him that he was being discharged. I, therefore, do not credit Schultz' testimony that he could not recall that Schanfish was the other person involved. I think it is more likely that, similar to his recollection regarding the use of obscenities during the confrontation with Clark, Schultz was attempting to minimize his confrontation with Clark by omitting the fact that it resulted in the highest-ranking management official coming out and removing him.

I further discredit Schultz based upon some inconsistencies in his testimony. For example, Schultz testified he (and other employees) began using obscenities because he and the other employees were frustrated and reacted based on the amount of work they thought they would need to complete before they could take a break. On this point, Schultz initially estimated that there were 80-100 railcars that needed to be prepped that day, and that they were about half-way done at the time. (Tr. 84-85.) Later, when asked again, Schultz estimated that there were 80–120 cars that needed to be prepped that day. (Tr. 98.)[15] As for how long this would take, Schultz initially estimated it would take between 1 and 1 1/2 hours. (Tr. 75.) But later, he estimated it could have taken "up to two hours or longer" to complete. (Tr. 99.)

I also discredit Schultz because I find his version of events to be inherently improbable. Schultz testified that after the employees got irritated and began using obscenities, Clark

[14] As previously stated, Schultz testified the employees he worked with were "just a bunch of friends hanging out." (Tr. 80–81.) Yet, when Schultz testified about the events at issue, he never identified any of the other employees by name, first or last. When asked who else used obscenities during the confrontation, Schultz could not name a single person, or what was said. I find Schultz' failure to identify a single employee by name, or what anyone else said, as further undermining his credibility.

[15] On the other hand, Clark estimated that there were around 60 cars on the line that day. He stated the line could only hold 63 cars, and the line of cars that day did not go all the way to the end. (Tr. 165.) To the extent that this is relevant, I credit Clark's testimony regarding the number of cars on the line.

inexplicably reversed course, went to his truck to call the office, and then came out to tell the employees they could take their requested lunchbreak. After watching Clark testify, I do not credit that he would have responded this way. Clark is a larger man (appeared to be over 6 feet tall and weighed close to 300 pounds) who does not strike me as being easily intimidated, or as someone that would have responded to having obscenities directed at him by then going out of his way to call the office to get Schultz and the others permission to take their lunchbreak. I also do not credit that Respondent, after learning of Schultz' insubordinate conduct and obscene statements to Clark, would have allowed Schultz to return to the facility where Schanfish's office was located for a 30-minute lunchbreak, and then allowed him return to work for another 45 minutes, before removing and discharging him.

Therefore, based on the credible evidence, I find that on the day in question Clark assigned Schultz to do prep work out in the railcars, as opposed to operating the supply buggy. Schultz was upset about his assignment, particularly since it was a cold and rainy day. When Schultz was out in the rail yard, he worked slowly and began walking around and complaining loudly to the others about the weather conditions, and his complaining caused the others to stop working. Clark was nearby and he saw and overheard Schultz, and he noticed the others had stopped working to listen to Schultz complain. Because the employees were not on break, Clark climbed onto the railcar and told Schultz to stop complaining and to return to work. Schultz refused and began yelling and swearing at Clark, saying "fuck this shit" and "fuck you and fuck this job." I do not credit that any other employee directed obscenities or insults at Clark. Clark then radioed in to Schanfish, told him what had occurred, and asked him to come out and remove Schultz. When Schanfish came out, Schultz continued to yell and swear. Schanfish and the other individual (Zach) then took Schultz back to the office and informed him that he was being discharged.

VI. ANALYSIS

1. Was Clark a supervisor and/or agent within Section 2(11) and (13) of the Act?

A. Supervisory Status

The General Counsel contends that Kenyada Clark is a statutory supervisor and agent within the meanings of Section 2(11) and (13) of the Act. Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, provided that exercise of that authority is done with "independent judgment" on behalf of management and not in a routine manner. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). The evidence must establish that: (1) that the purported supervisor has the authority to engage in any one of the twelve enumerated supervisory functions; (2) that their "exercise of such authority is not merely routine or clerical nature, but requires the use of independent judgment;" and (3) that their authority is exercised "in the interest of the employer." *NLRB v. Kentucky River Community*

Care, supra at 710–713. See also *Oakwood Healthcare*, 348 NLRB 686 (2006). The authority to effectively recommend generally means that "the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Children's Farm Home*, 324 NLRB 61, 61 (1997). To exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare*, supra at 692-693. A "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. at 693.

The party asserting supervisory status has the burden of proof. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. at 713. Although Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise, the evidence still nevertheless must suffice to show that such authority actually exists. *Mountaineer Park, Inc*., 343 NLRB 1473, 1474 (2004). "[W]henever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Likewise, mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). In addition, any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

The General Counsel contends that Clark had the authority to discharge or effectively recommend discharge, as evidenced by his role in the decision to discharge Schultz. However, I find that Clark's involvement in Schultz' discharge was not as a supervisor, but as a witness to and the target of Schultz' insubordinate conduct and profane statements. Clark reported what occurred to Schanfish, and Schanfish, in turn, reported it to DeLeon, who made the decision to terminate Schultz based on Schanfish's reports.

The General Counsel also argues that Clark could effectively recommend discipline. However, I find there was no specific evidence of this authority, that involved the use of independent judgment, or that Respondent accepted Clark's recommendations, if any, without further investigation.

The General Counsel makes similar arguments regarding Clark's authority to effectively recommend hiring of employees. The record reflects that Clark sat in on interviews with Schanfish, and that he later participated in conversations with Schanfish and DeLeon about hiring, but there is no evidence as to what his actual role or involvement was in those decisions. Schanfish had the authority to hire or effectively recommend hiring. He was involved in all the interviews and hiring decisions, and there is no evidence that DeLeon made a hiring decision based on Clark's recommendation, as opposed to Schanfish's recommendation. There also is no evidence that DeLeon relied upon Clark's recommendations.

The General Counsel also argues that Clark possessed the authority to adjust or effectively recommend adjustment of grievances, as evidenced by his role in getting the employees permission to take their lunchbreak on January 8. However, as I do not credit Schultz' version of events that day, I do not credit Clark exercised any authority to adjust or effectively recommend adjustment of grievances related to lunchbreaks. Clark's testimony is that he talks with the employees as to when they want to take lunch in relation to the work that needs to be completed, and he does what they want to do. Plus, on the day in question, if I was

to credit Schultz' version of events, Clark called Schanfish about the employees taking their lunch break, but it is not clear what, if anything, he recommended. In short, I find no specific evidence Clark possessed this authority or that it involved the use of independent judgment.

The General Counsel further argues that Clark had the supervisory authority to make assignments because he handled the daily job assignments, and he could move employees around to different jobs. In *Oakwood Healthcare, Inc*., 348 NLRB at 689, the Board held that with regard to the meaning of the term "assign" in Section 2(11) of the Act:

> [W]e construe the term "assign" to refer to the act of designating an employee to a place (such as a location, department, or wing) appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g. restocking shelves) would generally qualify as "assign" within our construction.

The Board has held that ad hoc instructions to perform discrete tasks are not assignments, and that the assignment of work must be issued with independent judgment. *Entergy Mississippi, Inc.*, 357 NLRB, 2150, 2157 (2011).

The General Counsel failed to meet its burden regarding Clark's authority in making assignments. The evidence in this case shows that the pretrip laborers' work is relatively simple, routine, and repetitive in nature. The record fails to establish that the assignment of these routine tasks, which did not change from day to day, involved the use of independent judgment.

Similarly, I do not find that Clark had the authority to responsibly direct. In *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006), the Board summarized the definitions of "responsibly to direct" as follows:

> The authority "responsibly to direct" is "not limited to department heads," but instead arises "[i]f a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' . . . provided that the direction is both 'responsible,' . . . and carried out with independent judgment." "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly." "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take the steps." (Internal citations omitted).

As mentioned above, the Board considers a person to be responsible for the direction of other employees' work when that person performs the oversight of the work and is held accountable for the performance of the work of others. That putative supervisor must be empowered to take corrective action and suffer the risk of adverse consequences for the deficiencies of others. *Oakwood Healthcare*, supra. In addition, simply requesting that

employees take certain action is insufficient to establish responsible direction of work. *Golden Crest Healthcare Center*, supra at 734.

In this case, the evidence is insufficient to establish that Clark exercised independent judgment in directing employees. Although Clark was responsible for making sure everybody was doing what they were supposed to be doing in accordance with the company's standards, the record is devoid of evidence reflecting that Respondent held Clark accountable for the performance of others, or that it independently empowered Clark to take corrective action with regard to their work that may be unsatisfactory. This is evidenced by that fact that Clark contacted Schanfish on January 8 to ask him to come and remove Schultz, as opposed to Clark taking those actions himself.

Finally, the General Counsel points to secondary indicia to support the argument that Clark is a supervisor, citing to his higher pay rate, his involvement in the morning meetings, his role of assigning daily tasks, his role in handling requests for breaks, etc. While secondary indicia can be a factor in establishing statutory supervisory status, it is well established that where, as here, putative supervisor is not shown to possess any of the primary supervisory indicia, secondary indicia are insufficient to establish supervisory status. *Golden Crest Healthcare Center*, supra at 730 fn. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).[16]

B. Agency Status

Alternatively, the General Counsel asserts that, pursuant to Section 2(13) of the Act, Clark is an agent because Respondent placed him in the position of the lead person, in which employees would reasonably understand him to have authority to speak on behalf of Respondent. The Board applies common law principles of agency when it examines whether an employee is an agent of the employer if she/he makes a particular statement or takes a particular action. *Pan-Oston Co.*, 336 NLRB 305 (2001). Under these common law principles, the Board may find agency based on either actual or apparent authority. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp*., 315 NLRB 725 (1994); *Alliance Rubber Co.*, 286 NLRB 645, 646 (1987). The test then is whether, under all the circumstances, employees ""would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426–427 (1987); *Einhorn Enterprises*, 279 NLRB 576 (1986). The position and duties of the employee alleged to be an agent are relevant in determining agency status. Thus, it is well settled that an employer may have an employee's statement attributed to it if the employee is "held out as a conduit for transmitting information [from management] to the other employees." *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994); *Hausner Hard-Chrome of Kentucky*, *Inc.,* 326 NLRB 426, 428 (1998). The Board also considers whether the alleged agent's statements or conduct were consistent with those of the employer. *D&F Industries, Inc.*, 339 NLRB 618, 619–620 (2003). The burden is on the party

[16] The General Counsel cites to Clark's affidavit in which he identified himself as a supervisor with certain authority. It is well settled, however, that an individual cannot be transformed into a supervisor "by the vesting of a title and the theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act." *Lakeview Health Center*, 308 NLRB 75, 78 (1992). While Clark may possess supervisory authority, I find the General Counsel has failed to meet its burden of presenting sufficient evidence to prove it.

asserting agency status to prove such status, by offering specific evidence. See *Pan-Oston Co.*, supra.

Based upon the evidence, I find Respondent held Clark out as a conduit and as someone who had certain day-to-day authority to act on behalf of Respondent in his dealings with other employees. For example, while it may not be sufficient to confer supervisory status, I find that Clark acted with authority when he communicated to employees their day-to-day job assignments during the morning meetings. Additionally, while there is no evidence that he was held accountable for their performance, I find that Clark acted on behalf of management when he monitored employees to see if they were performing in accordance with the company's standards. And, as stated below, it was Clark's monitoring of employees on behalf of management that led to the January 8 confrontation with Schultz.

2. Was Schultz engaged in protected, concerted activity, and did he lose the protection of the Act based on his statements and conduct, during his confrontation with Clark out in the rail yard?

A. Protected concerted activity

Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." Rights guaranteed by Section 7 include the right to engage in "concerted activities for the purpose . . . of mutual aid or protection." To be concerted, employee activity must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 493, 497 (1984). Concerted activity includes individual activity that seeks to initiate or to induce or to prepare for group action, as well as individual employees bringing group complaints to the attention of management. *Meyers Industries*, 281 NLRB 882 (1986). Employees do not have to accept the individual's call for group action before the invitation itself is considered concerted. *Cibao Meat Products*, 338 NLRB 934 (2003); *Whittaker Corp.*, 289 NLRB 933, 934 (1988); *El Gran Combo*, 284 NLRB 1115 (1987). "[C]oncertedness . . . can be established even though the individual [speaking] was not 'specifically authorized'. . . to act as a group spokesperson for group complaints." *Herbert F. Darling, Inc.*, 287 NLRB 1356, 1360 (1988). In *Phoenix Processor Limited Partnership*, 348 NLRB 28, 46 (2006), petition for review denied sub nom. *Cornelio v. NLRB*, 276 Fed. Appx. 608 (9th Cir. 2008), cert. denied 555 U.S. 994 (2008), the Board affirmed the judge's conclusion that "griping about a purely personal concern is not ordinarily considered action undertaken for mutual aid or protection," but "voicing concerns that pertain to working conditions affecting other employees as well as the complaining worker is protected by Section 7 of the Act."

In applying this standard, I find that Schultz was engaged in protected, concerted activity. Even though Schultz was the only one Clark heard complaining about the weather, and while it may have been in the context of his personal griping about having to work outside on the railcar rather than on the supply buggy, Schultz was, using Clark's phrases, "was trying to get everybody in an uproar" and trying to "rowdy up the team" by walking around talking to them about his complaints about the weather.

B. *Atlantic Steel* Framework

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(1) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980),

enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's protected activity. The elements commonly required to support such a showing are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove that it would have taken the same action even in the absence of the employee's protected activity.

However, the *Wright Line* standard does not apply where, as here, there is no dispute that the employer took action against the employee for conduct that occurred while the employee was engaged in protected activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed.Appx. 524 (D.C. Cir. 2003). When an employee is disciplined or discharged for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious or opprobrious to remove it from the protection of the Act. *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006). Employees are permitted some leeway for impulsive behavior when engaged in protected activity, but this leeway is balanced against "an employer's right to maintain order and respect." *Piper Realty*, 313 NLRB 1289, 1290 (1994); *Tampa Tribune*, 351 NLRB 1324, 1325–1326 (2007), enf. denied 560 F.3d 181 (4th Cir. 2009). To determine whether an employee loses the Act's protection based upon the nature of his/her outburst during a face-to-face confrontation with a supervisor or member of management,[17] the Board balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Atlantic Steel Co*., 245 NLRB 814 (1979). See also *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. 4 (2014); *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), enfd. in part 664 F.3d 286 (9th Cir. 2011), decision on remand 360 NLRB 972 (2014).[18]

The Board recognizes that the first factor—the location where the outburst occurs—is very significant in balancing the employee's right to engage in prtoected activity "against the employer's right to maintain order and discipline" in the workplace. *Plaza Auto Center, Inc.*, 360 NLRB at 978. An employer's interest in maintaining order and discipline is affected less by a private outburst in an area away from other employees than an outburst on the work area that is witnessed by other employees. Id. See also *Kiewit Power Constructors*, 355 NLRB 708 (2010). Accordingly, the Board has "regularly observed a distinction between outbursts under circumstances where there was little if any risk that other employees heard the obscenities and those where that risk was high." Id. citing to *Starbucks Coffee Co.*, 354 NLRB 876, 878 (2009), reaffirmed and incorporated by reference, 355 NLRB 636 (2010), enfd. in relevant part, 679 F.3d 70 (2nd Cir. 2012), decision on remand 360 NLRB 1168 (2014); *and Media General Operations, Inc. v. NLRB*, 560 F.3d 181, 187 (4th Cir. 2009) ("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.").

[17] The *Atlantic Steel* framework is applied to face-to-face confrontations with supervisors or members of management, which I find includes a confrontation with a statutory agent who is acting on behalf of management at the time of the confrontation or outburst.

[18] The Board applies a different standard—a totality of circumstances test—in cases addressing off-duty, offsite communications with other employees or third parties using social media. *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014*); Pier Sixty, LLC*, 362 NLRB No. 59 (2015).

I find the location of the outburst in this case weighs against protection. Schultz' outburst occurred in the work area, in the presence of more than a quarter of Respondent's workforce that Schultz had stopped from working at the time.

I find the second factor—the subject matter of the discussion—weighs in favor of protection. Schultz was upset because he was assigned to work out in the rain and cold, and he complained about this to his coworkers, "trying to get everybody in an uproar" and trying to "rowdy" them up. Although Clark was never asked what, if anything, he believed Schultz was trying to rowdy the other employees up to do, I find that Clark overheard enough of the conversation to infer that Schultz wanted to get out from the rain and cold. Even though Schultz and the other pretrip laborers were expected to work outside in the elements, Schultz' raising issues about the weather and working outside relates to working conditions, and, therefore, is a subject matter that favors protection.

I find the third factor—the nature of the outburst—weighs against protection. In assessing whether an employee's protected, concerted activity loses the protection of the Act, the Board has found that a line "is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Prescott Industrial Products Co.*, 205 NLRB 51, 51–52 (1973). The nature of the outburst must be examined in the context in which it occurred. As previously stated, the events at issue arose after Clark did not give Schultz his preferred job assignment, and Schultz was upset, particularly because it meant he would have to work with the other laborers out in the cold and rain. Schultz, who had a history of performance issues (albeit not disciplined) when assigned to prep the railcars, worked slowly and complained loudly to the others about the rain and cold, causing the others to stop working to listen to him. When Clark told him to stop complaining and return to work, Schultz refused and began yelling and directing profanity at Clark in front of the other employees, saying "fuck this shit" and "fuck you and fuck this job."

The General Counsel argues that Schultz' use of profanity did not cause him to lose the protection of the Act, because profanity was common in the rail yard. This overstates the evidence. The evidence is that profanity was used in the rail yard, but it was not directed at another individual. Schultz, in fact, testified that profanity was not used "in an insulting manner towards anybody." As a result, I find that it was uncommon for employees to direct profanity at another individual, let alone a member of management. See *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005) (although outburst was fairly brief, employee lost protection when he uttered profanity more than once, and although profanity was common at the plant, there was no evidence that profanity was commonly targeted at management). See also *Wal-Mart Stores, Inc.*, 341 NLRB 796, 807–808 (2004) (employee retained the protection of Act where employee used profanity to describe the employer's policy and its effects rather than to describe a member of management), enfd. 137 Fed.Appx. 360 (D.C. Cir. 2005); *Tampa Tribune*, 351 NLRB at 1326 (referring to vice president as a "stupid fucking moron" weighs "only moderately" against protection in part because employee did not say it to his face); *Stanford Hotel*, 344 NLRB 558 (2005) (nature of outburst not protected when employee called supervisor a liar and a bitch and loudly called him a "fucking son of a bitch"); and *Atlantic Steel Co.*, 245 NLRB at 817 (Board deferred to the arbitrator's finding that employee had lost protection of the Act when he "reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated.") Cf. *Plaza Auto Center, Inc.*, 360 NLRB 378–379 (Board, on remand, found the nature of an employee's outburst when he called supervisor a "fucking mother fucking," a "fucking crook," and an "asshole" weighed against protection, but found violation because three

remaining factors weighed in favor of protection). Additionally, I find that the incident involved more than a single, momentary outburst of profanity, because Schultz continued to yell and use profanity after Schanfish and the trainer drove out to remove Schultz from the jobsite. Overall, I find the combination of Schultz' insubordinate refusal to return to work and his yelling and use of profanity toward Clark, in front of other employees, as well as his continued yelling and use of profanity when Schanfish arrived, was conduct of such a character as to render him unfit for further service.

As for the fourth factor, I find Schultz' misconduct was not provoked by any unfair labor practice, and, therefore, does not weigh in favor of protection. *Tampa Tribune*, 351 NLRB at 1325, citing *Verizon Wireless*, 349 NLRB 640 (2007) (outburst provoked by statements or conduct not deemed unlawful weigh against retaining the Act's protection).

Overall, in applying the *Atlantic Steel* factors, I find that while Schultz may have been engaged in protected, concerted activity when he complained to other employees about working out in the rain and cold, he lost the protection of the Act by his insubordinate conduct and profane statements directed at members of management, in the work area, in the presence of other employees.

CONCLUSIONS OF LAW

The General Counsel has not proved by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint.

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

ORDER

The complaint is dismissed in its entirety.[19]

Dated, Washington, D.C. April 28, 2017.

Andrew S. Gollin
Administrative Law Judge

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