Lion Elastomers LLC *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 228. Cases16–CA–190681, 16–CA–203509, and 16–CA–225153

September 23, 2026

SECOND SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN MURPHY AND MEMBERS PROUTY, MAYER, AND MACY

This case is back before the Board on remand from the United States Court of Appeals for the Fifth Circuit for the second time. In 2021, the Fifth Circuit granted the National Labor Relations Board's unopposed motion to remand the original Decision and Order in this proceeding, reported at 369 NLRB No. 88 (2020) (*Lion Elastomers I*), to the Board to determine whether the newly-announced legal standard set forth in *General Motors LLC*, 369 NLRB No. 127 (2020), affected the Board's analysis in this case. On remand, the Board, in a Supplemental Decision and Order, reported at 372 NLRB No. 83 (2023) (*Lion Elastomers II*), overruled *General Motors*, announced that it would return to the Board's prior setting-specific standards aimed at deciding whether an employee has lost the protection of the National Labor Relations Act, and reaffirmed its findings in *Lion Elastomers I* that the Respondent violated the Act by threatening, disciplining, and discharging employee Joseph Colone.[1] On review, the Fifth Circuit found that the Board could not have overruled *General Motors* in this case and accordingly vacated the Board's overruling of *General Motors*. First, the court concluded that the Board exceeded the scope of its initial remand by failing to apply *General Motors* to the facts of this case. Second, the court concluded that the Board had violated the Respondent's due-process rights by overturning *General Motors* without providing the Respondent an opportunity to be heard on the issue. Accordingly, the court vacated *Lion Elastomers II* and remanded the case "for the Board to apply *General Motors* to this case." *Lion Elastomers, LLC, v. NLRB*, 108 F.4th 252, 262 (5th Cir. 2024).

In light of the court's holding, the change in law set forth in *Lion Elastomers II* did not survive judicial vacatur. Put another way, we find it impossible to reconcile the court's finding that the Board's attempt to overrule *General Motors* in *Lion Elastomers II* was invalid because it was beyond the scope of the court's remand with any argument that *General Motors* remains overruled.

Our dissenting colleague makes many contentions about what is being done in this decision, and we will address those contentions in more detail below. But it is important to note two fundamental points. To begin, we are not invalidating the change of law that the Board attempted in *Lion Elastomers II*; the Fifth Circuit's decision did that.[2] And second, as we will explain, based on the unique and particular circumstances of this case, recognition of the legal effect of the Fifth Circuit's decision presents no threat whatsoever to the tradition of nonacquiescence, which we view as established Board policy.

Procedural History

On May 29, 2020, the Board issued *Lion Elastomers I*, finding, in agreement with the judge, that the Respondent violated the Act by certain actions taken with regard to employee Colone. To begin, the Board found that the Respondent violated Section 8(a)(1) by threatening employee Joseph Colone with discharge when, during a grievance meeting on October 24, 2016, the Respondent's production manager, James Mosley, pointed his finger at Colone and said: "You ain't gonna make it." *Lion Elastomers I*, above, slip op. at 1 fn. 3. Next, the Board found that the Respondent violated Section 8(a)(3) and (1) by disciplining Colone on July 20, 2017, for engaging in protected union activity at a July 12, 2017 safety meeting.[3] The Board rejected the Respondent's defense that Colone lost the Act's protection by his conduct at the safety meeting under the four-factor balancing test articulated in *Atlantic*

[1] Although this decision will presumably be cited as *Lion Elastomers III* in order to differentiate it from the other Board decisions that have issued, it should not be forgotten that these successive proceedings involve *one* case before the Board.

[2] It is worth noting that the majority in *Lion Elastomers II*, which included our dissenting colleague, was on notice that using this case to overrule *General Motors* was taking a risk. The dissent of then-Member Kaplan expressly warned the majority that the change of law was unlikely to survive judicial review both because it was beyond the scope of the court's remand and because it violated the Respondent's due process rights. See *Lion Elastomers II*, 372 NLRB No. 83, slip op. at 19–20 & fn. 11 (Member Kaplan, dissenting). Nevertheless, the Board majority chose to use this case as the vehicle for overruling *General Motors* at its peril.

It is also worth noting that the same Board that issued *Lion Elastomers II* could have sought en banc review of the court's decision but did not do so.

[3] In this regard, the Board found it unnecessary to pass on whether Colone engaged in protected concerted activity at the safety meeting and instead found, consistent with the complaint allegation, that Colone engaged in protected union activity when, in his capacity as a union representative, he raised concerns about employees' working conditions at the safety meeting.

Steel, 245 NLRB 814 (1979).[4] Finally, the Board found that the Respondent violated Section 8(a)(3) and (1) by discharging Colone on June 8, 2018, for engaging in union activity. In so doing, the Board adopted the judge's findings that Colone's activity of filing and pursuing grievances constituted protected Section 7 activity and that Colone did not lose the Act's protection by engaging in such activity. Further, the Board adopted the judge's findings that it was unnecessary to analyze the discharge allegation under the burden-shifting framework set forth in *Wright Line*[5] but further found that, even assuming *Wright Line* applied, the discharge was still unlawful because the General Counsel met her initial burden of establishing that Colone's grievance-filing activity was a motivating factor in the Respondent's discharge of him and the Respondent did not meet its rebuttal burden of showing it that it would have discharged Colone even absent his protected activity.[6]

The Respondent filed a petition for review of the Board's Order with the Fifth Circuit, and the Board filed a cross-application for enforcement. While the case was pending before the court, however, the Board issued *General Motors*. *General Motors* overruled a series of Board decisions that established setting-specific standards to be used by the Board in determining whether employers lawfully took adverse action against employees engaged in protected activity due to abusive conduct that arose in the course of the protected activity.[7] In place of these various standards, *General Motors* established that the Board would apply the *Wright Line* framework in deciding these cases.

In light of *General Motors*, the Board filed an unopposed motion with the court, asking it to "remand the instant case to determine whether *General Motors* affects the Board's analysis in this case." On June 15, 2021, the court granted the Board's motion and remanded *Lion Elastomers I*.

On June 22, 2021, the Board invited the parties to file position statements with respect to the issues raised by the remand. The Respondent and then-General Counsel Abruzzo each filed position statements. The General Counsel argued, among other things, that the Board should reverse *General Motors*. The Respondent asserted that the case should be remanded to the administrative law judge for further consideration and provided the Respondent's views on how the case should be decided pursuant to *General Motors.* The Board's letter to the parties soliciting position statements did not contemplate responsive briefing, but on September 12, 2021, the Respondent filed a motion with the Board seeking special permission to file an answer or reply to the General Counsel's position statement so that it could address the General Counsel's new argument that *General Motors* should be overruled. By letter dated September 22, 2021, the Board denied the Respondent's motion on the ground that it had "not presented any circumstances warranting leave to file an answer or reply" to the General Counsel's position statement.

On May 1, 2023, the Board issued *Lion Elastomers II*, overruling *General Motors*, announcing that it would "return to earlier Board precedent, including *Atlantic Steel*, applying setting-specific standards aimed at deciding whether an employee has lost the Act's protection," and applying its holding retroactively to all pending cases. *Lion Elastomers II*, 372 NLRB No. 83, slip op. at 2. The Board also reaffirmed its findings in *Lion Elastomers I* that the Respondent violated Section 8(a)(1) by threatening Colone with discharge and violated Section 8(a)(3) and (1) by disciplining and discharging him because he engaged in union activity. In dissent, Member Kaplan contended that the Board was depriving the Respondent of its right to due process by overruling *General Motors*. Id., slip op. at 19–20 (Member Kaplan, dissenting). He also "seriously questioned whether the majority's decision . . . [to do so fell] within the scope of the Fifth Circuit's remand"; because he found the Board's decision was a violation of the Respondent's due process rights, however, he found it unnecessary to decide whether it also exceeded the scope of the court's remand. Id., slip op. at 20 fn. 11. The Board majority disagreed, finding that the Respond-

[4] Under *Atlantic Steel*, in determining whether an employee's conduct during Sec. 7 activity loses the Act's protection, the Board considers: (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. *Atlantic Steel* was overruled in *General Motors.*

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 1989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

Under *Wright Line*, the General Counsel must initially show that (1) the employee engaged in Sec. 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Sec. 7 activity. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6 (2019). If the General Counsel makes this initial showing, the employer will be found to have violated the Act unless it meets its defense burden to prove that it would have taken the same action even in the absence of the Sec. 7 activity. *Wright Line*, 251 NLRB at 1089.

[6] This reference, as well all further references to the General Counsel in this decision, is to former General Counsel Abruzzo and not to her successor.

[7] *General Motors* expressly overruled: (1) the *Atlantic Steel* test governing employees' conduct towards management in the workplace; (2) the totality-of-the circumstances test governing social-media posts and most conversations among employees in the workplace set forth in *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015), and *Desert Springs Hospital Medical Center*, 363 NLRB 1824, 1824 fn. 3 (2016); and (3) the test governing picket-line conduct set forth in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984).

ent was not prejudiced by its action because *Lion Elastomers II* "return[ed] to the law under which this case was decided originally" and that overruling *General Motors* left the Respondent "precisely where it was before, after it had a full and fair opportunity to litigate the case under the *Atlantic Steel* standard." Id., slip op. at 14 fn. 69. The Board majority further stated that they were not persuaded that its decision exceeded the scope of the remand because:

> The court's remand did not order the Board to apply *General Motors*, nor did the court decide any issue related to the governing legal standard here. It simply gave the Board the opportunity to determine what legal standard, in its view, was applicable. The Board was entirely free, then, to determine that *General Motors* has no bearing on this case because it was incorrectly decided and is overruled.

Id.

The Respondent petitioned for review of the Board's Order in *Lion Elastomers II*, and the Board cross-applied for enforcement. On July 9, 2024, the court issued its decision on review, vacating the Board's decision on the grounds that it both exceeded the scope of the court's remand order and violated the Respondent's Constitutional due process rights by failing to provide the Respondent with the opportunity to address whether *General Motors* should be overruled.[8]

On October 10, 2024, the Board notified the parties that it had accepted the court's remand and invited them to file position statements with respect to the issues raised by the remand. The General Counsel, the Respondent, and the Charging Party Union each filed position statements. The General Counsel argues that the Board, accepting the court's remand as law of the case, should find that the Respondent violated Section 8(a)(3) and (1) by disciplining Colone under *General Motors*. The General Counsel also argues that the Board should reaffirm the Board's findings in *Lion Elastomers II* that the Respondent violated Section 8(a)(3) and (1) by discharging Colone, consistent with the judge's alternative *Wright Line* analysis, and that the Respondent violated Section 8(a)(1) by threatening Colone with discharge. The Charging Party contends that the Board need only consider the application of *General Motors* to the discipline allegation because no other allegation in this case involves the application of setting-specific standards overturned by *General Motors*. The Charging Party further states that if the Respondent requests a remand of the discipline allegation to the judge, the Board should grant the request but if the Respondent does not so request, the Board should find the discipline was unlawful under *General Motors*. The Respondent requests that the Board remand the case to the judge for initial consideration under *General Motors* or, in the alternative, reverse the judge's findings that the Respondent unlawfully threatened, disciplined, and discharged Colone. The Respondent also submits that the Board should return to the legal standard adopted in *General Motors* and find that its conduct was lawful under that standard.

Analysis

It is well established that "the 'decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority,' including an administrative agency, which 'is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case.'" *Wendt Corp.*, 372 NLRB No. 135, slip op. at 14 fn. 60 (2023) (quoting *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977) (footnotes omitted)); see also *Grigsby v. Barnhart,* 294 F.3d 1215, 1218 (10th Cir. 2002) ("Although primarily applicable between courts of different levels, the [law of the case] doctrine and the mandate rule apply to judicial review of administrative decisions, and 'require[] the administrative agency, on remand from a court, to conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart.'" (quoting *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998))) (cited with approval in *Lion Elastomers, LLC v. NLRB*, above, at 257). Consistent with this principle, the Board has recognized that it is "required to faithfully comply with the terms of [a] court's remand and its instructions contained therein" and acknowledged that the court "is the authoritative interpreter of its own remand." *Wendt Corp.*, 372 NLRB No. 135, slip op. at 14 (citations omitted); see also *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004) (explaining that "[a]bsent exceptional circumstances, the mandate rule compels compliance on remand with the dictates of a superior court") (cited with approval in *Lion Elastomers, LLC v. NLRB*, above, at 259).

In this case, the Fifth Circuit made clear that the Board's decision in *Lion Elastomers II* exceeded the scope of the court's first remand order. More specifically, in finding that the Board exceeded the scope of the remand, the court observed that "a reviewing court *may* relax [an administrative agency's] obligation to abide by the mandate rule to permit uniform implementation of a newly developed rule to the extent it was developed in an adjudication

[8] The court noted that it declined to reach the questions of "whether *Atlantic Steel* comports with the [Act] or other federal laws" and whether the Board's "Decision and Order are supported by substantial evidence." Id. at 262 fn. 10.

independent of those controlled by the judicial mandate." *Lion Elastomers, LLC v. NLRB*, above at 259–260. The Board's transgression here, the court found, was that "there was no 'intervening' change of authority independent from the adjudication controlled by [the court's] mandate." Id. at 260. Rather, "the Board had sought remand to implement a newly developed rule, but rather than implementing the rule, the Board overturned it." Id. Because the Board "gave no suggestion to the court that it intended to seek the overturning of *General Motors*," the Board's actions were, in the court's words, nothing short of a classic "bait-and-switch." Id. at 259.[9] The court stated that its remand order "was not an invitation for the Board to reconsider what legal standards should apply but rather an instruction to apply the legal standards set forth in *General Motors*." Id. at 260. The court concluded that, by failing to apply *General Motors*, the Board violated both the "letter and spirit" of the court's remand order, and, as a result, the court vacated the Board's decision in *Lion Elastomers II*.[10] Id.

The court did not disagree with the change in law as a matter of policy or disagree with the application of the change in law to the facts at issue. Instead, the court held that the Board exceeded its authority by attempting to use this *case* to overrule *General Motors*. It necessarily follows that the Board's attempt to overrule *General Motors* in *Lion Elastomers II* was invalidated by the court's decision and did not survive judicial vacatur.[11] If not, the Board would effectively be ignoring the court's decision that the Board could not use this case to overrule *General Motors*.[12]

We respectfully disagree with our dissenting colleague that, by recognizing this fact, we have departed from established Board decisional norms. To begin, contrary to his assertion, our recognition of the effects of the Fifth Circuit's decision here would not "swallow nonacquiescence whole." We emphasize that the situation here is specific to the facts of this case and therefore limited in scope. Again, the court did not disagree with the Board's policy choice, either in the first instance of overruling precedent or in subsequently applying it. Here, the court vacated *Lion Elastomers II* based on its understanding of the scope of *its own remand*, finding the Board's purported overruling of *General Motors* was beyond the scope the remand and, further, violated the Respondent's due process rights. This situation is clearly distinguishable from cases in which a court has vacated a Board decision based on the court's interpretation of the Act. In such cases, the policy of nonacquiescence would apply because circuit courts could differ in their interpretation of the Act and thereby create a circuit split.[13] That chance is not present here; a different circuit court is not going to find that the Fifth Circuit misinterpreted the scope of its own remand. Nor is this case similar to cases in which the court decision does not reject the aspect of a Board decision that has been recognized as precedent.[14] Here, the court expressly rejected the Board's determination that

[9] As Member Kaplan observed in his dissent in *Lion Elastomers II*, the former General Counsel "filed [the] request for remand with the Fifth Circuit for a specific purpose, namely[,] to determine how *General Motors*—the law *at the time of the request for remand*—affected the analysis of the case." *Lion Elastomers II*, 372 NLRB No. 83, slip op. at 19. He went on to observe that "[t]he Respondent could not have anticipated that the General Counsel would, in turn, jettison the express purpose for which [she] had sought, and been granted, remand from the court." Id.

[10] As our colleague recognizes, it is within the discretion of each reviewing court to determine the scope of its own remand and determine whether that scope has been exceeded following remand.

[11] We disagree with our colleague's suggestion that *Intertape Polymer Corp.*, 373 NLRB No. 68 (2024), can be viewed as independent binding precedent overruling *General Motors*. To begin, the Board's decision in *Intertape* issued before the court's dispositive decision in this case, at a time when the prior Board decision in *Lion Elastomers II* was ostensibly valid law. Therefore, because no party sought reconsideration or judicial review after the court invalidated that change in law, neither the Board nor any court had the opportunity to judge whether that case remained good law following the Fifth Circuit's vacatur of *Lion Elastomers II*. But more importantly, as our colleague is well aware, it is Board tradition to use full-Board cases to overrule Board precedent. *Intertape Polymer* was not a full-Board case. Nor did the Board include any language in *Intertape* suggesting that the Board intended that decision to reaffirm the change in law set forth in *Lion Elastomers II*; the opinion simply applied the holding in *Lion Elastomers II* without any independent discussion of the policy grounds for departing from prior precedent. In this regard, it is notable that the same Board that issued *Intertape Polymer* had previously issued *Tecnocap*, 372 NLRB No. 136 (2023). In that full-Board case, the Board expressly reaffirmed an earlier decision in which it had overruled precedent. See Id., slip op. at 1 ("The Board in *Wendt* . . . overruled *Raytheon Network Centric Systems* to the extent it had departed from the mandate of *Katz*. The rationale of *Wendt* is sound, and we reaffirm and apply its principles . . . .") The fact that the Board did not follow that same practice by expressly reaffirming the change in law in *Lion Elastomers II* in *Intertape Polymer* strongly suggests that the Board did not intend that decision to be an independent basis for overruling *General Motors.*

[12] Although our colleague suggests that, by so stating, we are "undoubtedly and ironically" exceeding the scope of the court's remand, the court's decision held that the Board did not have the authority to overrule *General Motors* in *Lion Elastomers II*. It is that affirmative finding, not the scope of the remand, that dictates that the change in law in *Lion Elastomers II* did not survive the court's vacatur.

[13] See, e.g., *Asplundh Tree Export Co. v. NLRB*, 365 F.3d 168 (3d Cir. 2004) (denying enforcement based on interpretation of the Act as limited to the territorial United States); *G.W. Galloway Co. v. NLRB*, 856 F.2d 275 (D.C. Cir. 1988) (denying enforcement based on court's interpretation of Sec. 10(b) of the Act); *Cathey v. NLRB*, 189 F.2d 428 (5th Cir. 1951) (per curium) (denying enforcement based on finding that the union had failed to comply with the requirements of the Act).

[14] See, e.g., *NLRB v. Mike O'Connor Chevrolet-Buick-GMC Co.*, 512 F.2d 684 (8th Cir. 1975) (denying enforcement without reaching the question of whether unilateral changes after certification are unlawful).

General Motors was no longer good law. It necessarily follows that *General Motors* remains extant precedent.

Furthermore, as we have explained, our colleague's dissent does not accurately reflect our actions here. We are not "us[ing] the court's decision," overruling any precedent, or "establish[ing] a new standard to govern future cases." Indeed, we are not taking any "action" here. As we have explained, the Fifth Circuit decision *itself* held that the Board could not use this case to overrule *General Motors*. We are merely recognizing the court's holding now that the case is back before us. Because the court's decision makes clear that the Board acted beyond the scope of its authority by attempting to overrule *General Motors* in this case, it is clear that *General Motors* constitutes extant Board precedent for deciding whether an employee has lost the Act's protection for abusive conduct that arose in the course of Section 7 protected activity. If the issue of whether to overrule *General Motors* is presented and litigated in a future case, nothing in this decision or in the court's remand will preclude consideration of that issue.

Based on the foregoing, we remand this case to the administrative law judge to decide this matter under *General Motors*, including, if necessary, giving the parties the opportunity to introduce evidence relevant to the standard set forth in *General Motors*.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Michael A. Rosas for further appropriate action.

IT IS FURTHER ORDERED that the judge shall reopen the record, if necessary, and prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. September 23, 2026

Scott A. Mayer, Member

James R. Macy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MURPHY, concurring.

I agree with my colleagues, for the reasons stated, that the Board's earlier decision in this case, 369 NLRB No. 88 (2020) (*Lion Elastomers II*), has no precedential value in light of the Fifth Circuit's decision finding that the Board's decision exceeded the scope of its remand by using that case to overrule *General Motors LLC*, 369 NLRB No. 127 (2020). *Lion Elastomers, LLC, v. NLRB*, 108 F.4th 252 (5th Cir. 2024). I write separately to emphasize that, even though three members are reaching this same conclusion, this decision should not be considered as three members affirmatively voting to overrule precedent. In light of the scope of the remand currently before us, if the Board were to affirmatively overrule *Lion Elastomers II* in this decision, we would be committing the very same error that the Board made in that case by exceeding the scope of the court's remand. We are doing no so such thing. Rather, we are merely setting forth what the *court found* in rejecting the Board's attempt to change the law in *Lion Elastomers II* and remanding this case back to us: that, in light of the court's interpretation of its own remand, the Board could not have used this case to overrule *General Motors.*

I also emphasize that I am not reaching the merits of whether *General Motors* is a better test to apply than that set forth in *Lion Elastomers II*, or whether an entirely different standard would be preferable. As the Court found, the determination of what standard should apply was beyond the scope of the Board's initial remand request, and it is similarly beyond the scope of the current remand.

Finally, I note that our dissenting colleague's assertion that *Intertape Polymer Corp.*, 373 NLRB No. 68 (2024), independently overruled *General Motors* is not before us. The court's decision did not address *Intertape Polymer*; the court's only holding was that the Board could not have used the instant case to overrule *General Motors*. Accordingly, the question whether *General Motors* was independently overruled by *Intertape Polymer* is beyond the scope of the court's remand and irrelevant to the decision here, given that the court has directed us to apply *General Motors* as the law of the case.

Dated, Washington, D.C. September 23, 2026

James R. Murphy, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER PROUTY, concurring and dissenting.

I agree with my colleagues that we must apply the court's decision as the law of the case. However, I strongly disagree with their understanding of what that entails. Specifically, I disagree with their view that, under the law of the case doctrine, the decision of the Board in *Lion Elastomers LLC*, 372 NLRB No. 83 (2023) (*Lion Elastomers II*), overruling *General Motors LLC*, 369 NLRB No. 127 (2020), is no longer good law, and therefore *General Motors* "constitutes extant Board precedent for deciding whether an employee has lost the Act's protection for abusive conduct that arose in the course of Section 7 protected activity." My colleagues, in effect, are attempting to use the court's decision to overrule substantive precedent and establish a new standard to govern future cases. Needless to say, that is beyond the scope of the court's remand and constitutes arbitrary and capricious action under the Administrative Procedure Act. My colleagues' position swallows nonacquiescence whole, permits a single court decision to undo years of administrative work, and fails to satisfy the requirement for agencies to engage in reasoned decisionmaking before establishing new legal standards through adjudication or rulemaking. I dissent from my colleagues' effort to use the court's decision in this fashion.

As explained by my colleagues, this case is before the Board on remand from the United States Court of Appeals for the Fifth Circuit for the second time. In 2021, the Fifth Circuit granted the Board's unopposed motion to remand its original Decision and Order in this proceeding, reported at 369 NLRB No. 88 (2020) (*Lion Elastomers I*), to the Board to determine whether the new standard adopted by the Board in *General Motors* affected the Board's analysis in this case. On remand, a newly constituted Board overruled *General Motors* and announced that it would return to the long-established setting-specific standards applicable to cases where employees are disciplined or discharged for alleged misconduct that occurs during activity that is otherwise protected by the National Labor Relations Act. 372 NLRB No. 83 (2023).

On review, the Fifth Circuit vacated the Board's decision for two reasons. First, the court concluded that the Board exceeded the scope of the court's initial remand by failing to apply the Board's decision in *General Motors* to the facts of this case. *Lion Elastomers, LLC. v. NLRB*, 108 F.4th 252, 260 (5th Cir. 2024). Second, the court concluded that the Board violated the Respondent's due-process rights by overturning *General Motors* without providing the Respondent an opportunity to be heard on the issue. Id. at 262. The court therefore remanded the case to the Board with instructions "to apply *General Motors* to this case." Id. However, the court expressly declined to reach the question of whether the Board's policy choice to return to the traditional setting-specific standards comports with the Act or other federal laws. Id. at 262 fn. 10.

My colleagues and I agree that the court's decision must be applied as the law of the case. We further agree that it is appropriate to remand the case to the administrative law judge to apply *General Motors*. Not content with doing that, however, my colleagues also declare that the Board's overruling of *General Motors* in *Lion Elastomers II* "did not survive judicial vacatur" and that "*General Motors* constitutes extant Board precedent." I fundamentally disagree.

As noted above, the court remanded the case with instructions to apply *General Motors* "in this case," and it expressly declined to reach the question of whether the setting-specific standards the Board adopted in *Lion Elastomers II* comported with the Act or other laws. Contrary to my colleagues, moreover, the court did not address whether the policy change the Board adopted in *Lion Elastomers II* has continued precedential value and cannot be applied in future cases; nor did it decide that the Board must apply *General Motors* as extant precedent in future cases.

My colleagues claim that the court's finding that the Board exceeded the scope of the remand necessarily invalidated the change in Board policy announced in *Lion Elastomers II*. My colleagues fail to cite any authority in support of this novel claim, and it is flatly inconsistent with the law-of-the-case doctrine. It is well settled that the law of the case does not apply across different cases. See *Musacchio v. United States*, 577 U.S. 237, 244–245 (2016) ("The law-of-the-case doctrine generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages *in the same case*.'" (emphasis added) (citation omitted)); *Schaffner v. Monsanto Corp*., 113 F.4th 364, 376 (3d Cir. 2024) (law of the case doctrine applies only when a question has been decided "in the same case"); 18B Charles Alan Wright et al., Federal Practice & Procedure: Jurisdiction & Related Matters § 4478 (3d ed. April 2026 Update) ("Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. They do not apply between separate actions, even if they are related." (footnotes omitted)). Another important limitation of the law of the case doctrine is that the court must have "actually decided an issue." *Lewis Brisbois Bisgaard & Smith LLP v. Bitgood*, No. 24–20458, 2026 WL 561181, at *4 (5th Cir. Feb. 27, 2026). Here, as noted above, the court did not decide that the policy change the Board adopted in *Lion Elastomers II* no longer has precedential value; nor did it decide that the Board must apply

General Motors as extant precedent in future cases. By treating the Fifth Circuit's decision in this case as binding in pending and future cases, my colleagues misapply the law-of-the-case doctrine and deny parties in pending and future cases the opportunity to present their own arguments, implicating due process concerns.

My colleagues' position is also flatly inconsistent with the policy of nonacquiescence, under which the Board respectfully regards an adverse circuit court decision as only "the law of that particular case."[1] Thus, when a circuit court vacates or "set[s] aside" a decision of the Board, the order is nullified or void, and the respondent in *that* case no longer has a legal obligation to take the remedial action identified in the vacated order.[2] However, the Board's decision retains precedential value and may continue to be cited by the Board, unless and until it is overruled by the Supreme Court or rejected by the Board through reasoned decisionmaking.[3] My colleagues contend that the policy of nonacquiescence is not implicated here because the court vacated *Lion Elastomers II* without addressing the Board's rationale or its policy choice to return to the traditional setting-specific standards. I disagree.[4] But even if my colleagues were correct, it would not mean that *Lion Elastomers II* is no longer valid precedent. As the Board and courts have repeatedly recognized, a court's vacatur based on a substantive disagreement with the Board's interpretation of the Act or policy rationale does not deprive the underlying decision of precedential effect in future Board cases. If that is the case, then a vacatur based entirely on process without expressing any opinion regarding the Board's statutory interpretation or policy cannot reasonably be understood to do so.

In prior cases, the Board has not treated judicial vacatur of a precedential decision as precluding future reliance on the decision's rule. Thus, regardless of whether a court sets aside or vacates a Board decision on substantive grounds or for reasons unrelated to the merits, the Board has adhered to its policy, applied it in future cases involving different parties, and defended it in the courts.[5]

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[1] *Tri-State Rigging*, 374 NLRB No. 21, slip op. at 2 fn. 3 (2025) (quoting *D. L. Baker, Inc.*, 351 NLRB 515, 529 fn. 42 (2007)).

[2] *Airgas USA, LLC*, 373 NLRB No. 102, slip op. at 1 fn. 2 (2024), enfd. 2025 WL 2992542 (9th Cir. Oct. 24, 2025); see also Secs. 10(e) and (f) of the Act, which vest courts of appeals with the "power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board."

[3] See *Tri-State Rigging*, supra, slip op. at 3 fn. 3 (2025) ("As an administrative agency charged by Congress with the uniform and effective administration of a national labor policy, the Board is not bound to acquiesce to the views of a federal circuit court that conflict with those of the Board, even in cases arising in that circuit (which could be reviewed elsewhere on appeal)."); *Airgas*, supra, slip op. at 1 fn. 2 (finding that the Board's expansion of its traditional "make-whole" remedies in *Thryv, Inc.*, 372 NLRB No. 22 (2022), vacated in part on other grounds 102 F.4th 727 (5th Cir. 2024), would remain valid Board precedent, even if a federal circuit court had specifically vacated the Board's rationale for the remedies, under the Board's long-established policy of nonacquiescence to adverse appellate court decisions); *Sunbelt Rentals, Inc.*, 372 NLRB No. 24, slip op. at 17 fn. 40 (2022) (noting that "the Board 'is not obliged to accept [a circuit court's] interpretation' and may 'refus[e] to knuckle under to the first court of appeals (or the second, or even the twelfth) to rule adversely to the Board,' because only the Supreme Court is 'the supreme arbiter of the meaning of the [Act]'") (quoting *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066–1068 (7th Cir. 1988)); *D. L. Baker,* 351 NLRB at 529 fn. 42 (explaining that the Board applies its nonacquiescence policy, and instructs its administrative law judges to follow Board precedent, not court of appeals precedent, unless overruled by the Supreme Court).

[4] In finding that the Board in *Lion Elastomers II* exceeded the scope of the court's initial remand and did not adequately provide due process, the court adopted arguments that were rejected by the Board in *Lion Elastomers II*. Thus, while we are bound by the law of the case to accept the court's findings on remand, the Board's rejection of these arguments retains precedential value pursuant to the Board's policy of nonacquiescence. Indeed, a different court of appeals might have agreed that the Board did not exceed the scope of remand by changing precedent on a remand. See *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1056–1057 (D.C. Cir. 1989) (holding Board did not exceed scope of remand by announcing a new rule). This possibility, and the need for national uniformity in labor policy, are among the chief reasons the Board follows its nonacquiescence policy. *D. L. Baker*, 351 NLRB at 529 fn. 42. Moreover, even if the Board were to acquiesce in the court's findings on the scope of the remand and due process, it would provide no entrée to overturning the Board's rationale or its traditional setting-specific standards, which were not rejected by the court.

[5] See, e.g., *J.G. Kern Enterprises, Inc. v. NLRB*, 94 F.4th 18, 31 (D.C. Cir. 2024) (finding that the Board's analysis in *Whisper Soft Mills, Inc.*, 267 NLRB 813 (1983), rev'd 754 F.2d 1381 (9th Cir. 1984) retained "precedential value" even though a federal circuit court vacated its order in that case, because the reviewing court did not reject the underlying principle applied by the Board); see also *Oncor Electric Delivery Co., L.L.C.*, 373 NLRB No. 80, slip op. at 3 fn. 5 & 15–16 (2024) (Board cited and relied on Board decision even though a federal circuit court vacated the order in the case, observing that the Board's nonacquiescence policy was not implicated because the court did not repudiate the underlying principle for which the decision was cited).

The Board has consistently viewed vacated Board decisions as retaining precedential value even where, as here, a reviewing court has found the Board did not have the authority to issue the decision in the first place. For example, the Board and its administrative law judges continue to cite *G. W. Galloway Co.*, 281 NLRB 262 fn. 1 (1986), enf. denied 856 F.2d 275 (D.C. Cir. 1988), as precedential authority, even though a federal court of appeals set aside the Board's order in the case because it found that the Board was not authorized to issue the complaint based on the preprinted language in the charge form stating that the company had engaged in "other acts" of interference with Sec. 7 rights. (See, e.g., *Hispanics United of Buffalo, Inc.*, 359 NLRB 368, 368 fn. 2 (2012); *Liston Aluminum*, 296 NLRB 1181, 1181 fn. 2 & 1186 (1989), enfd. 936 F.2d 578 (9th Cir. 1991); see also Casehandling Manual, Part One—Unfair Labor Practice Proceedings, Sec. 11820.) Similarly, the Board has repeatedly cited its decision in *Cathey Lumber Co.*, 86 NLRB 157 (1949), enf. denied 189 F.2d 428 (5th Cir. 1951), as precedential authoity, even though a federal court of appeals set aside that decision because it found the union failed to comply with the requirement of then Sec. 9(h) of the Act, 29 U.S.C.A. § 159(h), that it execute a Non-Communist Affidavit, from which it necessarily follows that the Board had no authority

The majority's decision to act otherwise here is a *choice* to acquiesce to the court's decision—but one made without the work necessary to justify a retreat from *Lion Elastomers II* back to *General Motors.*

To be sure, a three-member majority of the Board could overrule *Lion Elastomers II* and return to the standard adopted in *General Motors*, if it can demonstrate that the standard is rational and consistent with the National Labor Relations Act and if it engages in the reasoned decision making required by the Administrative Procedure Act. As the Supreme Court has observed, when an agency seeks to change applicable standards, it must "display awareness that it *is* changing position," demonstrate that the new policy is "permissible under the statute," and show "there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Vacatur does not relieve the Board of this obligation. It must still satisfy the requirement of reasoned decisionmaking by acknowledging the prior position and explaining why it is now choosing a different course.[6] Today's decision fails this test. My colleagues' reasoning for abandoning the setting-specific standards rests on the mistaken premise that the court's vacatur of the Board's decision in *Lion Elastomers II* compels that result.[7] As discussed above, however, the court found no fault with the Board's rationale or its policy choice to return to the traditional setting-specific standards.[8] Accordingly, contrary to my colleagues, the Board's decision in *Lion Elastomers II* retains precedential value and constitutes extant Board precedent for deciding whether an employee has lost the protection of the Act by engaging in alleged misconduct in the course of Section 7 protected activity.[9]

Dated, Washington, D.C. September 23, 2026

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to issue either the complaint or the decision in the case. (See, e.g., *Dun & Bradstreet Software Servs., Inc.*, 317 NLRB 84, 85 (1995), affd. sub nom *Kelley v. NLRB*, 79 F.3d 1238 (1st Cir. 1996); *Freightway Corp.*, 299 NLRB 531, 531 fn. 2 (1990); *Winer Motors, Inc.*, 265 NLRB 1457, 1457 fn. 7 (1982).) In *California Gas Transport, Inc.*, 347 NLRB 1314, 1316 (2006), enfd. 507 F.3d 847 (5th Cir. 2007), the Board announced its adherence to *Asplundh Tree Expert Co.*, 336 NLRB 1106, 1107 (2001), vacated 365 F.3d 168, 180 & fn. 15 (3d Cir. 2004), even though a federal court of appeals vacated that decision because it found the Board did not have jurisdiction in the case—and therefore necessarily had no authority to issue the decision in the first place. The Board and its administrative law judges have also repeatedly cited the Board's decision in *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied 512 F.2d 684 (8th Cir. 1975), as authority for the proposition that an employer acts at its peril if it implements unilateral changes while it is challenging a union's certification, even though a federal court of appeals found that the Board improperly certified the union, from which it necessarily follows that the issue for which the case is routinely cited was not properly before the Board to decide. (See, e.g., *Longmont United Hospital*, 374 NLRB No. 52, slip op. at 1 fn. 3 (2026)); *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 10 fn. 51 (2019); *Ardit Co.*, 364 NLRB 1836, 1838 (2016).)

[6] See *Sanitary Truck Drivers & Helpers Local 350 v. NLRB*, 45 F.4th 38, 48 (D.C. Cir. 2022) ([T]he National Labor Relations Board is free to change its mind. But the Board must acknowledge when it is doing so and explain its reasoning."); *Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 476 (D.C. Cir. 2020) ("When the Board seeks to change applicable standards through an adjudication, the Board must 'display awareness that it *is* changing position.'") (emphasis in original) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515); *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137, 1146 (D.C. Cir. 2017) ("[W]hen the Board fails to explain—or even acknowledge—its deviation from established precedent, its decision will be vacated as arbitrary and capricious.") (citation and internal quotation marks omitted); *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.").

[7] My colleagues attempt to circumvent both the Board's policy of nonacquiescence and the requirements of the Administrative Procedures Act by portraying their effort to overrule *Lion Elastomers II* as a necessary result of the court's decision. To justify their position, they repeatedly mischaracterize the court's ruling and exaggerate its impact, asserting that the court "vacated the Board's overruling of *General Motors*," determined that "the Board's attempt to overrule *General Motors* in *Lion Elastomers II* was invalid," and "expressly rejected the Board's determination that *General Motors* was no longer good law." In reality, however, the court did not address those issues. They were not presented to the court, and the court had no occasion to consider them. Therefore, any discussion by my colleagues regarding whether the policy change adopted in *Lion Elastomers II* retains precedential value, or whether the Board is required to apply *General Motors* as extant precedent in subsequent cases, extends beyond the scope of the court's remand.

[8] As the Board observed in *Lion Elastomers II*, no federal court of appeals has ever rejected the Board's traditional setting-specific standards. 372 NLRB No. 83, slip op. at 3.

[9] It also bears emphasizing that the Board expressly relied on *Lion Elastomers II* in *Intertape Polymer Corp*., 373 NLRB No. 68, slip op. 4–9 (2024), to find a violation. Even indulging—for argument's sake only—the premise that *Lion Elastomers II* is no longer valid precedent, the Board is not free to disregard its decision in *Intertape Polymer*, which adopted and applied the setting specific standards the Board restored in *Lion Elastomers II*, absent a reasoned explanation, and my two colleagues who are espousing this view supply none. Their explanation that the Board's decision in *Intertape Polymer* is not "independent binding precedent" because it issued "before the court's dispositive decision in this case, at a time when the prior Board decision in *Lion Elastomers II* was ostensibly valid law" and did not "reaffirm" but "simply applied the holding in *Lion Elastomers II* without any independent discussion of the policy grounds for departing from prior precedent" is wholly unconvincing. The only conclusion I can draw from this is that my colleagues' view is that a single adverse appellate court decision—in addition to establishing the legal precedents to be applied for this case and for pending and future cases—also invalidates the precedential force of past Board decisions that have never been overruled by a subsequent Board decision. As discussed above, however, my colleagues' view cannot be reconciled with the law of the case doctrine or even a limited fealty to the Board's policy of nonacquiescence. Cf. *NLRB v. Wyman-Gordon Co*., 394 U.S. 759, 766 (1969) (holding that Board order was "unquestionably valid," even though it was based on a rule promulgated in an earlier Board decision in violation of the requirements of the Administrative Procedure Act).

David M. Prouty, Member

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