JD(SF)-03-24
Buffalo, New York

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

STARBUCKS CORPORATION

and

WORKERS UNITED

	Cases 03—CA—295810
	03—CA—296570
	03—CA—296987
	03—CA—297753
	03—CA—298904
	03—CA—299013
	03—CA—300873
	03—CA—300977
	03—CA—301199
	03—CA—302194
	03—CA—302464
	03—CA—302539
	03—CA—303305
	03—CA—303672
	03—CA—304562
	03—CA—304779
	03—CA—304830
	03—CA—305153
	03—CA—306315
	03—CA—306347
	03—CA—307855
	03—CA—307980
	03—CA—309936
	03—CA—310305
	03—RC—308945

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DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. The complaint in this consolidated unfair labor practice (ULP) and objections litigation alleged that the Starbucks Corporation (Starbucks or the Respondent) violated §8(a)(1), (3) and (5) the National Labor Relations Act (the Act) at several Western New York stores in response to an ongoing organizing campaign by Workers United (the Union). The objections component alleged that Starbucks unlawfully

interfered with an election at its Penfield, NY store.[1] On the record, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Starbucks operates cafés in Western New York. Annually, it accrues revenues exceeding $500,000, and purchases and receives goods exceeding $50,000 directly outside of New York. It engages in commerce under §2(2), (6) and (7) of the Act. The Union is a §2(5) labor organization.

II. UNFAIR LABOR PRACTICES AND OBJECTIONS[3]

A. BACKGROUND

Cafés are run by Baristas and Shift Supervisors. Baristas are cashiers, bartenders and cleaners. Shift Supervisors perform these tasks, but, also open and close cafés, access store safes and coach Baristas. Cafés are supervised by Store Managers, who report to District Managers.

This case concerns Starbucks' response to the Union's ongoing organizing campaigns at these cafés: 5395 Sheridan Dr., Buffalo, NY (Williamsville Place store); 4255 Genesee St., Cheektowaga, NY (Genesee Street store); 9660 Transit Rd., East Amherst, NY (Transit Commons store); 3611 Delaware Ave., Tonawanda, NY (Delaware & Sheridan store); 933 Elmwood Ave., Buffalo, NY (Elmwood store); 2071 Fairport Nine Mile Rd., Penfield, NY (Penfield store); 3015 Niagara Falls Blvd., Amherst, NY (East Robinson store); 5120 Camp Rd., Hamburg, NY (Camp Road store); 3186 Sheridan Dr., Buffalo, NY (Sheridan & North Bailey store); 6707 Transit Road, Buffalo, NY (Transit Regal store); and 235 Delaware Ave., Buffalo, NY (Delaware & Chippewa store).

B. DELAWARE & SHERIDAN STORE

1. §8(a)(1): June 2022[4] – Staffing Threats by Stachowiak[5]

Shift Supervisor Rachel Cohen said that business at the relatively new Delaware &

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[1] This litigation succeeds an earlier round of litigation between the same parties, which involved several Western New York stores and many of the same witnesses. On March 1, 2023, ALJ Rosas issued a *Decision* in that litigation, which found that Starbucks committed multiple violations of §8(a)(1), (3), (4) and (5) (Buffalo I). Although judicial notice has been taken of Buffalo I for general background purposes, the factual and legal findings therein have not been relied upon in this *Decision* for multiple reasons. *First*, the parties filed several exceptions to Buffalo I, which are pending before the Board. Buffalo I is, as a result, not yet a final judgment suitable for collateral estoppel. *Second*, although Buffalo I involves many of the same witnesses and stores, the legal issues, theories and claims involved in this litigation are distinct. *Third*, the findings in Buffalo I are not a condition precedent for the resolution of the instant claims. *Finally*, the GC's contention that Buffalo I should be controlling because Starbucks is a recidivist is a point better left for the Board. See also (ALJ Exh. 2)(explaining this ruling in greater detail).

[2] Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

[3] The GC withdrew complaint ¶9(g)(i) and (iv), (h)(ii) and (iii), and (i)(viii) at the hearing. (Tr. 1433-34).

[4] All dates are in 2022, unless otherwise stated.

[5] This was alleged to be unlawful under complaint ¶¶6(c) and 13.

Sheridan store rose and eventually caused a June staffing shortage, which led to this exchange with Stachowiak:[6]

> I … told her that … customers were waiting for too long. I had to close down the lobby … due to short staffing. And I asked her if we were able to add an extra person … or even have people stay late just to cover …. She said she was not allowed to make any scheduling adjustments because we did not have a contract.

(Tr. 787–88).[7]

A statement is an unlawful threat, when it coerces employees in the exercise of their §7 rights. 29 U.S.C. §158(a). The Board, "does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act." *Sage Dining Service,* 312 NLRB 845, 846 (1993).[8] Stachowiak's reply that staffing could not be increased because employees do not have a contract was unlawful. She improperly laid blame for the staffing shortage, and Starbucks unwillingness to address it, on employees' §7 activities.

2. §8(a)(1): June – Threats about Early July 4 Closure by Stachowiak[9]

Cohen described this discussion with Stachowiak concerning July 4:

> [I] asked … if there was any plan to shut … down early … for July 4…. She said … she was not allowed to modify store hours because there was no contract …. I told her that I couldn't remember a time when July 4 was not a half business day … in … about 10 years …. [S]he said … this was our decision ….

(Tr. 789-790).[10]

Stachowiak's comment that the store could not close early on July 4 and hours could not be reduced because employees lacked a contract violated §8(a)(1). Her remarks, once again, conveyed that unionization was to blame for management's unwillingness and inability to address this issue; these comments, as a result, reasonably impeded employees' §7 activities.[11]

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[6] Store Manager Stachowiak was initially assigned to the Sheridan & North Bailey store. When this store temporarily closed for renovations, her team shifted to Delaware & Sheridan from June to August. (Tr. 1832; GC Exh. 44).

[7] Although Stachowiak denied the comment, Cohen was credited. Cohen was straightforward and consistent, with a strong demeanor. Unlike Stachowiak, who remains employed by Starbucks, she has since resigned and held no obvious stake in the proceeding.

[8] *Double D Construction Group,* 339 NLRB 303 (2003)("test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.").

[9] This was alleged to be unlawful under complaint ¶¶6(d) and 13.

[10] Cohen's testimony on this issue has been credited for the reasons previously discussed.

[11] Although Respondent provided conflicting testimony that several stores do not close early on July 4, Stachowiak's comment remained unlawful because she blamed the Union and the absence of a contract. She could have lawfully replied that "we've never done this in the past," "are too busy to do it this year," etc. Her comments, however, became unlawful when she labeled the Union and employees' §7 activities as the proximate cause of her resistance.

3. §8(a)(1): June or July – Blaming Union for Bargaining Delays by Stachowiak[12]

Cohen recalled this exchange with Stachowiak about bargaining:

> [A]fter a conversation about my frustration with the lack of a big store contract, we … had a conversation on the floor about how we weren't making any progress with [the Starbucks' negotiator] Alan and bargaining sessions. And she said that this is the decision that we made [and] you're just going to have to deal with it.

(Tr. 790).[13]

Stachowiak's comment was lawful. Although the Board has generally found a violation where an employer makes statements to employees that reasonably convey that they are being adversely affected by their Union's actions (see, e.g., *Kentucky Fried Chicken Caribbean Holdings*, 341 NLRB 69, 69-70 (2004)), I do not find that Stachowiak actually blamed the Union for bargaining delays. She simply said that you chose a process and this is how it works, without attributing blame to anyone. She accurately reported that bargaining is a slow and often tedious process. *Garden Ridge Management, Inc*., 347 NLRB 131 (2006)(no violation where statements were accurate and did not imply that the union was the cause); *Lepel Corp*., 323 NLRB 841 (1997).

4. §8(a)(1): July 9 – Interrogation and Implied Promise of Rewards by Stachowiak[14]

On July 8, the Union held a 1-day strike. (GC Exh. 45). It provided 4 a.m. notice, which was 1.5 hours before the store's regularly scheduled opening (Tr. 815–16). Following the strike on July 9, Cohen had this exchange with Stachowiak:

> She told me that … we should have given her more notice, so that she could schedule people who didn't want to be involved at different stores.

(Tr. 799).[15]

Regarding the alleged promise of reward, Stachowiak's statement was valid. Although an employer violates the Act, when it promises to reward employees, in order to curtail unionization,[16] Stachowiak was not offering non-strikers a tangible reward. *First*, the context of her statement suggests that the non-strikers were already scheduled to work. This, in turn, suggests that non-strikers were not gaining hours that were not already received, which is not a promised benefit. *Second*, given that Stachowiak's offer was contingent upon Cohen's voluntary action (i.e., her providing added notice), Cohen retained control over the condition precedent that triggered the alleged benefit (i.e., giving greater notice). Therefore, Cohen was, at all times empowered to ignore Stachowiak's invitation and not trigger the alleged reward. Under these circumstances, Starbucks did not unlawfully promise a reward to curtail unionization; dismissal is, thus, recommended.

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[12] This was alleged to be unlawful under complaint ¶¶6(e) and 13.

[13] Cohen has, for the reasons previously cited, been credited over Stachowiak's generalized denials.

[14] This was alleged to be unlawful under complaint ¶¶6(f) and (g), and 13.

[15] Stachowiak did not dispute this commentary.

[16] *Curwood, Inc*., 339 NLRB 1137, 1147 (2003); *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964).

Regarding interrogation, Stachowiak's question was valid. She never sought "the identity of potential striking employees," as alleged under Complaint ¶6(g). She solely asked for additional strike notice, which would typically not identify the individuals expected to participate in the strike itself and is a relatively run-of-the-mill labor relations transaction. Dismissal of this allegation is, accordingly, recommended.

5. §8(a)(1): July 11 – Accusing Strikers of Theft by Stachowiak[17]

Cohen and Stachowiak had this discussion about alleged theft during the strike:

> [S]he … asked if there was anybody in the store on the day of the strike. She said somebody had driven by and s[aw] … people inside … I told her I was there from the beginning to the end … and no one stepped foot inside …. I told her that we … used our mark outs to give the coffee away …. [O]nce a week at Starbucks, employees can mark out a pound of coffee … and take it home for free….

(Tr. 801).

"[A]n employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided its expression of opinion does not threaten employees or otherwise interfere with ... Section 7 rights." *Tesla, Inc*., 370 NLRB No. 101, slip op. at 7 (2021). See also *Sears, Roebuck & Co*., 305 NLRB 193, 193 (1991) ("words of disparagement alone concerning a union or its officials are insufficient for finding a violation.").

The GC has not established a violation. Stachowiak lawfully asked, "if there was anybody in the store on the day of the strike" in order to assess why coffee was being given away outside. *First*, the question itself did not disparage the Union and was valid. Also, Stachowiak flatly accepted Cohen's explanation without protest, did not press on to identify who gifted their mark outs or otherwise attempt any further action.[18] *Second*, the questioning itself, even if it were momentarily labeled disparagement, seems to fit well within the auspices of *Tesla,* inasmuch as it did not threaten employees or otherwise interfere with §7 rights. Dismissal is, thus, warranted.

C. SHERIDAN & NORTH BAILEY STORE

On March 17, Region 3 certified the Union as the representative of this store's Baristas and Shift Supervisors. (GC Exh. 85). J.D. Roewer has been the Store Manager since May. (Tr. 2613). Stachowiak also served as Store Manager here during the temporary closure of her store.[19]

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[17] This was alleged to be unlawful under complaint ¶¶6(i) and 13.

[18] Two other points are notable. *First*, the GC did not analyze this issue in its brief; it solely included a finding in its proposed legal conclusions and order, without explanation. *Second*, although Stachowiak's actions might constitute an implied impression of surveillance, this theory was not alleged by the complaint, briefed or fully litigated.

[19] Stachowiak was on leave from November 2022 to February 2023. Some allegations concern her and others Roewer.

1. §8(a)(3): August 5 – Samuel Amato Discharge[20]

a. GC's Case

Shift Supervisor Amato, an active Union organizer, served on its effects bargaining committee regarding the temporary closure and remodel of the Sheridan & North Bailey store, and participated in various strikes. His *Notice of Separation* stated that, "on 7/3/22, Samuel closed the café during regular business hours without informing his SM or DM."[21] (GC Exh. 24).

Amato averred that his coworker, Shift Supervisor Megan Gillen, actually closed the café on July 3. He added that Store Manager Stachowiak previously said that Shift Supervisors were empowered to close the lobby when staffing was insufficient, which occurred on July 3.[22] He said that, "closing the lobby is something that a supervisor would have power to do." (Tr. 522–23).

Gillen accepted full responsibility for the July 3 closure.[23] (Tr. 714). She explained:

> I closed the lobby that day because we were short staffed. It was a holiday weekend and we weren't able to keep up with business. And so I made the decision it would be best for the store to be drive through only.

(Tr. 715). She made her decision at 1 p.m. and then advised Amato and the 2 Baristas.[24] She averred that she independently closed the lobby other times, without issue.[25] She said she later called Stachowiak to make sure that mobile ordering remained off and relay that her plan was to reopen at 4 p.m. Stachowiak texted her later that day and asked, "did you make the decision to close down the lobby without my permission today?" (GC Exh. 41). She said that she replied to Stachowiak on July 5 at the store and said, "I'm sorry I didn't contact you about closing the lobby. I thought I did what was best." (Tr. 731). She said that Stachowiak accepted her apology, told her to obtain her permission in the future, and advised that she planned to call Partner Resources about the incident. She said that Stachowiak later advised that, "Partner Resources [said] … I would need to be written up." (Tr. 731-32). Gillen said that, surprisingly, she was never written up.

b. Starbucks' Reply

Stachowiak insisted that Amato was fired because he closed the lobby without her permission. She said that Amato was responsible, even though his shift overlapped with Gillen's.

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[20] This was alleged to be unlawful under complaint ¶¶9 and 14.

[21] Amato previously received an unrelated *Final Written Warning* on August 8, 2021. (GC Exh. 25). It is also undisputed that there is no written policy, which regulates store lobby closing procedures for Shift Supervisors.

[22] He explained that only he, Gillen and 2 Baristas were present on July 3, which was insufficient to run the lobby, mobile ordering and drive-through. The lobby then reopened at 4 p.m., when more staff arrived.

[23] She credibly testified that she supported the Union, but, unlike Amato, was covert about her support. She recalled that Amato, Rachel Cohen and Daniel Rajas were the primary and open Union leaders at her store.

[24] She stated that she was previously told by District Manager Lewis in December 2021 that she was empowered to do what was "best for my customers and best for my partners [a]nd if that meant closing the lobby … and going drive through only then that's what I should do." (Tr. 718).

[25] She offered March 2022 as an example of when she independently closed the lobby due to understaffing. She added that Shift Supervisor Renee also independently closed the lobby in May 2022 and still works for Starbucks.

She claimed that she spoke to Gillen, who said that "her and Sam decided together." (Tr. 1858).

c. Credibility Resolution

Gillen was first-rate witness; she was extremely cooperative and had a strong demeanor. Her admission that she closed the lobby was a statement against her own interest, which only enhances her credibility. Stachowiak was, as stated, less credible. Hence, her contention that Gillen told her that both she and Amato jointly closed the store was not credited. Gillen's testimony that she singularly made the decision, told Stachowiak, and was never held accountable was credited.

d. Analysis

Starbucks violated §8(a)(3), when it discharged Amato. In *Security Walls, LLC*, 371 NLRB No. 74, slip op. at 11 (2022), the Board held that:

> Under *Wright Line*, [251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, 102 S.Ct. 1612, 71 L. Ed. 2d 848 (1982),] the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. The General Counsel meets this burden by proving that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. Once the General Counsel sustains her initial burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity.

Id. (footnotes omitted). "[W]here an employer's purported reasons for taking an adverse action against an employee amount to a pretext--that is to say, they are false or not actually relied upon--the employer necessarily cannot meet its *Wright Line* rebuttal burden." *CSC Holdings, LLC*, 368 NLRB No. 106, slip op. at 3 (2019).[26] On the other hand, further analysis is required if the defense is one of "dual motivation," i.e., the employer avers that, even if an invalid reason played some part in its motivation, it would have still taken the same action for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

The GC adduced a prima facie *Wright Line* case. It showed that Amato engaged in Union activity (i.e., he co-organized his store, participated in effects bargaining, etc.), and that Starbucks knew and held animus (i.e., Stachowiak's unlawful threats and the other actions found unlawful herein). The GC, accordingly, proved a causal relationship between his firing and §7 activity.

It must now be examined whether Starbucks proved that it would have fired Amato absent

[26] The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must show that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–87 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), it fails, by definition, to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

his protected activity. Starbucks failed to meet its burden. *First*, Amato did not make the closure decision; Gillen did. He was, as a result, fired for something he never did. Starbucks' decision to ignore Gillen's admission against her own interest, and, instead, prosecute Amato under these circumstances is inexplicable and suspect. *Second*, even if we momentarily credit Stachowiak's contention that it was a joint decision, which it was not, Starbucks decision to hold Amato accountable (i.e., the one with open Union activity) and hold Gillen unaccountable (i.e., the one without open Union activity) is a painfully glaring case of unlawful disparate treatment. *Finally*, it is implausible that Starbucks, which created an ambiguous situation by failing to have a clear written policy on closure, would use this situation to rid itself of a long term Shift Supervisor like Amato unless it had other invalid reasons. Or put another way, Starbucks' decision to use an ambiguous issue of its own making to eliminate a strong Union supporter further demonstrates unlawful intentions. In sum, it failed to meet its *Wright Line* rebuttal burden.

2. §8(a)(3): November 14 – Tatiayna Gurskiy Discharge[27]

a. GC's Case

Shift Supervisor Gurskiy was employed from May 2021 until her November 14 firing. She had significant Union activity, which included serving on the Union's effects bargaining committee, organizing strikes, wearing Union pins and otherwise advocating for her coworkers. Her *Notice of Separation* stated, inter alia, that:

> On October 30, 2022, Tati engaged in argument with another Shift Supervisor, where she lost her composure and yelled at the other shift supervisor. During this argument, Tati made a threat of violence toward the other partner stating that she would "call her boyfriend to come finish the conversation."
>
> The Workplace Violence policy … states, "A threat of violence prohibited by this policy includes conduct or behavior that reasonably could be interpreted as conveying an intent to engage in violence or to cause injury or harm to a person or property." Additionally, … the Partner Guide … states, "in cases of serious misconduct, immediate separation from employment may be warranted …."
>
> Due to this misconduct, Tati is separated from employment, effective immediately.

(GC Exh. 70).

Gurskiy recalled the October 30 incident; she offered this highly detailed account:

> [F]or the first hour … , I was working the solo drive-through ….
>
> After an hour, … I asked another person to cover me so I could go to the back to take a … sip of my water …. There were three other people in the back …. Yazmin Gil … was doing dishes …. Joe Calicut was … on his break … [and] Kevin Parham was seated in the back area ….

[27] This was alleged to be unlawful under complaint ¶¶9 and 14.

> I noticed that Kevin was talking about me very loudly to Joe, speaking negatively …. He was talking about … the previous day …. [H]e was … saying that … I was disrespectful and that he didn't like … me running all of these shifts ….
>
> I asked him … if he was talking about me …. He said that he was …. I asked him if he could not talk about me, especially … if it's not true …. He was very upset and he immediately stood up from his chair and he started clapping his hands in front of me and walking towards me and screaming at me ….
>
> He was calling me a bitch several times. He said he was going to have his sister come to the store and beat my ass. He was just screaming at me. I can't recall everything that he said, but those are the things that I remember him saying ….
>
> I was walking towards the front area of the store. I was trying to get away from him …. He was still continuing to scream at me and clap his hands, and I felt like the more that I walked away, the more he was following me. Like he didn't like the fact that I wasn't engaging in the … argument with him. So he was following me to the front of the store ….
>
> I was … right near … the brewing area …. He was still continuing to yell at me and calling me a bitch. He called me a bitch over six times ….
>
> So after … the fifth or sixth time of him calling me a bitch, I … noticed that he was still following me. I turned around and I told him that if he called me a bitch again, I would have my boyfriend come finish the conversation ….

(Tr. 1113-1119). The lobby was closed to customers at that time. She said that, immediately after she threatened Parham, Store Manager Rower reacted and separated them. Parham is over 6' and Gurskiy is around 5'4". She recalled the trauma inflected by this situation:

> I just felt scared, … I had never been in this situation like this before. I've never been threatened at work …. I've never experienced … anything like this in my life. Me and Kevin had friendly relationships prior to this …. I did not expect that this was going to happen at all.

(Tr. 1120). She said that she felt that threatening Parham was her sole option to de-escalate a hostile and unpredictable situation. (Tr. 1121). She that Store Manager Roewer initially sent Parham home and had her to remain in the lobby. She said that, after reflecting about the situation, Roewer eventually sent her home, in order to be consistent.[28]

b. Starbucks' Response

Roewer succinctly testified that:

[28] On November 14, Parham was also fired. (GC Exh. 128). He was not called by Starbucks to testify, which left most of Gurskiy's account unrebutted, which was highly believable, detailed and consistent, and has been fully credited.

> In the back of the house, I just heard loud noises. And then out front threats made toward one another. Kevin calling Tati a bitch, that he would go ahead and get his sister up here to … beat her ass, was along the lines of exactly what he said. And then she retaliated with threats of having her boyfriend come up to fight him.

(Tr. 2619). He said that he waited with Kevin in the back of the store until he left because of "the threats that he was making" (Tr. 2621). He noted that both employees were consequently fired.

c. Analysis

Starbucks violated §8(a)(3), when it fired Gurskiy. The GC adduced a prima facie case. It showed that Gurskiy had substantial Union activity, when she supported effects bargaining, organized strikes and engaged in other activities. Starbucks had knowledge, and held animus (e.g., Stachowiak's threats, Amato's firing, and the host of other actions found unlawful herein). On this basis, the GC proved a causal relationship between Gurskiy's firing and §7 activity.

It must now be examined whether Starbucks adequately showed that it would have fired Gurskiy absent her protected activity. It failed to meet its burden. Most of the relevant facts are undisputed. Gurskiy, a 5'4" female, was pursued by Parham, a 6'male, at work. Parham instigated the altercation, was unprovoked, arose from his break room chair and pursued Gurskiy, acted in a menacing way, threatened to have his sister accost Gurskiy, repeatedly called Gurskiy a "bitch," and aggressively stalked her into the café's lobby, even though Gurskiy was, at all times, retreating. Gurskiy felt physically threatened and had no option beyond retreat, whereas Parham, the pursuer, did not feel threatened and could have abandoned pursuit at any point. The altercation also flowed from Gurskiy, a Shift Supervisor, giving direction to a subordinate Barista, and involved Parham insubordinately challenging such authority. Gurskiy also made her offensive comment to Parham only after she believed that she had no further path of retreat.[29] As a result, it is truly remarkable that, when Starbucks was faced with the disciplinary question of how to differentiate between an aggressor and a victim, it just threw up its hands and fired both as equal offenders.[30] In sum, grouping Parham and Gurskiy in the same culpability set under these circumstances is so devoid of reason that it renders Starbuck's *Wright Line* defense invalid.

3. §8(a)(5): August 5 – Amato Discharge[31]

The GC contends that Starbucks violated §8(a)(5), when it unilaterally discharged Amato.

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[29] Roewer testified that, "In the back of the house, I just heard loud noises. And then out front threats made …. Kevin calling Tati a bitch, that he would go ahead and get his sister up here to I believe beat her ass …. ***And then she retaliated with threats of having her boyfriend come up to fight him***. (Tr. 2621 (emphasis added to show timing)).

[30] Starbucks could have, for example, rationally differentiated by issuing a *Notice of Separation* to Parham, and a *Written Warning* to Gurskiy. It failed to explain why it neglected this obvious path or some other reasonable option. This is not to say that it cannot be argued that Gurskiy was slightly less that innocent, i.e., an armchair quarterback, who is a fan of venturing from the sublime to the ridiculous, could certainly argue with a mostly straight face that Gurskiy should have made a last ditch sprint behind Store Manager Roewer and used him as a human shield before uttering any threats. In spite of this, glomming Gurskiy together with Parham and treating them as disciplinary equals is irrational under the circumstances.

[31] This was alleged to be unlawful under complaint ¶¶10, 11 and 15.

Under current precedent, employers have no duty to bargain over discretionary discipline issued to employees not yet covered by a contract, where the discipline is "similar in kind and degree to what the employer did in the past within the structure of established policy or practice." *Care One at New Milford*, 369 NLRB No. 109, slip op. at 5 (2020). This allegation is, therefore, invalid.

4. §8(a)(3) and (5) – Three Strikes Policy[32]

a. GC's Case

Amato testified that, in early June, Stachowiak implemented a *Three Strikes* Policy:

> [I]t was a disciplinary measure … by Shift Supervisors, where … I would observe the baristas and if I saw them violate a rule …. I was to approach … and let them know that they're breaking a policy, tell them what the policy is …. And then throughout the day, if I saw them break this rule again, I would go up to them a second time, second strike, and I would say, "We've talked about this policy. You're still leaving the ice bin open. Please don't let this happen again. If it happens again, I'll be sending you home." And then if I see them break the policy a third time, I was to go up to them and let them know that this is … their third strike …. [and have them] punch out and go home for the day.

(Tr. 416-17). He said that partners were previously gently coached about miscues, without being automatically sent home after 3 strikes. He stated that Starbucks never gave the Union of notice of this policy change or otherwise bargained. Gillen corroborated this testimony.

b. Starbucks' Response

Starbucks does not challenge that it failed to notify the Union or bargain prior to implementing this policy. It contended that this policy was just a reiteration of pre-existing rules.

c. Credibility Analysis

I credit Amato's and Gillen's testimony that the *Three Strikes* policy was a harsher application of Starbucks' pre-existing rules. They were deeply credible and consistent witnesses with strong demeanors (i.e., particularly Gillen). Thus, although Amato and Gillen, as Shift Supervisors, have always reminded Baristas to close the ice bin and follow other rules, the added aspect of sending someone for a third violation represented a new and more rigorous application.

d. Analysis

Starbucks violated §8(a)(5), when it implemented the *Three Strikes* policy. In *San Miguel Hospital Corp*., 357 NLRB 326, 326-27 (2011), the Board described an employer's obligation to bargain with a newly established union as follows:

[32] This was alleged to be unlawful under complaint ¶¶7, 12, 14 and 15.

> Sections 8(a)(5) and (d) of the Act obligate an employer to bargain with the representative of its employees in good faith with respect to "wages, hours and other terms and conditions of employment." . . . . Section 8(a)(5) also obligates an employer to notify and consult with a union concerning changes in terms and conditions of employment before imposing such changes. . . . When a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain, at least with respect to changes in terms and conditions of employment, commences . . . [on] the date of the election.

(Id.). A bargaining obligation similarly arises when an employer enforces an unchanged rule in a more rigorous manner. See, e.g., *Vanguard Fire & Supply Co*., 345 NLRB 1016 (2005) (changing from lax to stringent enforcement). In addition, work rules that can be grounds for discipline and thereby affect employees' continued employment are mandatory bargaining topics. *Success Village Apartments, Inc*., 348 NLRB 579, 630 (2006), *Postal Service*, 341 NLRB 684, 687 (2004). In order to trigger a bargaining obligation, a unilateral change must be material, substantial and significant. *Crittenton Hospital*, 342 NLRB 686 (2004). A change will not, however, constitute an unlawful unilateral change, when it narrowly addresses a newly arising condition covered by a pre-existing rule. *Goren Printing Co*., 280 NLRB 1120 (1986) (limited fine tuning of extant rules).

Starbucks went from its Shift Supervisors gently reminding Baristas about health and safety rules without generally sending anyone home to, under the *Three Strikes* policy, automatically sending Baristas home after 3 miscues. A change from lax enforcement of pre-existing rules to stringent enforcement was a material, substantial and significant change to the Sheridan & North Bailey Unit's terms and conditions of employment. See, e.g., *Vanguard Fire & Supply Co*., supra; *Success Village Apartments, Inc*., supra. Given that Starbucks failed to notify the Union about this significant change or otherwise bargain, its actions violated §8(a)(5).[33]

5. §8(a)(3) and (5) – Early Holiday Closure[34]

Cohen testified that, although she "couldn't remember a time when July 4th was not a half business day … in … about 10 years …," Stachowiak unilaterally eliminated this half-day. Stachowiak asserted that the alleged half day practice was sporadic and inconsistent.[35] It is undisputed that Starbucks never notified the Union or engaged in bargaining over this matter.

The Board has held that, "[u]nder the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes." *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205 (2011). The Act bars employers from taking unilateral action

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[33] The GC also alleged that the *Three Strikes* policy violated §8(a)(3). Given that this change was found to violate §8(a)(5) and rescission has been recommended, it is unnecessary to pass on the §8(a)(3) allegation, given that it would not materially affect the remedy. *Alamo Rent-A-Car*, 362 NLRB 1091, 1093 fn. 8 (2015).

[34] This was alleged to be unlawful under complaint ¶¶7, 12, 14 and 15.

[35] As previously discussed, Cohen has been credited over Stachowiak. In addition, Starbucks could have easily offered time and attendance records, which demonstrated that its past practices for the last decade regarding early July 4 closure were intermittent, sporadic and unpredictable. Such evidence would have likely been outcome determinative. Its failure to present such evidence suggests that, if it truly existed, it would surely be part of the record.

on mandatory bargaining topics such as rates of pay, wages, hours of employment and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 5 (2011). An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment, even where such practices are not expressly set forth within a collective-bargaining agreement. *Garden Grove Hospital*, supra. The party asserting the existence of a past practice bears the burden of proof on the issue; specifically, the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis. *Palm Beach Metro Transportation, LLC*, 357 NLRB 180, 183-184 (2011), enfd. 459 Fed. Appx. 874 (11th Cir. 2012).

Starbucks violated §8(a)(5), when it unilaterally changed its past practice of granting employees a half-day on July 4. Based upon Cohen's credited testimony, this practice was regular, longstanding and reached a status where employees could reasonably expect its consistent reoccurrence. *Palm Beach Metro*, supra. The practice involved holiday hours and work time, which is a mandatory bargaining subject. Starbucks, accordingly, violated the Act, when it modified this past practice without notifying the Union and bargaining to a good faith impasse.[36]

D. WILLIAMSVILLE PLACE STORE

On March 14, the Union petitioned to represent the Baristas and Shift Supervisors at the Williamsville Place store. (GC Exh. 89). The Union won the election and a *Certification of Representative* issued on December 15. (GC Exhs. 92–94).

1. §8(a)(1)–April 4: Unit Packing the Williamsville Place[37]

In April, the Transit Regal café underwent a major renovation, which resulted in the temporary closure of this café and transfer of partners to Williamsville Place and other neighboring stores. The GC contends that Starbucks engineered the temporary transfer of the Transit Regal partners to negatively impact the upcoming mail ballot election at Williamsville Place.

a. GC's Case

The GC's proof on the unit packing issue was, at best, limited. Its primary witness, Barista Brian Murray, said that, before the April renovation occurred, the Union formed a Transit Regal organizing committee. He claimed that he and the 2 other committee members were transferred to Genesse Street, which was already unionized, and that outspoken anti-Union partners were transferred to Williamsville Place, which was in the early stages of organizing.[38] He, as a result, attempted to imply that Starbucks intentionally sent anti-Union partners to Williamsville Place to affect the election. Barista Jason Ekberg added that he was transferred to Williamsville Place, even though he did not request that store.

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[36] As noted, the GC also alleged that the change in past practice violated §8(a)(3). Given that this change was found to violate §8(a)(5) and rescission has been recommended, it is unnecessary to pass on the same §8(a)(3) allegation, given that it would not materially affect the remedy. See, e.g., *Alamo Rent-A-Car*, supra.

[37] This was alleged to be unlawful under complaint ¶¶6(a) and 13.

[38] He noted, however, that he was unsure where his coworkers sought temporary transfers. (Tr. 1096).

b. Starbucks' Reply

Store Manager Rubaya Disha said that several factors guided temporary assignments, including proximity to the receiving café and its staffing needs. She denied that Union affiliation played any role. District Manager Michaela Murphy reported that Transit Regal closed on April 4 and that the remodel lasted 6 weeks; she offered that:

> [W]e asked those partners to submit their … top three locations …. Those … preferences were then reviewed … to understand what the needs of the surrounding stores were. And then we were able to place partners as close to their preference, within the stores that we had availability….

(Tr. 2211).

On March 10, Murphy sent out this email to management regarding temporary transfers:

> [A]pproximately 18 partners are going to Transit & Maple and the remaining partners have asked to be at Williamsville Place except for the two partners Tiffany shared …. We are hoping to share the store they will be placed at … tomorrow ….

(R. Exh. 111). On March 16, Murphy transferred 7 partners to Williamsville Place. (R. Exh. 114).

c. Precedent

The Board has held that an employer's hire of a substantial number of employees in order to "pack the unit" and dilute the union's strength in an election is unlawful. *Einhorn Enterprises*, 279 NLRB 576, 596 (1986). The question frequently turns upon circumstantial evidence as to why individuals were added to a particular site. *Golden Fan Inn*, 281 NLRB 226, 228, 229 (1986).

d. Analysis

The GC failed to prove that Starbucks packed the Williamsville Place unit. Murphy's testimony that Starbucks transferred employees on the basis of store needs, proximity and desirability is a plausible, non-discriminatory reason, which the GC did little to nothing to undercut.[39] The GC's case is, as a result, rested solely upon Barista Murray's anecdotal opinion that pro-Union partners were intentionally sent to Genesse Street, while anti-Union partners were intentionally sent to Williamsville Place. His opinion was, however, devoid of any personal knowledge of partner transfer preferences and store availability (i.e., a basis in fact), which greatly reduces the weight, if any, that it can be afforded.[40] In sum, the circumstantial evidence presented herein suggests something other than unit packing occurred.[41] *Golden Fan Inn*, supra. Dismissal of this allegation is, accordingly, recommended.

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[39] Murphy's testimony on this point is, accordingly, credited.

[40] Murray acknowledged these points during cross-examination.

[41] It is also noteworthy that, even assuming arguendo that Starbucks intended to pack the unit, which it did not, it did a somewhat poor job, inasmuch as the Union ultimately won the Williamsville Place election. This piece of additional circumstantial evidence, although not determinative, further undermines the unit packing claim.

2. §8(a)(3) – Sariah Hakes *Notice of Separation* and Casey Moore *Written Warning*[42]

a. GC's Case

i. August 31: Hakes *Notice of Separation*

Hakes, an active and open Union supporter, received this *Notice of Separation*:

> 06/05/2022, Sariah received a final written warning for attendance and punctuality policy violations. Despite this, …. [o]n 8/22/22, Sariah clocked in 28 minutes late to her scheduled 7:00 am shift, she did not call the store to notify of her lateness.

(GC Exh. 11).[43]

ii. November 16: Moore *Written Warning*

Moore, another open and active Union supporter, received this *Written Warning*:

- On 10/2/22, 5 min late
- On 10/13/22, 54 min late. Casey arrived out of dress code and … sent home ….
- On 11/6/22, failed to call out properly by sending a text message to the shift supervisor on duty
- On 11/13/22, failed to call out properly by sending a text message to the store manager
- On 11/24/22, Casey NCNS her scheduled shift ….

(GC Exh. 27).[44]

iii. Time and Attendance Records and Discipline

Starbucks' time and attendance records at Williamsville Place show that lateness is somewhat routine and that even the most egregious latecomers retained their jobs. (GC Exh. 177(a)(b)) This chart offers some glaring examples of the worst violators, who retained their jobs:

Employee	Time Period	Days Late	Shifts	% Late
H. Beyer	Aug. 2., 2020 to Jun. 14, 2021	164	199	82%
S. Celmer	Aug. 3., 2020 to Jun. 17, 2021	149	190	78%
A. Hare	Aug. 2, 2020 to Jun. 13., 2021	30	91	32%

[42] This was alleged to be unlawful under complaint ¶¶9 and 14.

[43] Hakes averred that, when she checked her schedule on August 21, she confirmed that her start time on August 22 was 7:30 a.m. She related that was never given notice that her start time was changed to 7:00 a.m.

[44] Moore did not dispute the facts underlying her discipline. She explained that she submitted several availability requests in June to Store Manager Disha, which would have addressed the situation causing her lateness. She said that Disha denied her requests and that this recalcitrance exacerbated the issues that led to her discipline.

(Id.). In addition to tolerating monumental lateness, Starbucks was equally inconsistent regarding how many times one could arrive late before discipline was triggered at Williamsville Place. This table demonstrates this anomaly:

Employee	Discipline	Date	Underlying Lateness
M. Shanklin	Written Warning[45]	May 22, 2022	17x late
M. Shanklin	Final Written Warning	Jun. 9, 2022	4x late & stayed over shift
M. Shanklin	Notice of Separation	Jun. 19, 2022	1x late, missed shift
M. Hernandez	Written Warning[46]	Dec. 13, 2022	10x late & falsifying record
L. Huey	Written Warning	Jul. 17, 2022	1x late
L. Michels	Documented Coaching	Oct. 6, 2022	13x late
L. Michels	Written Warning	Nov. 16, 2022	5x late
M. Ramos	Documented Coaching	Jul. 1, 2022	9x late

(GC Exh. 177; R Exhs. 65-68, 70, 72, 77).

b. Starbucks' Reply

Manager Disha said that Starbucks maintains established time and attendance policies. She averred that Hakes and Moore were disciplined for undisputed conduct and their Union activities played no role. She insisted that she would not tolerate even the slightest level of lateness at her store, would fire an employee for a single no-call, no show, and considered a single minute of lateness to be a violation. She made no effort, however, to address the highly inconsistent personnel records described above, which clearly show something other than the hardline, no-compromise, stance described during her testimony.

c. Analysis[47]

i. Hakes' *Notice of Separation*

The GC satisfied its burden of showing that Hakes' protected conduct was a motivating factor. She had significant open Union activity.[48] There is widespread Union animus, which includes Stachowiak's threats, Amato's and Gurskiy's firings and the many other actions found unlawful herein. The close timing between Hakes' August 31 firing, and the Union's March to May campaign, also adduces animus. *La Gloria Oil & Gas Co*., 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). On these bases, the GC demonstrated a strong causal relationship between Hakes' firing and §7 activity.

Starbucks failed to show that it would have taken the same action against Hakes absent her protected activity. Regarding lateness, it alleges that it disciplined her lateness in the same consistent way that it handled other latecomers at Williamsville Place. This defense is, however,

[45] It is unclear whether the *Written Warning* followed a *Documented Coaching*.
[46] It is unclear whether the *Written Warning* followed a *Documented Coaching*.
[47] Under complaint ¶¶10, 11 and 15, Hakes' *Notice of Separation* and *Final Written Warning* were alleged as §8(a)(5) violations. Under current precedent, dismissal of these allegations is warranted. *Care One at New Milford*, supra.
[48] Starbucks has not denied knowledge of her Union activities.

eviscerated, by its retention of partners like Beyer and Celmer, who respectively arrived late a whopping **164** and **149 times** over a 10-month period. It is, as a result, inexplicable why Hakes' single instance of lateness triggered her firing, whiles others arrived late over a hundred times each and held their jobs.[49] Starbucks' defense is further undermined by the fact that, even when it actually disciplines lateness, it does so in deeply inconsistent and arbitrary ways, e.g., its time attendance disciplines show that employees can be disciplined for arriving late anywhere from 1 to 17 times.[50] There's simply no predictability regarding lateness, which begs the question of why it singled out Hakes.[51] In short, its claim that Hakes was treated evenhandedly is invalid.[52]

ii. Moore's *Written Warning*

The GC satisfied its initial burden of showing that Moore's protected conduct was a motivating factor. She had extensive open Union activity, Starbucks had knowledge, and there is significant Union animus.[53] The close timing between Moore's November 16 *Written Warning*, and the Union's March to May campaign and December certification further demonstrates animus. *La Gloria Oil & Gas Co*., supra. On these bases, the GC proved a strong causal relationship between her *Written Warning* and §7 activity. Starbucks failed to show that it would have taken the same action against Moore's lateness absent her protected activities for all of the same reasons cited regarding Hakes above. Her discipline, therefore, violated §8(a)(3).

E. GENESSEE STREET STORE

On January 10, the Union was certified as the exclusive representative of this store's Baristas and Shift Supervisors. (GC Exh. 86).

1. §8(a)(3): Alexis Rizzo – September 18 *Final Written Warning*[54]

a. GC's Case

Rizzo was a member of the Union's organizing committee and vocal Union advocate; she solicited for the Union, participated in strikes, wore Union pins and was the Union's point of contact at her store. On September 18, she received a *Final Written Warning* for missing her August 29 shift and notifying management of her absence after her shift began. (GC Exh. 8). Rizzo avers that she missed the start of her shift due to a migraine.

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[49] Beyond the hope to oust a Union supporter, why else would Starbucks retain Beyer and Celmer, while firing Hakes?

[50] Given that Starbucks already tracks start and stop times up to the minute for wage and scheduling purposes, it seems intuitive that disciplining employees for lateness in a consistent manner would be a relatively easy task.

[51] This contradicts Disha's testimony that she consistently disciplines employees. In reality, if employees are actually disciplined for lateness, the amount of underlying lateness that triggers such discipline is random.

[52] Starbucks' history of tolerating lateness at Williamsville Place necessarily means that it failed to rebut the GC's burden, and that Hakes' firing for lateness was unlawful. See, e.g., *Constellium Rolled Products Ravenswood, LLC*, 371 NLRB No. 16, slip op. at 3-4 (2021) (citing *General Motors LLC*, 369 NLRB No. 127, slip op. at 10 fn. 26 (2020)) ("the Board would find a violation under *Wright Line* when an employer is unable to rebut the General Counsel's burden because it had a history of tolerating inappropriate conduct"); *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117 (2021) (employer failed to meet burden where it had never disciplined an employee for similar conduct before).

[53] Starbucks has not denied knowledge of her Union activities.

[54] This was alleged to be unlawful under complaint ¶¶9 and 14.

2. Starbucks' Reply

Starbucks avers that Rizzo was consistently late and received 2 *Documented Coachings* and 4 *Written Warnings* from August 2017 to September 2021. (R Exhs. 10–15). It notes that her lateness disciplines evenhandedly covered both her pre-organizing period (i.e., pre-2021) and post-organizing period. It adds that, after 6 disciplines for time and attendance infractions, a *Final Written Warning* was a logical next step in terms of dealing with this ongoing issue.

3. Analysis

The GC satisfied its burden of showing that Rizzo's protected conduct was a motivating factor. She had significant known Union activity, and there is widespread Union animus. The GC has, thus, proven a causal relationship between the *Final Written Warning* and §7 activity.

Although this is a closer question than the several other lateness disciplines analyzed herein, Starbucks nevertheless failed to show that it would have taken the same action against Rizzo absent her protected activities. On the one hand, Rizzo was consistently late during her tenure, received 6 lateness disciplines from August 2017 to September 2021, and was disciplined for lateness both before the 2021 campaign and after. In this sense, Starbucks showed that it disciplined Rizzo for arriving late, irrespective of the Union's status. On the other hand, Starbucks affords great lateness leeway to partners without Union activity (i.e., it allows them to come late repeatedly at many stores in the Buffalo market as described). The highly arbitrary and haphazard way that Starbucks handles time and attendance violations for others, who lack Union activity, makes it virtually impossible to discern whether it would have disciplined Rizzo for lateness absent her Union activities, i.e., because there is simply no standardized rule for time and attendance disciplines. See, e.g., *Constellium Rolled Products Ravenswood, LLC*, supra, 371 NLRB No. 16, slip op. at 3-4 (*Wright Line* violation where employer had history of tolerating inappropriate conduct at issue). This very close call regarding Rizzo also breaks in favor of the GC due to the rich history of Union animus herein. In sum, Starbucks failed to show that it would have issued Rizzo a *Final Written Warning* absent her Union activities; its overwhelming record of animus is simply too great, and its history of handling other attendance violations too arbitrary, to credit its claim that Rizzo was treated neutrally. Rizzo's discipline, thus, violated §8(a)(3).

2. §8(a)(3): Danka Dragic – August 8: *Final Written Warning*[55]

a. GC's Case

Dragic started in 2019. She has worn a Union pin at work since August 2021 and generally supported the Union. On August 8, she received this *Final Written Warning*:

> [W]hile working on the floor on, Danka made inappropriate, unprofessional comments over the headset, including talking about her sexual encounters, multiple times in July 2022. This was overhead by partners and further substantiated in an Ethics and Compliance investigation.

[55] This was alleged to be unlawful under complaint ¶¶9 and 14.

> Danka's conduct is not reflective of the company's Mission & Values …. The behavior is also inconsistent with Starbucks Anti-Discrimination/Anti-Harassment standard and created an uncomfortable working environment for partners.
>
> It is the expectation that Danka communicate respectfully in the workplace ….

(GC Exh. 15).

Dragic generally acknowledged that:

> I had said … the last time I was on Tinder, I matched with a couple, [and] … all I'm saying is don't be a third. Don't be somebody's sum couple spirit. It'll be the kiss … [of] death for the relationship.

(Tr. 348). She conceded that this comment was overheard on the headset by other partners.

b. Starbucks' Response

Starbucks avers that its actions were valid. *First*, it offers that it maintains a *Sexual Harassment* policy, which Dragic violated. (R. Exh. 19 at 22-23). *Second*, it did not initiate the Dragic discipline; a partner did. Specifically, on June 22, a partner initiated this *Ethics and Compliance* complaint:

> Danka … speaks crazy on the headsets speaking of her sexual experiences …. [I am] very uncomfortable and [it] happens all the time [and] … feel uncomfortable using the headsets … in fear of hearing disgusting comments [.]

(R. Exh. 126). It adds that the employee-generated aspect of the complaint further demonstrates its neutrality. *Third*, its internal investigator validated the partner's allegations:

> During my interview …, she confirmed almost every detail. Subject … admitted to the comments …. Subject described her comments as "girl talk" …. When asked to name other partners who graphically discussed their sexual encounters, subject could not recall ….
>
> In review, much of the relevant facts are not in dispute. Subject discussed her sexual encounters in detail over a company issued headset. Although no customers overheard her comments, the comments were … were inappropriate in nature ….

(R. Exh. 127). The investigator concluded that, because Dragic failed to accept accountability, a *Final Written Warning* was warranted. (Id.). *Finally*, Starbucks avers that the investigator, who recommended discipline, was unaware of Dragic's Union activities. These arguments are persuasive.

c. Analysis

The GC satisfied its initial burden of showing that Dragic's protected conduct was a motivating factor. She had Union activity and Starbucks does not dispute knowledge. There is also significant evidence of Union animus. On these bases, the GC has demonstrated a causal relationship between the *Final Written Warning* and her §7 activity.

Starbucks demonstrated, however, that it would have taken the same action against Dragic absent her protected activities. *First*, she generally admitted to making sexually suggestive comments on the headset during working hours. *Second*, Starbucks maintains a *Sexual Harassment* policy, which bars such comments.[56] *Third*, an independent investigator, who was unaware of Dragic's Union activity, recommended the *Final Written Warning*, and local management consistently applied their recommendation.[57] *Fourth*, a partner initiated the disciplinary chain of events by complaining to *Ethics and Compliance,*[58] which shows that local management was not proactive in pursuing this discipline. *Finally*, there is no evidence of disparate treatment. On these bases, Starbucks showed that it would have taken the same action against Dragic absent her limited protected activities. Dismissal of this allegation is, accordingly, recommended.[59]

F. TRANSIT COMMONS STORE

On July 19, the Region issued a *Certification of Representative*, which certified the Union as the exclusive representative of this store's Baristas and Shift Supervisors. (GC Exh. 88).

1. §8(a)(1) Allegations

a. March/April –Telling Partners to Remove Union Pins by Store Manager Crawford [60]

Barista Cole Graziano began working for Starbucks in February. (Tr. 1312). He recalled Store Manager Crawford telling him to remove his Union pin shortly after starting. (Tr.1314)("my first or second week … I was told to take it off."). Crawford did not address this issue.[61] This directive violated §8(a)(1), inasmuch as Starbucks failed to adduce special circumstances, which validated Crawford's instruction to Graziano to remove his Union pin. See, e.g., *Shelby Memorial Home*, 305 NLRB 910, 919 (1991), enfd. 1 F.3d 550, 565 (7th Cir. 1993)(selective restriction of union pins); *Stabilus, Inc*., 355 NLRB 836, 838-39 (2010)(targeted use of dress code policy against union supporters).

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[56] Employees, irrespective of Union status, routinely get disciplined for making these kinds of unwelcome comments in the workplace.

[57] The GC failed to establish that the investigator knew of Dragic's Union activity.

[58] The GC failed to show that the partner had an axe to grind with Dragic, beyond being offended by her banter.

[59] Under complaint ¶¶10, 11 and 15, Dragic's *Final Written Warning* was also alleged as §8(a)(5) violations. Under current precedent, dismissal of this allegation is warranted. *Care One at New Milford*, supra.

[60] This was alleged to be unlawful under complaint ¶¶6(b) and 13.

[61] I credit Graziano's unrebutted testimony on this issue.

b. August 10 – Denial of Graziano's Weingarten Rights by Crawford[62]

On August 10, Graziano received a *Final Written Warning*. (GC 103). He asked to have Sanabria serve as his witness at his disciplinary meeting, but, was denied. (Tr. 1330). Under *NLRB v. J. Weingarten, Inc*., 420 U.S. 251 (1975), a represented employee can have a union representative attend an investigatory meeting that may lead to discipline. Once union representation is sought, the employer can: (1) grant the request; (2) discontinue the meeting; or (3) offer the employee the choice between continuing without a representative or terminating the meeting. *Washoe Medical Center, Inc.*, 348 NLRB 361, 367 (2006). If, however, the meeting is non-investigatory, discipline is a fait accompli, and the employer's goal is solely to issue pre-determined discipline, the right to union representation does not attach and the meeting can proceed without union representation. *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).

Crawford called the Graziano meeting to issue pre-determined discipline. The *Final Written Warning* was prepared on August 1, signed on August 4, and a fait accompli once issued on August 10. (GC Exh. 103). The meeting was, accordingly, not investigatory in nature and solely held to issue pre-determined discipline. Starbucks did not, as a result, violate §8(a)(1), when it refused Graziano a representative.

2. §8(a)(3) Allegations

a. October 7 – Michael Sanabria Discharge[63]

i. GC's Position

Shift Supervisor Sanabria engaged in a significant level of open Union activities.[64] He related that, when his grandmother passed on September 9, he promptly advised proxy Store Manager Stachowiak.[65] On September 9 and 10, he texted Stachowiak and advised that he would miss work for the September 16 funeral. (GC Exh. 31). He told Stachowiak that "Bethany said she can do 4-9 on Friday, so 2-4 coverage is needed." (Id.). Stachowiak accepted his offer, agreed to "look for coverage," and pledged her "support." (Id.). And, although Sanabria thought that Bethany would cover most of his shift, she unexpectedly took leave and became unavailable.

On September 16, during the funeral, Shift Supervisor Ericka Sherwood texted Sanabria and asked if he was coming to work. (GC Exh. 32). He explained that he was at a funeral, and that Store Managers Stachowiak and Crawford were aware. (Id.). Sherwood texted back that Crawford was unaware and that he should retain any texts regarding this issue. (Id.). On the date of the funeral, Crawford texted, "you told me you had coverage," and Sanabria replied, "I told you it was Bethany and I asked what to do since she's out." (GC Exh. 33). On October 4, Sanabria spoke with District Manager Sebastian Garcia, who told him that he would request bereavement leave for him.

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62 This was alleged to be unlawful under complaint ¶¶6(j)-(l) and 13.

63 This was alleged to be unlawful under complaint ¶¶9 and 14.

64 He was involved in the Union's organizing drive at his store, talked to media outlets for the Union and was interviewed by a news station about the campaign. He is presently creating a video documentary about Starbucks staunch response the Union's organizing drive in Buffalo. He also wore a Union pin and assisted with negotiations.

65 He said that his normal Store Manager Gavin Crawford was on vacation at the time.

Garcia never questioned the legitimacy of the request or hinted that his firing was imminent.

On October 7, Sanabria, quite surprisingly, received this *Notice of Separation*:

> On 9/16/2022, Michael did not attend his scheduled shift and failed to find coverage. Michael admitted to the store manager that he did not attend his shift so that he could work another job. The SM reminded Michael on 9/14/2022 that he would need to attend his shift on 9/16/2022 or find coverage, and Michael failed to do so. Due to the misconduct, Michael is separated from employment ….

(GC Exh. 34). Sanabria denied having a second job (i.e., there was simply no evidence of this presented), insisted that he attended the funeral (i.e., this was basically undisputed), and reiterated that he notified management. He, thereafter, appealed his firing to Partner Resources, which reinstated him on November 11. He provided his grandmother's obituary as further corroboration. (GC Exh. 35).

ii. Starbucks Defense

Starbucks tried to defend the mostly indefensible. District Manager Garcia testified that:

> It was [a] … moment of confusion …. He failed to show the … coincidence of this personal loss …. And that's why we … did the right thing in … bringing him back. He was reinstated without any lingering repercussion. But ultimately … he did commit a no call, no show against a denied time off request.

(Tr. 2436).

iii. Analysis

The GC adduced a prima facie *Wright Line* case. It showed that Sanabria had substantial Union activity, Starbucks knew about his actions and held animus. On this basis, the GC demonstrated a causal relationship between Sanabria's firing and §7 activity.

Given that the GC adduced a prima facie case, it must now be examined whether Starbucks showed that it would have fired Sanabria absent his protected activity. Starbucks failed to meet its burden. *First*, if Starbucks' motivation was truly innocent, it would have first sought Sanabria's explanation and supporting documentation regarding the funeral before firing him (e.g., the obituary). Its staunch refusal to afford him these most basic of due process rights smacks of invidious intent. *Second*, Starbucks' contention that this was all "just a big mistake" rings hollow, once one observes that Sanabria notified Stachowiak and others before the September 16 funeral and was reassured that he would be "supported." To then turn around and feign ignorance demonstrates invidious intent. In sum, Starbucks's "shoot first and ask questions later" approach regarding Sanabria was suspect, and its usage of his grandmother's funeral as cover for an unlawful firing was inexcusable. *Finally*, Partner Resources' reversal of local management's termination decision further demonstrates Starbucks' discriminatory handling. The fact that this transparent matter even needed to be elevated to Partner Resources, instead of local management promptly

remedying a clear mistake, is unreasonable.

b. Graziano's August 10 Final Written Warning[66]

i. GC's Case

Graziano engaged in Union activity during his tenure. He wore a Union pin, participated in strikes, and signed the "Dear Howard" letter announcing his inclusion on the Union's organizing committee. In May, Crawford told Partner Relations that Graziano "has signed [the Union] petition," which demonstrated knowledge of his activities. (GC Exh. 102 at p.4).

On August 16, Graziano received a *Final Written Warning* for saying, "I hate my fucking car" at work.[67] (GC Exh. 103). Graziano denied the comment; he also claimed that Crawford told him that the *Final Written Warning*, "has been in the works for months." (Tr. 1328–31). It is undisputed that no customers heard Graziano's alleged profanity and that Crawford, who claims that he heard the comment, was unable to find corroborating partners. (GC Exh. 100 at p.1).

ii. Starbucks' Defense

Crawford said that he heard Graziano use profanity, which merited the *Final Written Warning*. He denied stating, that this "has been in the works." Starbucks averred that it consistently disciplines partners for profanity usage and offered these corroborating exhibits:

Employee	Discipline	Summary	Store	Prior Discipline?	Date
H. Lyke	Written Warning	Repeatedly saying "fuck" in relation to customer order	Orchard Park	No	Nov. 29, 2021
A. Goldenberg	Written Warning	"He's just an asshole in reference to a customer	Sheridan & No. Bailey	No	Mar. 1, 2022
J. Skretta	Final Written Warning	Calling workers "fucking idiots" and slamming door	Sheridan & No. Bailey	No	Feb. 18, 2022
C. Geiger	Final Written Warning	Profanity in store	Camp Rd.	Yes (Apr. 2021 written warning)	Jun. 4, 2021

(R. Exhs. 143, 145, 147). In sum, Starbucks' personnel records show that it has disciplined at least 4 partners without any record of Union activity for profanity, and that it elevated these employees anywhere from 1 to 3 rungs up the disciplinary ladder for these transgressions. It averred, as a result, that, because Graziano had a prior *Documented Coaching*, a *Final Written Warning* (i.e., a 2 rung elevation) was consistent and valid.

iii. Credibility

Inasmuch as Graziano denies using profanity and Crawford testified that he heard the comment, a credibility resolution must be made. After careful consideration, I credit Crawford. *First*, Graziano was a somewhat uncooperative witness with a poor recall, who often needed to be

[66] These actions were alleged to be unlawful under complaint ¶¶9 and 14.

[67] By way of background, on June 2, prior to the *Final Written Warning* at issue, Graziano received a *Documented Coaching* for, inter alia, failing to follow the *Dress Code*. (GC Exh. 103).

led during direct. Crawford, on the other hand, was more believable. *Second*, it is implausible that Crawford simply concocted a story about Graziano using profanity, and then sought Partner Resources' affirmation of his invention. I find, as a result, that Graziano stated, "I hate my fucking car" in the workplace.

Given that Graziano also claims that Crawford said, this "has been in the works for months," which Crawford denied, another credibility resolution must be made. Crawford's denial has been credited. In addition to the reasons discussed above, it is implausible that Crawford would undercut his own interests by admitting a Machiavellian scheme to Graziano, who was clearly not his ally. Also, if Crawford truly hatched a scheme about Graziano using profanity, it would be senseless for him to wait months to prosecute him, as Graziano suggests. In sum, Graziano's claim appears to be a fabrication.

iv. Analysis

The GC satisfied its burden of showing that Graziano's protected conduct was a motivating factor. He had some Union activity, Starbucks did not dispute its knowledge and, as noted, there is significant evidence of animus. On these bases, the GC has demonstrated a causal relationship between the *Final Written Warning* and his §7 activity.

I find, however, that Starbucks showed that it would have taken the same action against Graziano in the absence of his protected activities. *First*, as noted, he used profanity at work, which is a valid disciplinary basis. *Second*, Starbucks has shown that it previously disciplined at least 4 others, without any record of Union activity, for profanity. These employees were elevated anywhere from 1 to 3 rungs up the disciplinary ladder; thus, in Graziano's case, elevating him up 2 rungs was consistent. I find, accordingly, that Starbucks showed that it applied its rules evenhandedly. Dismissal is, thus, recommended.[68]

c. Graziano's October 7 Discharge[69]

i. GC's Case

On October 7, Graziano received this *Notice of Separation*:

> Cole has … two previous corrective actions, a documented coaching … and a final written warning …. Despite this, Cole has had the following violations:
>
> • On 8/26/2022, … an hour late to his scheduled shift
> • On 9/4/2022, … no call/no showed to his scheduled shift
> • On 9/16/2022, … arrived to his shift out of dress code wearing a purple beanie.
>
> Cole was coached to remove the beanie but refused. Cole was sent home to change and did not return for his shift ….

[68] Under complaint ¶¶10, 11 and 15, Graziano's *Final Written Warning* was also alleged as a §8(a)(5) violation. Under current precedent, dismissal of this allegation is warranted. *Care One at New Milford*, supra.

[69] These actions were alleged to be unlawful under complaint ¶¶9 and 14.

(GC Exh. 30).

Sanabria repeatedly worked alongside Graziano. He recalled that Graziano often wore beanies of various colors, logo shirts, hoodies and other items barred by the *Dress Code* without issue. He recalled that Jake Moore, a partner, often wore a red hoodie outside the color palette without issue, and that King Franklin, another partner, did the same, without issue. He added that he also observed several coworkers, who were repeatedly no-call-no-show without issue.

ii. Starbucks' Defense

Starbucks avers that the purple beanie violated its *Dress Code* and that Graziano was previously warned about *Dress Code* violations in his *Documented Coaching*. (GC Exh. 103). The *Dress Code* provides that:

> All partners are expected to follow these standards during the workday…. Failure to adhere to the dress code may result in corrective action ….
>
> **General Appearance, Colors and Materials**
>
> Starbucks partners are expected to present a clean, neat and professional appearance when starting every shift ….
>
> Clothing colors must fall within a general color palette that includes white (for tops only), black, gray, navy blue, brown or khaki (tan). Other colors are only allowed as a small accent on shoes or for accessories (ties. Scarves, socks, etc.) ….
>
> **Shirts, Sweaters and Jackets**
>
> Shirts must be clean, wrinkle-free, and in a style appropriate for food service that allows freedom of movement but does not present a safety hazard ….
>
> Shirts may have a small manufacturer's logo, but must not have other logos, writings or graphics. The base shirt color must be within the color palette (black, gray, navy blue, brown, khaki or white). These same colors may be the base color for a subdued, muted pattern. Starbucks®-issued promotional shirts may be worn for events or when still relevant for product marketing.
>
> Solid-color sweaters or jackets within the color palette may be worn. Other than a small manufacturer's logo, outerwear must not have logos or writings.
>
> Starbuckscoffeegear.com offers reasonably priced, dress-code approved shirts for sale ….

(R. Exh. 19).

Starbucks added that Graziano's time and attendance violations, which are undisputed, in tandem with his *Dress Code* violation, warranted him being elevated a rung on the disciplinary ladder, which led to his *Notice of Separation*. It denied that his Union activities played any role.

iii. Credibility

Sanabria was a highly credible witness. He had a strong demeanor and was believable. As a result, I fully credit his testimony that Graziano and several partners were allowed to repeatedly violate the *Dress Code* prior to the Union's organizing campaign, without disciplinary consequences.

iv. Analysis

As discussed, the GC adduced a prima facie case under *Wright Line.* It demonstrated that Graziano engaged in Union activity, Starbucks had knowledge, and held widespread animus. On this basis, it proved a causal relationship between his firing and §7 activity.

Given that the GC adduced a prima facie case, it must now be examined whether Starbucks proved that it would have fired Graziano absent his protected activity. Starbucks failed in this regard. *First*, as discussed above when the Hakes and Moore disciplines were analyzed, Starbucks routinely permits many employees in the Buffalo market, who lack Union activities, to arrive late as often as they desire, without disciplinary consequences. This eviscerates Starbucks' contention that Graziano was evenhandedly fired for his limited time and attendance infractions, when it simultaneously accepts hundreds of time and attendance violations from others without Union activity. *Second*, Starbucks' willingness to accept *Dress Code* violations from others without Union activity, as credibly related by Sanabria, while simultaneously cracking down on Graziano's *Dress Code* transgressions also suggests discriminatory treatment.[70] See, e.g., *Shelby Memorial Home*, supra; *Stabilus, Inc*., supra. On these bases, it has failed to show that it would have fired Graziano absent his union activity; his firing, thus, violated §8(a)(3).

G. Elmwood Store

On December 9, 2021, the Union won an election in a bargaining unit of Baristas and Shift Supervisors at Elmwood. On December 17, 2021, the Board certified these election results.

1. §8(a)(1) – July 9: Implicit Store Closure threat by Alameda-Roldan and Murphy[71]

Natalie Wittmeyer, a partner, recalled that, on July 9, the Elmwood partners struck to protest staffing levels. (GC Exh. 38). Starbucks responded by posting a letter from Store Managers Merly Alameda-Roldan and Michaela Murphy on it *OneStarbucks.com* website, which stated:

Dear Striking Workers United of Elmwood,

[70] The GC does not challenge the validity of Starbucks' *Dress Code* rule itself. See generally *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–04 (1945).

[71] This was alleged to be unlawful under complaint ¶¶6(h) and 13.

> We understand … the hard work of ALL Starbucks partners ….
>
> We … have received your strike notification in which you reference store hours and staff schedules … resulting … in … your decision to walk off your shifts. We want to clarify that staffing and scheduling … [is] determined by the customer and business needs for each location. Unfortunately, over the last several … months, we have seen a … negative impact to the business of the Elmwood store.
>
> … [W]e have continued to schedule partners in accordance with the business needs. Unfortunately, limited staff availability and frequent call outs are resulting in … shifts going unstaffed. This … [makes it] difficult … to deliver the Starbucks Experience …. Additionally, … we have had to … keep our mobile order and pay functionality turned off for approximately 25 percent …. Finally, … the Elmwood store business continues to decline as does the number of new hire applicants ….
>
> The high volume of call outs and requests to be transferred out of this specific store, increasing attrition, limited staff availability … have put significant … stress on the … store, creating difficulty for … managers in staffing and hiring ….
>
> With this clarity provided, I look forward to our … bargaining discussions …. **In the meantime, given the continued challenges and instability of this location, consistent with our ongoing assessment of all stores, we will be evaluating store operations and staff availability in an effort to maintain the viability of our Elmwood business and the elevated Starbucks Experience our customers … have come to expect of us**.

(GC Exh. 38)(emphasis added).

A statement is an unlawful threat, when it coerces employees in the exercise of their §7 rights. 29 U.S.C. § 158(a). The Board, "does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act." *Sage Dining Service,* supra. Unlawful threats include plant closure threats connected to union activity. *Mid-South Drywall Co., Inc*., 339 NLRB 480 (2003). Unsubstantiated predictions that unionization will cause a shutdown are unlawful. *Federated Logistics & Operations*., 340 NLRB 255, 256 (2003).[72]

On July 9, the Union struck to protest staffing. On the same day, Starbucks painted a dire picture of Elmwood's ongoing viability. Specifically, it advised strikers that customer satisfaction and applications were down, transfer requests were up, and the store's overall economics were bleak. It added that, "given the continued challenges and instability of this location, … we will be evaluating store operations and staff availability in an effort to maintain the viability of our Elmwood business." The timing, context and magnitude its response to the strike had "all of the subtlety of a hand grenade,"[73] and sent strikers the very loud and clear message that continued

[72] A closure prediction may be lawful, if the employer can show that it is the probable result of unionization for reasons beyond its control. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969).

[73] *Pretty Little Liars*, Season 3, Kingdom of the Blind.

strikes will prompt an ongoing evaluation of the store's "viability," which could reasonably lead to closure. This threat violated the Act.

2. §8(a)(3): September 13 – Constructive Discharge of Jaz Brisack[74]

a. GC's Case

Brisack worked at Elmwood from December 2020 until her September 2022 resignation. She was a prolific organizer, who started the Union's highly successful national campaign at Starbucks. In this role, she solicited employees to sign authorization cards and engaged in a host of high-level national and local organizing activities. Her actions have been the subject of articles in the New York Times and Washington Post. (GC Exhs. 144, 150). Starbucks' knowledge of her activities is undisputed. (GC Exhs. 144, 147). In sum, Brisack is the face of the Union's campaign.

In February, Brisack began asking Store Manager Alameda-Roldan for permission to work a shortened schedule. At that time, she was assigned a Saturday, Sunday and Monday schedule. (GC Exh. 13).[75] She renewed these scheduling change requests on a weekly basis, and recalled this resulting discussion with Store Manager Shanley during her testimony:

> I told her that I had a second job and … needed more availability to help with organizing because … this was the period when the campaign was really taking off across the country and … I needed to be more available for that…. I was helping other Starbucks workers organize their cafes.

(Tr. 295).

In May, Brisack submitted an availability request in the Partner Hours system that sought a Sunday-only schedule, effective June 11. (Tr. 296; GC Exh. 12). Her request was forwarded to Store Manager Alameda-Roldan. They then had this exchange in late-May:

> I was … talking to her about how I needed a reduction in availability, how I was not physically available for the Saturday and Monday shifts … and how … denying my availability … didn't change the fact that I was not available ….
>
> I tried to propose … solutions including … work[ing] one or two days a week. So if she needed me for an additional day, I was open to one or two days a week ….
>
> And she would tell me …, we don't have enough partners at Elmwood …. I said … I'm willing to work the full shifts until we get more partners trained and then … have my one day a week availability after there's enough people to cover those shifts. And she said that that was … not possible ….

(Tr. 298–99).

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[74] This was alleged to be unlawful under complaint ¶¶9 and 14.

[75] Her availability was listed as Friday to Monday in the Partner Hours system.

From May 30 to September 18, Brisack was scheduled to work 2 to 3 days per week on Mondays, Saturdays and Sundays, in spite of her repeated requests to reduce her work schedule. (GC Exh. 13). During this period, Brisack often "called off" and averaged less that a shift per week work. (Id.). At one point, when Brisack "called off," she had this exchange with Alameda-Roldan:

> So it was usually a very similar conversation …. I would tell her, I'm calling off because I'm not physically available to work the shift that you've scheduled me. I was intentionally saying that because I wasn't calling off because I was sick ….
>
> And I would try to emphasize … that … this was not a tenable situation. I needed to not be scheduled for shifts that I couldn't physically work because that was hurting the team ….
>
> And I would say … I can work one or two days a week or … I'll work until we have the partners and then I'll go back down or, … if you need to take me off the schedule, like we can talk about that, but this is not tenable.
>
> And she would just say, that's your decision. I would say, no, it's your decision because I've told you repeatedly I'm not available. You're the one denying my availability request and scheduling me on days you know I can't come in.
>
> And we would just go in circles.

(Tr. 308-309).

Starbucks' records connected to the Elmwood store show that several employees (i.e., not named Brisack) were allowed to work fewer than 3 shifts per week from 2021 to 2023. This chart summarizes their work assignments:

Employee	Month	Shifts Assigned Per Month	Approximate Number of Shifts Per Week[76]
C. Aiken	Mar. 2022	8	2
C. Chan	Jan. 2023	6	1.5
	Mar. 2023	9	2.25
M. Eisen	Feb. 2022	7	1.75
	Mar. 2022	7	1.75
	Apr. 2022	3	.75
	May 2022	9	2.25
	Jun. 2022	4	1
	Jul. 2022	5	1.25
	Aug. 2022	9	2.25
	Sep. 2022	7	1.75
	Oct. 2022	6	1.5

[76] This estimation was reached by dividing assigned shifts per month by 4 weeks per month. The estimate is, admittedly, a rough one, inasmuch as the average month has 4 weeks and 2 days. Thus, in reality, this chart overstates the number of assigned shifts per week and conservatively favors Starbucks' position.

	Nov. 2022	6	1.5
	Dec. 2022	8	2
	Jan. 2023	7	1.75
R. Frombgen	Oct. 2022	7	1.75
	Nov. 2022	8	2
	Dec. 2022	7	1.75
	Feb. 2023	7	1.75
K. Ginsberg	Nov. 2021	7	1.75
	Jan. 2022	5	1.25
	Feb. 2022	8	2
	Mar. 2022	7	1.75
	May 2022	8	2
J. Mendez	Sep. 2021	2	.5
	Oct. 2021	6	1.5
	Nov. 2021	5	1.25
	Dec. 2021	3	.75
	Jan. 2022	4	1
	Feb. 2022	5	1.25
	Mar. 2022	5	1.25
	Apr. 2022	8	2
	May 2022	6	1.5
K. Montanye	Sep. 2021	5	1.25
	Oct. 2021	3	.75
	Nov. 2021	5	1.25
	Dec. 2021	7	1.75
	Feb. 2022	2	.5
	Mar. 2022	4	1
M. Payos	May 2022	4	1

(GC Exh. 183(b)). In sum, between 2021 and 2023, 8 Elmwood employees were permitted to work approximately 1 to 2 shifts per week. This actually happened ***on 40 occasions***. These employees generally lacked any record of Union activities.

On September 13, Brisack submitted this letter of resignation to Alameda-Roldan:

> For seven months, … Starbucks ha[s] been retaliating against me by refusing to accommodate my availability and my time off requests and scheduling me when I am not available to work in an attempt to force me to quit. Starbucks has deliberately made my continued employment at the company impossible.
>
> You have refused to stop scheduling me, despite my many requests that if you cannot accommodate my availability, you at least stop punishing my store by causing my coworkers to be short-staffed on the days I am not available. Not only has this continued to be the case, but you have been attempting to weaponize my availability to weaken the union at my store and make my coworkers' lives miserable with understaffing.

> As you know, I am only available on Sundays, and I requested off the 25th because I am participating in an organizing training. My last shift will be the last day I am available, which is Sunday, September 18th.
>
> Starbucks is forcing me out because of my union leadership ….

(GC Exh. 14). It is undisputed that Brisack was never disciplined for missing any scheduled shifts. See (GC Exh. 13).

b. Starbucks' Defense

Store Manager Alameda-Roldan said that the minimum availability for partners was 12 hours. She described the availability policy as, "three days availability, [and] 12 hours within those three days." (Tr. 1774). She noted that the availability requirements gave management sufficient scheduling flexibility. She said that many partners increased their availability, but, that a few partners such as Brisack refused. (Tr. 1778–79). She recalled this exchange with Brisack:

> I was still scheduling her to the availability that we had in the system and she kept on pushing that she cannot work that availability ….. I told her that I cannot … and that she would have to figure out whether or not she wanted to open it up …. If not, then we would have to have this conversation ….

(Tr. 1782). She explained that she was forced to deny Brisack's Sunday-only request:

> I'm running a business. We need people in the store …. [H]er availability were weekends … [which] was our toughest days to staff. So I needed it.

(Tr. 1782-83). She said that Brisack eventually resigned "because she was not available and I kept on scheduling her outside of her availability. (Tr. 1784). She stated that Brisack's denial was only based upon business needs and her Union activities played no role. She offered no explanation why Brisack was denied her scheduling accommodation, while she simultaneously permitted several other employees at Elmwood to be assigned 1 or 2 days per week, as summarized by the chart above. See also (GC Exh. 183(b)). Store Manager Murphy added that Starbucks has a minimum availability policy, in order to "effectively run our business, and provide partners with the flexibility that they're looking for …." (Tr. 2179).

c. Analysis

The Board recognizes two constructive discharges, i.e., "changed working conditions" and "Hobson's choice" constructive discharges. Brisack was unlawfully discharged under both rubrics.

i. Changed Working Conditions

"Changed working condition" constructive discharges have 2 elements. *N.C. Prisoner Legal Services*., 351 N.L.R.B. 464, 470 (2007). *First*, the burden imposed on an employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant that it

forces resignation. *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004); *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 3 (2001). *EDP Medical Computer Systems Inc*., 284 NLRB 1232, 1234 (1987); *Crystal Princeton Refining Co*., 222 NLRB 1068, 1069 (1976). *Second*, this burden must be imposed because of their protected activities. Id.; *Union 76 Auto Truck Plaza*, 267 NLRB 754 (1983). Intent is satisfied, if the employer "reasonably should have foreseen" that its actions would prompt the employee to quit. *American Licorice Co*., 299 NLRB 145, 148 (1990).[77]

The GC established that the burden imposed upon Brisack by refusing to grant her reduced schedule request caused a change in her working conditions that was so difficult that it compelled resignation. As a preliminary matter, it is undisputed that Brisack secured a full-time second job as a Union organizer, which made it impossible for her to work both her new full-time job and current part-time role for Starbucks, absent the grant of her Sunday-only scheduling request.[78] It is also undisputed that, although Brisack repeatedly asked Starbucks management to assign her a Sunday-only schedule and expressed her willingness to discuss a short-term compromise, these requests were consistently rejected. Management's ongoing rejection of her requests created an untenable change in her working conditions in several ways: (1) management repeatedly forced her to choose between her full-time Union organizing opportunity and her part-time Starbucks slot by causing her to choose to be absent from either one of these jobs; (2) management continuously forced her to choose between being potentially disciplined at her full-time Union organizing job for missing work versus being potentially disciplined for missing shifts at Starbucks;[79] and (3) Starbucks prompted her to choose between the career development opportunity associated with full-time employment versus the seniority and retained benefits associated with her Starbucks opportunity. In short, Starbucks's failure to reduce her schedule created an untenable employment condition, which prompted Brisack's resignation. See, e.g., *North Carolina Prisoner Services*, 351 NLRB No. 30 (2007)(employer's failure to maintain a reduced workweek for an employee whose schedule had been structured around other obligations created an untenable working condition); *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004)(requiring an employee to choose between work and family obligations is sufficiently burdensome to support a finding of constructive discharge); *Grand Canyon Mining Co.*, 318 NLRB 748, 760 (1995), enfd. 116 F.3d 1039 (4th Cir. 1997) (transferring employee to different shift caused transportation issues that made it impossible to attend work). The common thread of these cases is that the employer's discrimination against the employee made it impossible for that employee to continue to attend work on a regular basis, which is the analogous situation caused by Starbucks' discrimination against Brisack (i.e., its unwillingness to change her schedule made it impossible for her to continue to attend her part-time role).

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[77] "The mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as a constructive discharge. If that were the case, then any discrimination violative of the Act followed by a quit by the discriminatee could be termed a constructive discharge." *Algreco Sportswear Co*. 271 NLRB 499, 500 (1984)

[78] Brisack could no longer work on Saturdays or Mondays because those shifts conflicted with her newly acquired organizing slot and, consequently, could now only could only work Sundays

[79] Even though Starbucks had not, at the time of her constructive discharge, disciplined Brisack for missing numerous Saturday and Monday shifts, it is intuitively obvious that this scenario could have changed at any moment and that she could have, without notice, been subjected to considerable discipline for repeatedly missing assigned shifts. As demonstrated throughout this Decision, Starbucks' approach to time and attendance violations is often arbitrary, inconsistent and unpredictable. Hence, given this history, Brisack cannot be blamed for calling this potential sword of Damocles scenario "untenable."

The GC demonstrated that Starbucks knew that its ongoing refusal to reduce Brisack's work schedule would prompt her resignation. She repeatedly advised management that the status quo could was unsustainable, that she could not be 2 places at once and that Starbucks' ongoing recalcitrance would eventually force her to quit. See, e.g., (tr. 308-309). *American Licorice Co.*, 299 NLRB 145, 148 (1990)(intent element satisfied so long as the employer "reasonably should have foreseen" that its actions would cause the quit).[80]

Finally, the GC adduced that Starbucks placed this burden on Brisack (i.e., refusing to change her schedule) because of her Union activities. The GC made out a prima facie *Wright Line* case in this regard. It is undisputed that Brisack was a historically active Union organizer, who not only organized Starbucks' Buffalo market, but, also lit the spark that prompted the Union's national organizing campaign. Its knowledge of her Union activities is undisputed, inasmuch as it disseminated newspaper articles about her actions to various levels of management. See, e.g., (GC Exhs. 144, 147, 150). As noted, Starbucks has demonstrated a substantial level of animus in this case, which includes several threats and unlawful comments in violation of §8(a)(1) as well as a slew of disciplines and discharges in violation of §8(a)(3).[81] It similarly failed to show that it would have withheld its approval of her schedule change request absent her Union activities. Specifically, in spite of Alameda-Roldan's and Murphy's claims that business needs precluded granting Brisack's request, Starbucks' personnel records at the Elmwood store demonstrate that as many as 8 employees, who lacked Brisack's level of Union activity, were allowed to work a 1 to 2 days per week at Elmwood for several weeks. (GC Exh. 183(b)). As noted, this happened a whopping 40 times. Given Starbucks' willingness to accommodate other employees' scheduling needs, who lacked Union activities, in tandem with the strong record of Union animus in this case, the conclusion that Starbucks disapproved of Brisack's scheduling request because of her Union activities is inescapable.[82] It is also deeply plausible and highly likely that Starbucks saw Brisack's new scheduling dilemma as serendipity, and hoped that its ongoing refusal to meet her request to change her schedule would cause her to resign and effectively eliminate the strongest Union voice in its workforce. Unfortunately, in this case, Starbucks' perceived serendipity arose to a constructive discharge, when it failed to treat Brisack in the same reasonable way that it treated several others at Elmwood, who lacked Union activities. In sum, the GC demonstrated that the burdens imposed on Brisack caused a change in her working conditions that were so difficult that her resignation was compelled and that these burdens were imposed upon her because of her protected activities. Her constructive discharge, as a result, violated §8(a)(3). See, e.g., *North Carolina Prisoner Services*, supra.

ii. Hobson's Choice

[80] Brisack described the situation as "untenable" and begged Starbucks to address it for at least 4 months. Starbucks was further notified of the consequence of its actions by Brisack's letter of resignation, which had an effective date, provided notice of the impact of its ongoing decision, and offered it time to reverse course. (GC Exh. 14).

[81] Starbucks made a §8(a)(1) threat on this analogous issue, when Stachowiak threatened employees that, "she wasn't allowed to make any changes to … availability, [or] … extra labor hours because we didn't have contract." (Tr. 788). Starbucks' handling of Brisack's situation was tantamount to the realization of the same threat at a different venue.

[82] Partner Megan Gillen credibly testified that she reduced her hours in July 2022. She recalled Stachowiak granting her request, and reducing her from 5 workdays per week to 2 workdays per week. She had no issue doing this at all. This testimony was not rebutted by Stachowiak.

A "Hobson's Choice" constructive discharge involves situations where an employer, rather than simply cutting an employee's hours, wages, benefits or shift, restricts their right to engage in §7 activities, which then prompts them to quit rather than working without engaging in their §7 rights. The Board has held that that, "[s]uch situations may arise when an employer confronts an employee with the Hobson's Choice of either continuing to work or foregoing rights protected by the Act." *Intercon I (Zercom)*, 333 NLRB 223, 223 (2001). The choice between continuing employment and forfeiting statutory rights, however, must be clear and unequivocal. *Chartwells, Compass Grp*., 342 NLRB 1155, 1157 n.15 (2004); *ComGeneral Corp.*, 251 NLRB 653, 657-58 (1980). A constructive discharge finding is, as a result, appropriate where the employee quits rather than complying with the condition. *Intercon I (Zercom)*, supra, 333 NLRB at 223. An employee does not have to wait for a formal ultimatum to reasonably interpret an employer's words to mean that ongoing §7 activity will result in their discharge. *Id*. at 224.

Brisack was faced with the "Hobson's Choice" of performing a full-time position as a national Union organizer of Starbucks' employees (i.e., engaging in §7 activities at her own workplace on a national level) or foregoing these activities in order to retain her part-time slot at the Elmwood store. Her choice was "clear and unequivocal," i.e., choosing between full-time organizing in your workplace or keeping your part-time job. Starbucks was aware that it was forcing Brisack to make this choice. (Tr. 295, 298-99, 308-309; GC Exh. 14). Brisack, consequently, quit rather than foregoing her §7 right to serve as a full-time organizer in her workplace. In this manner, Starbucks created a "Hobson's Choice," which arose to a constructive discharge in violation of §8(a)(3) when she resigned. See, e.g., *Titus Electric Contracting, Inc.*, 355 NLRB 1357, 1358 (2010)(employee not allowed to work until he went home to change his Union shirt was conditioning the employee's employment on his abandonment of his §7 right to wear clothing bearing union insignia in the workplace); *Mayrath Co.*, 132 NLRB 1628, 1630 (1961), enfd. in pertinent part 319 F.2d 424 (7th Cir. 1963) (finding that, when an employer instructed employees to take off their union buttons or "leave," it "conveyed to the employees the idea that they had no right to wear the buttons at work and gave them a Hobson's Choice of either foregoing the protected right or being discharged."). Brisack's constructive discharge was analogous to the Hobson's Choice that the *Titus Electric* and *Mayrath Co*. employees faced (i.e., abandon your §7 rights or lose your jobs). The only difference here is that, in Brisack's case, she was engaged in vastly higher level §7 activities than the *Titus Electric* and *Mayrath Co*. employees, i.e., directly organizing employees on a national scale is an obviously higher level of §7 activity than simply wearing a pin or union shirt. It is, therefore, inescapable that, if wearing a shirt or t-shirt is protected under the Hobson's Choice doctrine, Brisack's elevated organizing activities must also be protected in the same way. Her constructive discharge, therefore, violated §8(a)(3) in this manner as well.

H. PENFIELD STORE

On December 15, the Union filed an election petition with Region 3, which sought a vote amongst Penfield's Baristas and Shift Supervisors.

1. ULP Allegations

a. §8(a)(1) – December 19: Removal of Union Booklets by Griffith[83]

Partner Wren Walters left Union organizing pamphlets for her partners to review in the break room at 5:30 a.m. on December 19. She recalled this reply by Store Manager Lessie Griffith:

> [B]efore 11:00 … she had pulled me off of the floor … and handed me the pamphlets and told me that she was going to hand these back to me because my name was on the Dear Howard letter. And that I couldn't … put them on that back table anymore, but I could hand them directly to partners if I wanted to ….

(Tr. 1039-1040). Inasmuch as Store Manager Griffith was not called to rebut Walters' testimony on this matter, Walters' generally credible testimony on this topic was credited.[84] Given that there was no prior restriction on the usage of the back room table at Penfield (i.e., a non-working area used during non-work time), Starbucks implementation of a new no-solicitation rule aimed at barring Union flyers violated §8(a)(1). See, e.g., *Cannondale Corp*., 310 NLRB 845, 847 (1993) (no-solicitation rule unlawful when promulgated in response to protected activity).

b. §8(a)(1) – December 23: Removal of Union Flyers by Griffith[85]

Walters also left copies of the Union's Instagram account page in the break area in late December at the start of her 5:30 am shift. She stated that these documents disappeared by 9:30 a.m., but, concedes that she does not know who removed them. (Tr. 1045). Given that Walters did not know who removed the flyers, I find that the GC failed to show that Griffith was the culprit and recommend dismissal (i.e., anyone with access, including a partner, could be responsible).

c. §8(a)(1) – December: Mandatory Captive Audience Meetings[86]

The GC alleged that Starbucks unlawfully called partners into mandatory meetings to discuss unionization. Given that an employer can hold captive audience meetings regarding unionization, this allegation is dismissed. *Babcock & Wilcox Co*., 77 NLRB 577, 578 (1948).

d. §8(a)(1) – December: Threats Regarding Loss of Benefits by Griffith[87]

Walters recalled this exchange with Store Manager Griffith:

> [S]he said that she was just worried because she wasn't sure if we would have credit card tips if we unionized our store and … was worried that we wouldn't be able to give raises to the employees moving forward.

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[83] This was alleged to be unlawful under complaint ¶¶6(m) and 13.

[84] See *Douglas Aircraft Co*., 308 NLRB 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge"). Walters was also a generally credible witness, who had a sound demeanor.

[85] This was alleged to be unlawful under complaint ¶¶6(n) and 13.

[86] This was alleged to be unlawful under complaint ¶¶6(o) and 13.

[87] This was alleged to be unlawful under complaint ¶¶6(p) and 13.

(Tr. 1051). Partner April Soule recalled a similar exchange with Griffith:

> She … ask[ed] me how I felt about the Union and … brought up that it would be possible for us to lose our benefits if we were to join the Union. One big thing was the credit card tipping … she brought up that a lot of unionized stores … wouldn't get credit card tipping and that's something we could potentially lose. She also brought up … the loss of healthcare benefits being a possibility ….

(Tr. 1072-1073).[88]

A statement is an unlawful threat, when it coerces employees in the exercise of their §7 rights. 29 U.S.C. § 158(a). The Board, "does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act." *Sage Dining Service,* supra.

Griffith's threats regarding wages, tipping and health benefits violated §8(a)(1). A promise of a future wage or benefit increase is a condition of employment, which must be maintained during a campaign and bargaining. *Deaconess Medical Center*, 341 NLRB 589, 590 (2004). Starbucks, thus, violated the Act, when it threatened to rescind tipping and health benefits. *Wal-Mart Stores, Inc.*, 352 NLRB 815 (2008); *Lynn-Edwards Corp.*, 290 NLRB 202, 205 (1988).

2. Objections in Case 03-RC-308945[89]

On February 3, 2023, a *Tally of Ballots* issued in Case 03-RC-308945. Out of the approximately 20 eligible voters, 4 votes were cast for the Union and 9 against. (GC Exh. 1).

a. Objections 1–3: Credit Card Tipping, Raise and Lost Benefit Threats[90]

Objections 1 to 3 restated complaint ¶6(p), which was valid. These objections are sustained.

b. Objections 4 and 8 – Onerous Conditions and Store Closure Threats.[91]

There was no testimony solicited regarding objections 4 and 8, which are overruled.

c. Objection 9 – Captive Audience Meetings[92]

Objection 9 restated complaint ¶6(0), which was not valid. This objection is denied.

d. Objection 10 – Removal of Union Flyers[93]

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88 Walters and Soule have been credited. *First*, they were credible, consistent and corroborated each other. *Second*, as noted, Starbucks' failure to call Griffith further advanced their credibility.

89 The Union previously withdrew Objections 5-7 and 13-15. (GC 1(gggg)).

90 Objections 1–3 mirror complaint ¶6(p). (Tr. 2665).

91 Objection 4 mirrors complaint ¶6(p). (Tr. 2666).

92 Objection 9 mirrors complaint ¶6(o). (Tr. 2666).

93 Objection 10 mirrors complaint ¶6(n). (Tr. 2666).

Objection 10 mirrored complaint ¶6(n), which was not valid. This objection is denied.

e. Objection 11 – Removal of Union Booklets[94]

Objection 11 mirrored complaint ¶6(m), which was valid. This objection is sustained.

f. Objection 12 – Removal of Store Bulletin Board

There was no testimony solicited regarding objection 12, which is overruled.

g. Analysis

Objections 1, 2, 3 and 11 were sustained. The conduct underlying these objections violated §8(a)(1) and prevented employees from exercising free choice during an election. Given that the election was decided by a somewhat close margin (i.e., 5 only votes),[95] one would be hard-pressed to find that these unlawful actions did not take a great, and potentially determinative, toll upon the election's outcome. On this basis, it is recommended that the election be invalidated and employees be afforded the right to vote in a second untainted election. See *General Shoe Corp.,* 77 NLRB 124 (1948); *Diamond Walnut Growers, Inc.,* 326 NLRB 28 (1988).

I. EAST ROBINSON STORE

In March 2021, Victoria Conklin transferred to the East Robinson store. In January, she began organizing this café. In April, the Union petitioned to represent these Baristas and Shift Supervisors, which resulted in an election victory and certification in July. Starbucks knowledge of her Union activities is undisputed. (GC Exh. 2).

1. §8(a)(3) – February: Disparate Application of Transfer Rules for Conklin[96]

a. GC's Case

Starbucks maintains this *Transfer* policy:

> A store partner may want to transfer to a different store …. All transfers … are subject to district manager approval, and are contingent upon business needs, partner availability and partner performance.
>
> To be considered for transfer, a barista must have completed Barista Basics…. Any partner requesting a transfer must be in good standing, which means the partner is adhering to company policy, is meeting the expectations of the job, and has no recent written corrective actions. Ultimately, permission for a partner transfer is at

[94] Objection 11 mirrors complaint ¶6(m). (Tr. 2666).
[95] The *Tally of Ballots* reported that 4 employees voted for the Union and 9 voted against. This means that, if these unlawful actions, caused just 3 partners to change their votes from yes to no, Starbucks cost the Union an election.
[96] This was alleged to be unlawful under complaint ¶¶8, 9 and 14.

the discretion of the store manager and/or district manager.

> To request a transfer, the partner should talk to the current manager …. The partner should work with the manager to obtain additional information about transfers and to complete and submit the required paperwork for approvals …. Starbucks retains sole discretion in determining whether a partner will be transferred.

Conklin raised transferring in February, but, was rejected. She then asked District Manager Greta Case, if she could transfer to another store, but was told that there were no openings. She added that Case told her to fill out a transfer slip, but, she declined because it seemed futile. She then asked District Manager Tracey Desjardins about transferring in mid-March, but, was again denied and reminded to complete a transfer form, but, again did not do so. She stated that her 2019 transfer to East Robinson was informally accomplished during a phone call.

b. Starbucks' Defense

Support Store Manager Josie Havens managed East Robinson from March to July. She said that partners can seek a transfer as long as they are discipline-free for 6 months and complete the appropriate paperwork. See also (R 38, 39) She claimed that she has never accepted a transfer request without a completed transfer request form.

Store Manager Murphy stated that:

> [If a] Barista is looking to transfer to a neighboring store within the same market …. [,] that partner would fill out a transfer request form. That transfer request form would then be provided to their Store Manager. Their Store Manager would then review it, sign off if they approved it, and then provide it to the owning District Manager …. I would also review the transfer request, ensure that everything was correct. And at that point I would then send the transfer request, as well as the partner's availability to the receiving District Manager.
>
> The District Manager at that time would be able to review the transfer form, ensure that they have the appropriate availability and the need for this hourly partner within their roster. Once it's approved, that District Manager would then send to the receiving Store Manager. And the receiving Store Manager would make contact with the hourly partner … and get them added to the team.

(Tr. 2184-2185). She insisted that partners cannot transfer without first filling out an online form and that Conklin's application was deficient in that regard.

c. Analysis

The GC established that Conklin had substantial Union activity, Starbucks knew of her activity, and Starbucks had Union animus. Starbucks established, however, that it would have denied her transfer request in the absence of her protected activities because she failed to perfect her request by completing a transfer form. The *Transfer* policy clearly states that partners must

"complete and submit the required paperwork for approvals," and it is undisputed that Conklin did not. Murphy and Haven credibly testified that a completed transfer request form is a condition precedent.[97] Finally, the GC failed to show that there were open slots at another store in the district where Conklin might have transferred. On these bases, Starbucks demonstrated that it would have rejected Conklin's transfer request absent her Union activities.

2. §8(a)(3) – Conklin Discipline and Discharge

a. Final Written Warning[98]

On May 22, Conklin received this *Final Written Warning*:

> On May 7 …, Victoria left the cash unsecured in closed till drawers and the drive thru window unlocked and unsecured overnight.
>
> Page 17 of the Starbucks Store Operations Manual under closing standards states that keyholders must "ensure all entrances, exits and backdoors are locked and secure. Additionally, Steps to Excellence for Cash Handling under SSV delegations states that at a close, "Cash Controller secures all till drawers in the safe and places excess funds in the day's deposit bag and places signed card receipts, refunds or voids in the Sales Media envelope.

(GC Exh. 3; R. Exh. 6).

i. GC's Case

On May 7, the Union held a strike at East Robinson. Conklin was the Shift Supervisor when the strike began and notified Store Manager Crawford via text at its onset. Regarding her *Final Written Warning*, Conklin explained that she secured the cash register before the strike and "left the drawers in the locked registers with the register keys locked in the safe." (Tr. 65). She added that other employees left monies in the register once or twice per month and the only consequence that resulted was a note in the daily records book.[99] She agreed that she did not remove the cash till and lock it in the safe. She stated that employees continuously picketed outside the store until the strike ended at 6 p.m. and that nobody accessed the store during the strike. She said that the drive-through window was latched (i.e., the window could not be opened unless unlatched or forced open), but, conceded that the security bar (i.e., a redundant bar lock for the

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[97] Their accounts were plausible inasmuch as it is reasonable that Starbucks would require a writing for a significant employment action such as a transfer. Their accounts were also corroborated by the clear terms of the *Transfer* policy. *Finally*, the GC failed to provide any evidence of employees being granted transfers without accompanying paperwork, besides Conklin's anecdotal claim about 2019. In short, if such evidence existed, it follows that the GC would have sought to provide it.

[98] This was alleged to be unlawful under complaint ¶¶9 and 14.

[99] Shift supervisor Kayla DeSorbo credibly indicated that shift supervisor Jeff Thompson left the cash drawer open on a weekly basis without disciplinary consequences. (Tr. 1173). She said she observed this when she was the opening shift supervisor, and Thompson was the closing shift supervisor from the night before. (Tr. 1174). She estimated that she observed this scenario about 10 times. (Id.). This was not rebutted by Starbucks.

window) was not placed down.[100] She said that, after the strike, Store Manager Havens told her that the strike was hurtful. (Tr. 84–85).

ii. Starbucks' Defense

Havens stated that Conklin left cash in the drawer and the store unsecured. She said that she called the Partner Resource Center to assess if discipline was required and was told to issue a *Final Written Warning*. She added that Shift Supervisors must secure the store and register, and that leaving monies in the register and failing to secure the drive-through window bar was deficient.

iii. Analysis

As a threshold matter, Conklin received a *Final Written Warning* for engaging in protected §7 activities. It is undisputed that her *Final Written Warning* flowed from her leaving her post to lead and join her coworkers during a strike on May 7. See, e.g., *Pain Relief Centers*, 371 NLRB No. 70 (2022)(walkout for mutual aid and protection); *Electromec Design & Development Co., Inc*., 168 NLRB 763 (1967) (walkout was protected concerted activity, when connected to employer's failure to agree to union's bargaining demands); *Tomar Products, Inc*., 151 NLRB 57, 61 & fn. 13 (1965) (group walkout "precipitated . . . at least in part, in protest" of coworker's discipline or "dissatisf[action] with their conditions of employment" is protected "even where there is no common focus of dissatisfaction and each participant's complaint differs from all the others"). I find, as a result, that Conklin was issued a *Final Written Warning* for engaging in protected §7 activity, which would generally violate the Act,[101] unless the omissions raised by Starbucks removed her from the Act's protections, which was not the case herein.

Conklin leaving cash in the register and failing to fully secure the drive-through window was insufficient to remove her protected §7 activity from the Act's protections. The Board has long held that employees have the duty to take reasonable precautions when conducting a strike in order to avoid damage to company property. *Marshall Car & Wheel Foundry Co*., 107 NLRB 314 (1953), enfd. denied 218 F.2d 409 (5th Cir 1955). The Board has further explained that, "the right of certain classes of employees to engage in concerted activity is limited by the duty to take reasonable precautions to protect the employer's physical plant ***from such imminent damage as foreseeably would result from their sudden cessation of work***." *Youth Consultation Service*, 205 NLRB 82, 85 (1973)(emphasis added). However, employees need not act as insurers or take every precaution to secure company property for an indefinite period. *Reynolds & Manley Lumber Co.*,

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[100] DeSorbo also credibly reported that the drive through window is presently broken at the store and will not lock. (Tr. 1180). This was not rebutted by Starbucks.

[101] *Matsu Sushi Restaurant*, 368 NLRB No. 16, slip op. at 1 fn. 2 (2019) ("A *Wright Line* analysis is not warranted here because the Respondent has not asserted that it discharged the employees for any reason other than their protected concerted [activity]. . . . Indeed, the Respondent does not concede that it discharged the employees at all. Its principal defense, which we have rejected, is that [the employees] quit"), enfd. 819 Fed.Appx. 56 (2d Cir. 2020); *Atlantic Scaffolding Co.*, 356 NLRB 835, 838 (2011) ("Where, as here, employees are terminated for engaging in a protected concerted work stoppage, *Wright Line* is not the appropriate analysis, as the existence of the 8(a)(1) violation does not turn on the employer's motive.").

104 NLRB 827, 828-29 (1953), enf. den. 212 F.2d 155 (5th Cir. 1954).[102]

Conklin's actions abundantly met the defensibility standard;[103] she adequately protected Starbucks from such imminent damage as might foreseeably result from the strike. *First*, although she left monies in the register and failed to lock the cash till in the safe, the register nevertheless remained locked at all times, the register keys were secured inside the safe, the store was secured and locked, and the strikers remained assembled outside the store en masse during the strike. This means that, in order for someone to steal money from the register, they would have had to evade the strikers on the picket line, covertly break into the store without detection, forcibly pry open the cash register, and then escape past the picketers without detection. Given that Conklin protected Starbucks from all but a "Mission Impossible" style break-in, her actions were defensible and safeguarded Starbucks from "such imminent damage as foreseeably would result from their sudden cessation of work." *Youth Consultation Service*., supra; *Reynolds & Manley Lumber Co.*, supra (employees need not act as an insurer and take every precaution to secure the employer's property for an indefinite period of time). *Second*, although Conklin failed to confirm that the drive-through window's security arm was down, it is undisputed that this window also remained locked, latched and could not be opened from the outside without the application of a felony-level of force by an intruder. This, once again, for all of the reasons cited above, protected Starbucks' property from any "foreseeable" risk of entry and was defensible. *Third*, the strikers remained outside the property from noon to 6 p.m. and provided notice of their strike, which afforded Starbucks a very lengthy period to dispatch management to the store, inspect its security status before the strikers disbanded, and then take any additional precautions deemed necessary. In sum, on these bases, I find that Conklin received a *Final Written Warning* for her §7 activities, her minor omissions were not "indefensible," and that she sufficiently protected the store from "such imminent damage as foreseeably would result from their sudden cessation of work." As stated, the Board's standard is not perfection; an employee is only required to stave off foreseeable and imminent harm, which occurred. I find, as a result, that Conklin's *Final Written Warning* violated §8(a)(3).

b. Notice of Separation[104]

On June 22, Conklin received a *Notice of Separation* for arriving 29 minutes late on June 4. (GC Exh. 4; R Exh. 7).[105]

i. GC's Case

Although Conklin does not dispute arriving late on June 4, she asserted that her discipline was unfair because others were frequently late, without disciplinary consequences. Shift Supervisor Kayla DeSorbo echoed Conklin and reported that lateness at the store was rampant, with several partners arriving late repeatedly without disciplinary consequences. Starbucks' time and attendance records at East Robinson corroborate that lateness was routine and that many employees retained their jobs, irrespective of how often they were late. See (GC Exh. 178(a)(b)).

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[102] *Bethany Medical Center*, 328 NLRB 1094, 1094 (1999)("the right to strike is not absolute, and Section 7 has been interpreted not to protect concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible.").
[103] Starbucks solely asserts that her actions were indefensible.
[104] This was alleged to be unlawful under complaint ¶¶9 and 14.
[105] The *Notice of Separation* errantly stated June 24 instead of June 4. The parties agree that June 4 is correct.

This chart is demonstrative:

Employee	Time Period	Days Late	Shifts	% Late
A. Balatskay	Jan. 20, 2021 to Jul. 1, 2021	34	53	64%
S. Belous	May 10, 2021 to Jul. 1, 2021	5	31	16%
L. Benjamin	Mar. 6, 2021 to May 13, 2021	18	36	50%
M. Castellana	Apr. 19. 2021 to Jul. 1, 2021	15	49	31%
Denasia Stewart	Mar. 16, 2021 to Jul. 1, 2021	27	51	53%

(Id.).

ii. Starbucks' Response

Store Manager Josie Havens stated that Conklin was a keyholder and that her lateness precluded others from timely starting their shifts. See (R. Exhs. 41-42). She asserted that she disciplined other partners for lateness, who lacked Union activity. See. e.g., (R Exhs. 44 (R. Cisse Written Warning for 3 instances of lateness in March and April 2022), 45 (G. Birtha Documented Coaching for 3 instances of lateness in April and May, 2022)).

iii. Analysis

The GC satisfied its initial burden of showing that Conklin's protected conduct was a motivating factor, inasmuch as she had significant Union activity, Starbucks had knowledge and there is substantial evidence of animus. The close timing between Conklin's June 22 firing and the Union's January to July campaign also adduces animus. *La Gloria Oil & Gas Co*., supra. On these bases, the GC has proven a strong causal relationship between Conklin's firing and §7 activity.

Starbucks failed to demonstrate that it would have taken the same action against Conklin absent her protected activity. Regarding lateness, it alleges that it disciplined Conklin in the same consistent manner that it evenhandedly applied to others at East Robinson. This defense is contradicted, however, by its own records, which show that it has retained habitual latecomers such as Balatskay, Benjamin and Stewart, who arrived late for their shifts more than 50% of the time. (GC Exh. 178(a)(b)). This scenario makes it inexplicable why Conklin was fired for vastly less culpable behavior. Additionally, given that Conklin's firing was premised upon her unlawful *Final Written Warning*, it follows that she should never have been elevated to the *Notice of Separation* step, even assuming arguendo that her lateness discipline was valid, which it was not. Her firing, as a result, violated §8(a)(3).

J. CAMP ROAD STORE

1. §8(a)(3) – January to April: Denial of William Westlake's Transfer Request[106]

[106] This was alleged to be unlawful under complaint ¶¶8, 9 and 14.

a. GC's Case

Westlake worked for Starbucks from May 2021 until his October 4, 2022 firing. He participated in the Union's campaign at his store, handed out authorization cards, wore Union pins and signed the "Dear Kevin" letter, which announced his role as an organizing committee member. (GC Exh. 49). Although he was on leave for most of January, he requested to transfer stores during this period and claimed that he used the transfer portal to file a request. He sought to transfer to Elmwood, Genessee Street, Transit Commons and other stores. He asserted that all of his transfer requests expired without a reply. He returned from his leave in April. He said that, although Store Manager Tanner Rees agreed to follow up on his requests, he never did. (GC Exh. 50). As noted, Starbucks maintains a *Transfer* policy, which requires, inter alia, that "a barista must "be in good standing," and "submit the required paperwork for approvals."

b. Starbuck's Defense

District Manager Mann said that employees must give 60 days of written notice for transfer requests. She said that she reviewed Westlake's personnel file, but, never saw a transfer request.

c. Credibility

Inasmuch as Westlake contends that he completed a transfer request form, and Mann contends that she reviewed his personnel file and never saw a request, a factual resolution must be made. I credit Mann. If Westlake actually completed a written or electronic transfer request form, it would have been part of the record, which is not the case. I find, as a result, that he never completed a request form. I will now consider if his rejection was discriminatory.

d. Analysis

The GC made out a prima facie *Wright Line* case. It demonstrated that he had Union activity, Starbucks had knowledge of such activity and there is a prevalence of Union animus. Even assuming that Westlake orally applied for a transfer, which is unclear from the record, Starbucks adequately demonstrated that it still would not have issued him a transfer absent his Union activity. *First*, he never tendered the "required paperwork" under the *Transfer* policy, which was a prerequisite. *Second*, the GC failed to demonstrate which stores, if any, where Westlake sought a transfer had openings. This evidentiary lapse begs the question of where, if anywhere, Starbucks should have permitted him to go. Dismissal of this allegation is, thus, recommended.

2. §8(a)(3) – Discipline, Early Release and Discharge of Westlake[107]

a. Relevant Policies

Starbucks maintains a *Pin* policy, which provides as follows:

> Partners may only wear buttons or pins issued to the partner by Starbucks for special recognition or for advertising a Starbucks sponsored event or promotion;

[107] This was alleged to be unlawful under complaint ¶¶8, 9 and 14.

> and one reasonably sized and placed button or pin that identifies a particular labor organization or a partner's support for that organization, except if it interferes with safety or threatens to harm customer relations or otherwise unreasonably interferes with Starbucks public image. Pins must be securely fastened.
>
> Partners are not permitted to wear buttons or pins that advocate a political, religious or personal issue.

b. GC's Case

Westlake lost a coworker to suicide in March. He said that, when he returned to work, he wore a suicide awareness pin to commemorate the colleague he lost. He said that in May, his Shift Supervisors began telling him that Store Manager Rees wanted him to remove his pin. On May 28, Westlake met with Rees, who told him that the suicide awareness pin was not allowed to be worn outside of suicide awareness month and otherwise violated Starbucks' policies. Rees explained that pins could either be Starbucks-issued or Union-issued. (GC Exh. 51). In late May, Westlake received a phone call from District Manager Mann, who repeated that wearing the suicide awareness pin violated Starbucks' policies. (GC Exh. 52). He then took a leave of absence, and returned on July 22. Upon his return, he continued to wear the suicide awareness pin. See, e.g., (GC Exhs. 60–61). On several occasions, he arrived at work wearing his pin, and was instructed to either take off it off or clock out, which he did. Thereafter, Starbucks proceeded to progressively discipline him until he was ultimately fired, as summarized below:

Date of Delivery	Basis	Action Taken
August 2	Failure to adhere to *Dress Code* policy by wearing non-issued Starbucks pin on July 25 and 26, 2022.	Documented Coaching
August 20	Wearing non-issued Starbucks pin on August 4 and 6, 2022.	Written Warning
September 1	Wearing non-issued Starbucks pin on August 23, 24 and 30, 2022.	Final Written Warning
October 4	Wearing non-issued Starbucks pin on September 1, 2, 6, 14, 17, 20, 22, 28 and 29, 2022, and for lateness on September 6.	Notice of Separation

(GC Exhs. 58-59, 65-66).[108]

Rizzo, a Genessee Street partner, testified that she began wearing a suicide awareness pin on her apron in 2022, once she learned that Westlake had been fired for wearing this pin, and thereafter, consistently wore it until management noticed and barred her. (GC Exh. 9; tr. 198–99).[109] She asserted than pins were never raised as an issue prior to the Union campaign. Brisack

[108] Westlake also wore his pin at Williamsville Place and other stores, when he picked up other shifts. After August 20, he was barred from picking up these shifts. He said that prior to the campaign, pins were never an issue.

[109] At the hearing, Respondent moved to strike the testimony on this point as non-responsive. (Tr. 199, lines 2-5). The objection was errantly sustained in its entirety, even though a portion of this testimony was, in fact, responsive. (Tr. 199, 6-8). Thus, to the extent that the record is unclear or ambiguous on this point, the objection should have only been sustained in part, and Rizzo's responsive testimony that "I wore it when I found out that Will Westlake was separated" is allowed and included in the record. (Tr. 198, lines 23-24).

also provided similar testimony.

c. Starbucks' Defense

Store Manager Melissa Garcia said that partners can wear as many pins as desired, as long as they are Starbucks-approved. See (R Exh. 19). She noted that Westlake was given several options, including wearing his pin under his apron or holding it in his pocket.

Shift Supervisor Kathyn Spicola testified that the *Dress Code* permits Starbucks pins and a labor organization pin. She said that, if she observed an unauthorized pin, she would generally coach the offending employee to remove it. She agreed, however, that she often misses pin violations. She recalled sending home Westlake repeatedly for wearing his pin.

District Manager Murphy stated that:

> [The] pin policy is an element of our dress code policy. And it highlights that any Starbucks-issued pin can be worn, as well as one additional pin that shows their support for a labor organization. We do not allow personal pins or … pins that support political or religious beliefs in nature ….

(Tr. 2187).

d. Analysis

The GC contends that Westlake's disciplines, eventual discharge, early release from several shifts, and denial of multiple additional shifts violated §8(a)(3). As a threshold matter, the GC adduced a prima facie *Wright Line* case (i.e., he engaged in Union activity, Starbucks had knowledge and there is abundant evidence of animus). The GC advanced 2 theories in support of this violation: (1) Starbucks disparately enforced its *Pin* policy in order to discriminate against Westlake because of his Union activities; and (2) because Westlake's wearing of a pin is protected concerted activity, Starbucks' prohibition of the suicide awareness pin was unlawful.

Regarding the GC's contention that Starbucks disparately enforced its *Pin* policy in order to discriminate against Westlake because of his Union activities, I find that Starbucks established that it would have enforced the *Pin* policy against Westlake absent his Union activities. Although the GC points to partners Rizzo and Brisack as examples of employees, who wore suicide awareness pin at their stores without disciplinary consequences, the GC's argument fails to address several key issues. *First*, Rizzo and Brisack had at least as much, if not exceedingly more, Union activity than Westlake, which means that assuming that Starbucks knew that they were wearing their pins, it completely passed up on the opportunity to discipline 2 vastly higher-level Union adherents, who were already disciplined in this litigation. The GC's contention might be more persuasive, if it offered evidence of partners *without Union activity*, who were allowed to wear suicide awareness pins at their discretion, which was not done.[110] *Second*, given that the pins at

[110] There is, however, no evidence of this, beyond general assertions that employees could wear whatever pins they wished before the organizing drive began. This evidentiary lapse undermines the GC's contention of disparate

issue are quite small (see, e.g., GC Exhs. 60–61), and difficult to notice when affixed to a partner's uniform alongside a myriad of other pins, it appears to be plausible, or even likely, that a manager could repeatedly miss a partner wearing a non-compliant pin before taking action. Furthermore, it appears more likely than not that the other pin violations that the GC points to in order to establish disparate treatment could have been accomplished without management's awareness, and thus cannot serve as evidence of disparate treatment.[111] On these bases, i.e., that the GC's disparate treatment comparators had equivalent or greater Union activity and that a violative pin could go unnoticed for a lengthy duration before management reacts, Starbucks demonstrated that it was simply enforcing its *Pin* policy against Westlake in a routine way.

Regarding the GC's contention that wearing a suicide awareness pin is protected concerted activity in and of itself, and that barring an employee from wearing such a pin, discriminates on the basis of one's protected activity,[112] I find that wearing such a pin in this situation was not protected concerted activity. As a threshold matter, §7 protects the rights of employees to wear buttons, pins, stickers, t-shirts, flyers, or other items displaying a message relating to terms and conditions of employment, unionization, and other protected matters. An employer that maintains or enforces a rule restricting employees from wearing such items violates §8(a)(1). *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945); *In-N-Out Burger, Inc*., 365 NLRB No. 39 (2017), enfd. 894 F. 3d 707 (5th Cir. 2018). Moreover, even if the pin or item conveys a message that is "political" in nature, the message remains protected if it has a reasonable and direct nexus to the advancement of mutual aid and protection in the workplace. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)(distribution of a union newsletter advocating opposition to a right-to-work statute and supporting a federal minimum wage bill was protected activity); *In-N-Out Burger*, supra. (pins calling for a minimum wage for fast food workers); *AT&T*, 362 NLRB 885 (2015)(pins opposing ballot propositions that would impact working conditions); *American Medical Response*, 370 NLRB No. 58 (2020)(same); *Nellis Cab Co.*, 362 NLRB 1587 (2015)(pins opposing regulation impacting wages). In sum, the common theme behind this line of cases is that, in order for the pin or other item to be protected, there must be a reasonable, direct and proximate nexus between the message and §7 rights. In *Eastex*, the Supreme Court warned, however, that at some point the nexus between the activity in question and employees' interests "becomes so attenuated that an activity cannot fairly be deemed to come within the mutual aid or protection clause." 437 U.S. at 567-568.

In the instant case, the relationship between the message contained in the suicide awareness pin at issue and §7 rights is just too attenuated to fall under the Act's protections. Although suicide awareness is a deeply important societal, moral and political issue, it is too far removed from the advancement of workplace interests and other §7 rights. The suicide awareness pin has little to no nexus to employees' wages, hours and other terms and conditions of employment, and merely represented a political issue, albeit a deeply important one, that Starbucks remained free to regulate. Westlake's actions were, as a result, not protected and Starbucks validly sought his

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treatment (i.e., it's hardly disparate treatment, when the record primarily shows that Starbucks is treating Brisack, the lead Union organizer, more benevolently than Westlake, a vastly less active Union supporter).

[111] A pin could easily go unnoticed; it is very different than wearing a top or pattern outside of the color palette, which is vastly more conspicuous.

[112] It is, candidly, somewhat unclear whether the GC is actually making this argument from its brief. However, out of an abundance of caution, this issue has been considered.

compliance with its *Pin* policy.

K. DELAWARE & CHIPPEWA STORE

On April 15, the Union was certified as the representative of the Baristas and Shift Supervisors at Delaware & Chippewa. (GC Exh. 87). These allegations focus on a series of disciplines and terminations issued to several employees at this café.

1. §8(a)(3) – Allegra Anastasi *Final Written Warning* and *Notice of Separation*[113]

Anastasi was employed from 2014 until her August 26 firing. She wore Union pins, openly advocated for the Union and participated in various strikes. On March 13, she received a *Final Written Warning* for: lateness on January 20, 21 and 26, and February 24; and not completing a Siren's Eye setup on March 1.[114] (GC Exh. 79). On August 26, she received a *Notice of Separation* for lateness on July 18, 19, 20, 23, 25, 27 and 29, and August 1. (GC Exh. 80).

Delaware & Chippewa's time and attendance records show that lateness was rampant and that several employees, without any record of Union activity, were routinely permitted to retain their jobs, irrespective of how often they were late. This chart is illustrative:

Employee	Time Period	Total Days Late
B. Caciallo	November 5, 2020 to June 11, 2021	33
L. Gomez	August 2, 2020 to June 18, 2021	135
J. Coughlin	August 2, 2020 to July 1, 2021	183

(GC Exh. 180(a)(b)). The GC contends that Anastasi's termination was due to her Union activities, while Starbucks's avers that she was evenhandedly disciplined and discharged in accordance with its *Time and Attendance* policies and due to her failure to complete the Siren's Eye display.

The GC made out a prima facie *Wright Line* case, and adduced Union activity, knowledge and an abundance of animus. In response, Starbucks failed to show that it would have disciplined and fired Anastasi absent her Union activity. Specifically, it permitted employees such as Gomez and Coughlin, who lacked Union activity, to respectively arrive late 135 and 183 times over a 1-year period, while retaining their jobs. Its willingness to tolerate their prolific lateness, while swiftly disciplining and firing Anastasi for a vastly less egregious lateness wholly undermines its defense of evenhandedness and neutrality.[115] Therefore, given that lateness formed the lion's share of her *Final Written Warning* and *Notice of Separation*, it is apparent that Anastasi would not have received any discipline herein if lateness were validly removed from the calculus, in spite of her Siren's Eye deficiencies.[116] In sum, these actions were unlawful and violated §8(a)(3).

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[113] This was alleged to be unlawful under complaint ¶¶9 and 14.

[114] Siren's Eye is a marketing display.

[115] Moreover, as discussed repeatedly in this Decision, Starbucks maintains an unmistakable pattern of allowing rampant lateness amongst employees without any record of Union activities at several Buffalo stores, while simultaneously using lateness as a pretext for discharging vastly less culpable Union adherents.

[116] Starbucks' witnesses never asserted that she would have received discipline for just the Siren's Eye issues.

2. §8(a)(3) – Connor Mauche *Documented Coaching*, *Final Written Warning* and *Notice of Separation*[117]

Barista Mauche was a strong Union supporter, who wore Union pins at work, advocated for the Union and participated in several strikes. On August 25, Mauche received a *Documented Coaching* for arriving late on August 1, 7, 19 and 22. (GC Exh. 82). On October 3, he received a *Final Written Warning* for arriving late on August 23 and 31, September 1, 4, 8, 26, 28 and 29, and October 2 and 3. (GC Exh. 84). Finally, on November 2, he received a *Notice of Separation* for lateness on October 13 and 27. (GC Exh. 83). The GC contends that Mauche's disciplines and termination discriminatorily flowed from his Union activities, whereas Starbucks's avers that he was evenhandedly disciplined and discharged under its *Time and Attendance* policies.

The GC made out a prima facie *Wright Line* case for Mauche. It adduced Union activity, knowledge and abundant animus. Starbucks failed to show that it would have disciplined and fired Mauche absent his Union activity for all of the same reasons cited above regarding Anastasi.

3. §8(a)(3) – Jovan Draves *Notice of Separation*[118]

Draves wore a Union pin at work, participated in various strikes and advocated for the Union. On October 31, he received a *Notice of* Separation*,* which stated:

> Jovan has been delivered two previous corrective actions for violating the attendance & punctuality policy, a written warning on 8/26/21 and a final written warning on 3/17/22.
>
> Despite this, Jovan had the following violation:
>
> - 10/22/22 - no call, no show
> - 10/30/22 – no call, no show

(GC Exh. 97). Draves explained that he missed his October 22 shift due to illness but did not call his manager. He also agreed that he missed his October 30 shift. The GC contends that Draves' termination was due to his Union activities, and Starbucks avers that he was evenhandedly disciplined and discharged under its *Time and Attendance* policies.

Again, the GC made out a prima facie *Wright Line* case regarding Draves; it adduced Union activity, knowledge and abundant animus. Starbucks failed to show that it would have disciplined Draves absent his Union activity for the same reasons cited regarding Anastasi and Mauche.

4. §8(a)(3) – Marcus Hopkins *Final Written Warning*[119]

Hopkins has been employed since 2019. He had a significant amount of Union activity, which included participating in strikes, wearing a Union pin, signing the "Dear Howard letter,"

[117] This was alleged to be unlawful under complaint ¶¶9 and 14.
[118] This was alleged to be unlawful under complaint ¶¶9 and 14.
[119] This was alleged to be unlawful under complaint ¶¶9 and 14.

and other connected actions. On January 7, 2023, Hopkins received a *Final Written Warning* for:

> On 11/3/22 Marcus … distributed to a customer confidential company documents including three weeks of the daily coverage report that showed partner schedules, and partner contact Information which included personal telephone numbers.
>
> According to the Partner Guide, under *Confidentiality*, it states, "During employment with Starbucks, partners may have access to information such as drink recipes, product specifications, systems, other partner records and financial data, as well as new product innovations and ideas. All Information is confidential during employment …, and it is imperative that any information gained during a partner's employment with the company is not disclosed to anyone outside the company, including a future employer, friends or family, or anyone within the company who is not authorized to receive such information ...."

(GC Exh. 98). Hopkins conceded that he provided 3 weeks of Daily Coverage Reports (DCRs) to a Union representative for organizing purposes, which contained partner contact information.

The GC contends that Hopkins' discipline was due his Union activities, and Starbucks's avers that he was validly disciplined under its *Confidentiality* policy. Although the GC made out a prima facie case (i.e., established Union activity, knowledge and animus), Starbucks demonstrated that it would have disciplined him absent such Union activity. It is undisputed that he violated the *Confidentiality* policy by disseminating personal employee data without Starbucks' consent. This was a serious transgression and valid basis for discipline. Additionally, unlike the several lateness disciplines and firings presented in this case, there is no evidence of disparate treatment. It is likely that Starbucks would have disciplined any employee, irrespective of their Union activity, for this type of transgression. Dismissal is, thus, recommended.

5. §8(a)(5) – Mauche, Anastasi and Hopkins Discipline and Discharges[120]

The GC contends that Starbucks violated §8(a)(5), when it unilaterally disciplined and/or discharged Mauche, Anastasi and Hopkins. Under current precedent, dismissal of these allegations is warranted. *Care One at New Milford*, supra.

Conclusions of Law

1. Starbucks is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of §2(5) of the Act.

3. The Union is the exclusive collective-bargaining representative of the following appropriate bargaining unit of Starbucks' employees (the Sheridan & North Bailey Unit):

[120] This was alleged to be unlawful under complaint ¶¶10, 11 and 15.

Included: All full-time and regular part-time hourly Baristas and Shift Supervisors employed at 3186 Sheridan Drive, Amherst, NY.

Excluded: All office clerical employees, guards, professional employees, supervisors as defined in the Act, and all other employees.

4. Starbucks violated §8(a)(1) by:

a. Blaming the Union and employees' Union activities for its ongoing staffing problems.

b. Blaming the Union and employees' Union activities for its inability to close early on July 4.

c. Directing employees to remove their Union pins from their uniforms.

d. Implicitly threatening store closure because of employees' Union activities.

e. Promulgating an overly broad no-solicitation, no-distribution rule at the Penfield Store, which prohibited employees from distributing Union literature during non-working hours in non-working areas.

f. Threatening that employees will lose promised raises, credit card tipping and health benefits because of their Union activities.

5. Starbucks violated §8(a)(3) by:

a. Issuing Samuel Amato a *Notice of Separation* because of his Union and other protected activities.

b. Issuing Tatiayna Gurskiy a *Notice of Separation* because of her Union and other protected activities.

c. Issuing Sariah Hakes a *Notice of Separation* because of her Union and other protected activities.

d. Issuing Casey Moore a *Written Warning* because of her Union and other protected activities.

e. Issuing Alexis Rizzo a *Final Written Warning* because of her Union and other protected activities.

f. Issuing Michael Sanabria a *Notice of Separation* because of his Union and other protected activities.

g. Issuing Cole Graziano a *Notice of Separation* because of his Union and other

protected activities.

h. Constructively discharging Jaz Brisack because of her Union and other protected activities.

i. Issuing Victoria Conklin a *Final Written Warning* and *Notice of Separation* because of her Union and other protected activities.

j. Issuing Allegra Anastasi a *Final Written Warning* and *Notice of Separation* because of her Union and other protected activities.

k. Issuing Connor Mauche a *Documented Coaching*, *Final Written Warning* and *Notice of Separation* because of his Union and other protected activities.

l. Issuing Jovan Draves a *Notice of Separation* because of his Union and other protected activities.

6. Starbucks violated §8(a)(5) by:

a. Unilaterally implementing a three-strikes disciplinary policy at the Sheridan & North Bailey store without giving the Union notice or an opportunity to bargain.

b. Unilaterally implementing changing its past practice of closing the Sheridan & North Bailey store early on July 4 without affording the Union notice or an opportunity to bargain.

7. These unfair labor practices affect commerce within the meaning of §2(6) and (7).

8. Starbucks has not otherwise violated the Act.

9. By the conduct cited by the Union in objections 1, 2, 3 and 11, Starbucks has prevented a fair election and its conduct warrants setting aside the election in Case 03-RC-308945.

Remedy

The appropriate remedy for the violations found herein is an order requiring Starbucks to cease and desist from their unlawful conduct and to take certain affirmative action.

Starbucks, having unlawfully discharged Amato, Gurskiy, Hakes, Sanabria, Graziano, Brisack, Conklin, Anastasi, Mauche and Draves, shall reinstate them to their former jobs or, if these positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privilege previously enjoyed. Starbucks shall make them whole for any loss of earnings and other benefits, and all other direct or foreseeable pecuniary harms, suffered as a result of its unlawful discrimination against them. *Thryv, Inc*., 372 NLRB No. 22 (2022). This make whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In

accordance with *King Soopers, Inc.*, 364 NLRB 1152 (2016), enfd. in relevant part 859 F.3d 23, 429 U.S. App. D.C. 270 (D.C. Cir. 2017), Starbucks shall compensate them for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Starbucks shall compensate them for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), Starbucks shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 3 a report allocating backpay to the appropriate calendar year for these partners. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Starbucks shall remove from its files any references to the unlawful constructive discharge, *Notice of Separations, Final Written Warnings, Written Warnings* and *Documented Coachings* issued to Amato, Gurskiy, Hakes, Sanabria, Graziano, Moore, Rizzo, Brisack, Conklin, Anastasi, Mauche and Draves. It shall also notify them in writing that these actions have been removed and that these unlawful personnel actions will not be used against them in any way.

Regarding the GC's notice reading request, the Board generally grants such a remedy, where the ULPs are so pervasive and egregious that a notice reading is necessary to dispel the impact of such conduct.[121] In this case, a notice reading is fully warranted. Starbucks' serious and widespread ULPs, which were designed to unlawfully derail the Union's protected organizing campaign, warrant having the attached notice to employees read aloud during worktime. A public reading of the notice to employees is a remedial measure that ensures that they "will fully perceive that the Respondent and its managers are bound by the requirements of the Act." See *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920, 929–30, 365 U.S. App. D.C. 164 (D.C. Cir. 2005). A public notice reading will help "dissipate as much as possible any lingering effects" of the ULPs at issue herein. *Homer D. Bronson Co*., 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008). Starbucks, as a result, must hold a meeting or meetings during work time at its Delaware & Sheridan, Sheridan & North Bailey, Williamsville Place, Genessee Street, Transit Commons, Elmwood, Penfield, East Robinson, and Delaware & Chippewa stores, scheduled to ensure the widest possible attendance of employees, at which time the remedial notice is to be read to employees by a District Manager or higher level management official in the presence of a Board agent and a Union representative if the Region or the Union so desires, or, at Starbucks' option, by a Board agent in the presence of a District Manager or higher level management official, and, if the Union so desires, a Union representative.

Starbucks shall rescind its three-strikes disciplinary policy at the Sheridan & North Bailey store, reinstate its past practice of closing the Sheridan & North Bailey store early on July 4, and notify all employees at this store that this has been done. It shall post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).[122] Finally, given the egregiousness of

[121] *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007); *Domsey Trading Co*., 310 NLRB 777, 779–80 (1993).

[122] During this 60-day posting period, Starbucks shall permit a duly appointed Board agent to enter its facilities at

Starbucks' ULPs, a broad order requiring it to cease and desist "in any other manner" from interfering with, restraining, or coercing its employees in the exercise of their §Section 7 rights is warranted. *Hickmott Foods*, 242 NLRB 1357 (1979). On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[123]

ORDER

Starbucks Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   a. Blaming the Union and employees' Union activities for its ongoing staffing problems.

   b. Blaming the Union and employees' Union activities for its inability to close early on July 4.

   c. Directing employees to remove their Union pins from their uniforms.

   d. Implicitly threatening store closure because of employees' Union activities.

   e. Promulgating an overly broad no-solicitation, no-distribution rule at the Penfield Store, which prohibits employees from distributing Union literature during non-working hours in non-working areas.

   f. Threatening employees that they will lose promised raises, credit card tipping and health benefits because of their Union activities.

   g. Disciplining, firing, constructively discharging or otherwise discriminating against employees because of their Union and other protected activities.

   h. Changing terms and condition of employment of its Sheridan & North Bailey Unit employees by implementing a three-strikes disciplinary policy for all employees, without first notifying the Union and giving it an opportunity to bargain.

   i. Changing terms and condition of employment of its Sheridan & North Bailey Unit employees by eliminating its past practice of closing the store early on July 4, without first notifying the Union and giving it an opportunity to bargain.

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reasonable times and in a manner not to unduly interfere with its operations, for the limited purpose of determining whether it is in compliance with the notice posting, distribution, and mailing requirements.

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

j. In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by §7 of the Act.

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

a. On request, bargain with the Union as the exclusive collective-bargaining representative of its employees at the Sheridan & North Bailey store in the following appropriate unit, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time and regular part-time hourly Baristas and Shift Supervisors employed at 3186 Sheridan Drive, Amherst, NY.

Excluded: All office clerical employees, guards, professional employees, supervisors as defined in the Act, and all other employees.

b. Within 14 days from the date of the Board's Order, offer full reinstatement to Amato, Gurskiy, Hakes, Sanabria, Graziano, Brisack, Conklin, Anastasi, Mauche and Draves to their former jobs or, if their jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

c. Make Amato, Gurskiy, Hakes, Sanabria, Graziano, Brisack, Conklin, Anastasi, Mauche and Draves, whole for any loss of earnings and other benefits, and all other direct or foreseeable pecuniary harms, suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

d. Compensate Amato, Gurskiy, Hakes, Sanabria, Graziano, Brisack, Conklin, Anastasi, Mauche and Draves, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating their backpay awards to the appropriate calendar years.

e. File with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Amato's, Gurskiy's, Hakes', Sanabria's, Graziano's, Brisack's, Conklin's, Anastasi's, Mauche's and Draves' corresponding W-2 forms reflecting their backpay awards.

f. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all

other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

g. Within 14 days from the date of the Board's Order, remove from its files any references to the unlawful constructive discharge, *Notice of Separations, Final Written Warnings, Written Warnings* and *Documented Coachings* issued to Amato, Gurskiy, Hakes, Sanabria, Graziano, Moore, Rizzo, Brisack, Conklin, Anastasi, Mauche and Draves. In addition, within 3 days thereafter, notify them in writing that this has been done and that their discharges and disciplines will not be used against them in any way.

h. Rescind the three-strikes disciplinary policy at the Sheridan & North Bailey store and notify employees and the Union that the policy has been rescinded.

i. Reinstitute the past practice of closing early on July 4 at the Sheridan & North Bailey store and notify employees and the Union that this practice has been rescinded.

j. Within 14 days after service by the Region, post at its Delaware & Sheridan, Sheridan & North Bailey, Williamsville Place, Genessee Street, Transit Commons, Elmwood, Penfield, East Robinson, and Delaware & Chippewa stores in Western New York the attached notice marked "Appendix."[124] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Starbucks' authorized representative, shall be posted by Starbucks and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 21, 2022.

k. During this 60-day posting period, Respondent shall permit a duly appointed Board agent to enter its facilities at reasonable times and in a manner not to unduly interfere with its operations, for the limited purpose of determining whether it is in compliance with the notice posting, distribution, and mailing requirements.

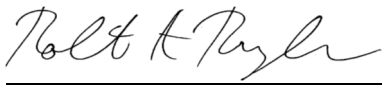
[124] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations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

l. Hold a meeting or meetings during worktime at its Delaware & Sheridan, Sheridan & North Bailey, Williamsville Place, Genessee Street, Transit Commons, Elmwood, Penfield, East Robinson, and Delaware & Chippewa stores in Western New York, scheduled to ensure the widest possible attendance of employees, at which the attached notice marked "Appendix" will be read to employees by a District Manager from the Western New York area in the presence of a Board Agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of the District Manager and, if the Union so desires, the presence of an agent of the Union.

m. Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

It is further **ORDERED** that the complaint is dismissed insofar as it alleges violations of the Act not specifically found, and that the Regional Director for Region 3 shall, in Case 03-RC-308945, set aside that election result, and hold a new election at a date and time to be determined by the Regional Director.

Dated Washington, D.C. February 6, 2024



Robert A. Ringler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT blame the Union or your Union activities for insufficient store staffing.

WE WILL NOT blame the Union or your Union activities for us not closing early on July 4.

WE WILL NOT tell you to remove Union pins from your uniforms.

WE WILL NOT implicitly threaten to close your store because of your Union activities.

WE WILL NOT issue an overly broad no-solicitation, no-distribution rule at our Penfield Store, which bars you from distributing Union literature during non-working hours in non-working areas.

WE WILL NOT threaten that you will lose promised raises, credit card tipping and health benefits because of your Union activities.

WE WILL NOT discipline, fire, constructively discharge or otherwise discriminate against you because of your Union and other protected activities.

WE WILL NOT change your terms and condition of employment at the Sheridan & North Bailey store by implementing a three-strikes disciplinary policy, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT change your terms and condition of employment at the Sheridan & North Bailey store by eliminating our past practice of closing the store early on July 4, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by §7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees at the Sheridan & North Bailey store in the following appropriate unit, concerning terms and conditions of employment and, if an understanding is reached, embody our understanding in a signed agreement:

Included: All full-time and regular part-time hourly Baristas and Shift Supervisors employed at 3186 Sheridan Drive, Amherst, NY.

Excluded: All office clerical employees, guards, professional employees, supervisors as defined in the Act, and all other employees.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to Amato, Gurskiy, Hakes, Sanabria, Graziano, Brisack, Conklin, Anastasi, Mauche and Draves to their former jobs or, if their jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Amato, Gurskiy, Hakes, Sanabria, Graziano, Brisack, Conklin, Anastasi, Mauche and Draves, whole for any loss of earnings and other benefits, and all other direct or foreseeable pecuniary harms, resulting from their disciplines and discharges, less any net interim earnings, plus interest, and **WE WILL** also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL File with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Amato's, Gurskiy's, Hakes', Sanabria's, Graziano's, Brisack's, Conklin's, Anastasi's, Mauche's and Draves' corresponding W-2 forms reflecting their backpay awards.

WE WILL within 14 days from the date of the Board's Order, remove from our files any references to the unlawful constructive discharge, *Notice of Separations, Final Written Warnings, Written Warnings* and *Documented Coachings* issued to Amato, Gurskiy, Hakes, Sanabria, Graziano, Moore, Rizzo, Brisack, Conklin, Anastasi, Mauche and Draves, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that their discharges and disciplines will not be used against them in any way.

WE WILL rescind our three-strikes disciplinary policy at the Sheridan & North Bailey store and notify the Union and you that the policy has been rescinded.

WE WILL reinstitute our past practice of closing early on July 4 at the Sheridan & North Bailey store and notify Union and you that this practice has been rescinded.

WE WILL hold meetings during working hours at our Delaware & Sheridan, Sheridan & North Bailey, Williamsville Place, Genessee Street, Transit Commons, Elmwood, Penfield, East Robinson, and Delaware & Chippewa stores in Western New York, and have this notice read to you and your fellow workers by your District Manager (or, if they are no longer employed by the Respondent, by an equally high-ranking responsible management official) in the presence of a Board agent and, if the Union so desires, a Union representative, or, at the Respondent's option,

by a Board agent in the presence of your District Manager (or an equally high-ranking management official), and, if the Union so desires, a Union representative.

STARBUCKS CORP.
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building, 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/03-CA-295810 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.
ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4931.