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

I.N.S.A., INC.	**Cases**	**01-CA-290558**
		01-CA-290561
		01-CA-290762
and		**01-CA-292452**
		01-CA-292453
		01-CA-292458
UNITED FOOD AND COMMERCIAL WORKERS		**01-CA-296411**
INTERNATIONAL UNION LOCAL 1445		**01-CA-300421**
		01-RC-288998

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Jonathan A. Keselenko and Allison Anderson, Esqs.,
for Respondent
G. Alexander Robertson and Alfred Gordon O'Connell, Esqs.
for Union

DECISION

INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These consolidated cases were tried on February 7-10, and April 3-5, 2023, in Boston, Massachusetts, over allegations that I.N.S.A., Inc. ("Respondent") violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act ("Act") and engaged in objectionable conduct affecting the results of the election to determine whether the employees at its Salem, Massachusetts cannabis dispensary/store ("Salem store") wanted to be represented by the United Food and Commercial Workers International Union Local 1445 ("Union").

On January 14, 2022,[2] the Respondent received a letter signed by a majority of the Salem store employees demanding that it recognize and bargain with the Union as their chosen representative. Four days later, the Union petitioned for an election, which it eventually lost. Between the letter and the finalization of the count, the Respondent is alleged to have engaged in parallel unlawful/objectionable conduct, including: holding mandatory meetings to discourage employees from supporting the Union; soliciting employee grievances, and promising employees increased benefits and improved terms and conditions of employment if they refrained from supporting the Union; having its owners and high-level managers make unprecedented and repeated visits to the store, creating the impression of surveillance; threatening employees with various adverse consequences if the Union were to win the election; informing employees that they would not receive performance reviews and related wage

[1]Abbreviations used in this decision are as follows: Transcript citations are "Tr. ___"; General Counsel Exhibits are "GC Exh. __"; the Respondent's Exhibits are "R Exh.__"; the Union's Exhibits are "CP Exh. ___"; Joint Exhibits are "Jt. Exh.__." Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record.
[2] All dates refer to 2022, unless otherwise stated.

increases until after the election; restricting employees from talking about unions while allowing employees to discuss other, non-work-related topics; discriminatorily enforcing work rules and policies, disciplining and discharging employees because they engaged in union activities; and implementing a wage increase for all employees following the election.

The General Counsel and the Union contend that as a result of the above conduct there is only a slight possibility of a fair rerun election, and a majority of unit employees' sentiments regarding representation, having been expressed through their signatures on the demand letter and on the authorization cards, would be better protected by the issuance of a bargaining order.

About a month ago, the Board issued *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), setting forth a new standard for determining whether an employer's unfair labor practices in response to an organizing effort require setting aside an election and issuing a remedial bargaining order. For the reasons stated below, I conclude Respondent committed certain serious unfair labor practices shortly after the petition was filed, that, under *Cemex,* require setting aside the results of the election and issuing a remedial bargaining order.

STATEMENT OF THE CASES

The Union filed the underlying representation petition on January 18. (Jt. Exh. 1(a)). Beginning on February 11, and continuing over the next 6 months, the Union filed the underlying unfair labor practice charges. (GC Exh. 1(a)-(p)). On April 6, the Regional Director issued a Decision and Direction of Election finding the following to be an appropriate bargaining unit within the meaning of Section 9(b) of the Act ("Unit"):

> All full-time and regular part-time retail associates, retail leads, retail inventory specialists, and inventory leads employed at the Employer's Salem, Massachusetts location, but excluding asset protection employees, managerial employees, guards and professional employees and supervisors as defined by the Act.

(Jt. Exh. 1(d)).[3]

The mail ballots were sent out on April 15, returned by May 6, and counted on May 9. At the time the petition was filed, the Unit consisted of 28 employees. By the time of the election, that number grew to 38. (Jt. Exh. 1). The initial tally of ballots showed that of the 38 eligible voters, 11 votes were cast for and 13 votes were cast against the Union, with 6 challenged ballots. (Jt. Exh. 1(f)). On May 16, the Union filed objections alleging the Respondent engaged in conduct affecting the results of the election, which were held in abeyance pending the outcome of the Region's investigation into the above charges. (GC Exh. 2). The Union later requested, and the Regional Director approved, withdrawal of several of the objections.

The Regional Director later approved a stipulation resolving four of the challenged ballots, and on May 26 issued a revised tally showing that 11 votes were cast for and 17 votes were cast

[3] At the representation hearing, the Respondent challenged the appropriateness of the Unit, arguing: (1) the retail inventory specialists did not share a community of interest with the other petitioned-for employees, and (2) the retail leads and inventory leads were statutory supervisors. The Regional Director rejected those arguments. (GC Exh. 1(d)). The Respondent did not file a request for review the Regional Director's Decision, making it final. 29 U.S.C. §102.67(g).

against the Union, with 2 challenged ballots, which were insufficient to affect the results. (Jt. Exh. 1(g)-(h)).

On October 31, the Regional Director, on behalf of the General Counsel, issued a consolidated complaint (GC Exh. 1(q)). On November 14, Respondent filed its answer to the consolidated complaint. (GC Exh. 1(s)). The Regional Director concluded that the conduct alleged in the remaining objections could be grounds for overturning the election. As a result, on November 22, the Regional Director issued an order consolidating the remaining objections with the consolidated complaint and setting them for hearing. (GC Exh. 2). Those objections largely parallel the complaint allegations. On January 19, 2023, the Regional Director issued an Amended Consolidated Complaint. (GC Exh. 1(t)).[4] On February 1, 2023, Respondent filed its Answer denying the allegations and raising various affirmative defenses. (GC Exh. 1(t)).

At the hearing,[5] all parties were afforded the right to examine witnesses, present any relevant documentary evidence, and argue their legal positions. The General Counsel, the Respondent, and the Union filed post-hearing briefs.[6] Following issuance of the *Cemex* decision, I ordered supplemental briefing. The parties filed supplemental briefs addressing *Cemex*. Based on the entire record and the briefs, I make the following

[4] In the Amended Consolidated Complaint, the General Counsel gave notice that while the allegations contained therein constitute unfair labor practices under extant Board law, she planned to advocate for overruling certain cases and their progeny. As an administrative law judge, I am bound to apply existing Board precedent that has not been overruled by the Supreme Court. See *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004); *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984). I, therefore, will not address those arguments for changing extant law.

[5] At the start of the hearing, the General Counsel moved to amend paragraph 9 of the Amended Consolidated Complaint to add that on about January 28, Respondent, by human resources manager Ryan Darling, solicited employee complaints and grievances, and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity, in violation of Sec. 8(a)(1) of the Act. (GC Exh. 3). (Tr. 28-29). Respondent opposed the motion arguing the allegation was untimely. Sec. 10(b) of the Act requires that unfair labor practice charges be filed and served within 6 months of the allegedly unlawful conduct. However, the Board permits litigation of an otherwise untimely complaint allegation if the conduct alleged occurred within 6 months of a timely filed charge and is closely related to the allegations of that timely charge. The test for determining whether the otherwise untimely allegation is closely related is set forth in *Redd-I*, *Inc*., 290 NLRB 1115 (1988). Under *Redd-I*, the Board considers whether (1) the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge (i.e., the allegations involve similar conduct, usually during the same time period, and with a similar object); and (3) a respondent would raise the same or similar defenses to both the otherwise untimely and timely allegations. I concluded at the hearing, and I affirm now, that the amended allegation involving Darling meets the "closely related" test. It involves identical conduct allegedly committed by other supervisors arising from the same factual situation or sequence as in that same paragraph of the Amended Consolidated Complaint. Specifically, in the days and weeks after learning about the organizing effort, Respondent's managers, including Darling, are alleged to have held meetings or conversations with employees to solicit their grievances and impliedly promised to address them, in an effort to undermine the organizing effort. The amended allegations also involve the same legal theory, and Respondent would raise the same or similar defenses, as to the timely allegations.

[6] I approve the parties' Joint Motion to Correct the Official Transcript and the corrections contained therein.

FINDINGS OF FACT[7]

I. Jurisdiction and Labor Organization

The Respondent is a corporation with its principal place of business in Easthampton, Massachusetts. It cultivates, manufactures, and dispenses cannabis and cannabis-related products. It owns and operates retail stores throughout the Commonwealth of Massachusetts, including the Salem store. The Respondent admits it derives annual gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from outside the Commonwealth. The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

1. *Respondent's Massachusetts Operations*

Massachusetts legalized the sale of cannabis for medical use in 2013, and for adult recreational use in 2018. The Massachusetts' Cannabis Control Commission ("CCC") licenses and regulates medical-use and recreational-use retailers. Applicants must submit plans, policies, and procedures related to its operations which should comply with the CCC's regulations and guidance documents, and cover topics such as operations, security (including cash handling), storage, transportation, inventory, quality control, testing procedures, personnel policies, dispensing procedures, and recordkeeping requirements. See *CCC Guidance on Licensure* (June 2021). See also 935 CMR 501.

Respondent has five licensed cannabis stores in Massachusetts. It has medical-use stores in Easthampton and Springfield, and recreational-use stores in Salem, Easthampton, and Avon. (Tr. 1228-1229).

[7] The Findings of Fact are a compilation of the stipulated facts, credible testimony, and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the Findings, such testimony has been discredited, either as in conflict with credited evidence or it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also have considered the context of their testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Of course, credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951)). I have given particular weight to the lack of detailed, corroborating evidence regarding statements allegedly made during meetings and conversations in which multiple employees were present. This litigation strategy by the General Counsel and the Union, which went unexplained, significantly undermined their cases regarding several of the Sec. 8(a)(1) allegations.

2. *The Respondent's Organizational Hierarchy*

Respondent's founders and owners are Peter Gallagher and Patrick Gottschlicht. Gallagher is the chief executive officer and Gottschlicht is the chief operating officer. Tom Davis is the chief financial officer. Brian Hammond is the director of security. Morgan Carlone is the director of retail operations, Ryan Darling is human resources manager, and Kendal Wagoner is retail operations manager. Stephen Lemieux was the retail district manager.

The Salem store was opened in 2019. It has four departments: operations, retail (sales), inventory, and asset protection (security). (GC Exh. 4). The store manager is Marc Rialdi. He was hired in August 2021. Under Rialdi, there are assistant store managers. In early 2022, the assistant store managers included Kathleen "Kasey" Clough, TJ Mercado, Nicholas Novello, Sydney Saynganthone, and Joel Rodriguez.[8] Under the assistant store managers, there are the leads. The inventory leads oversee the inventory specialists, and the retail leads oversee the retail associates. The store manager and assistant store managers are statutory supervisors; the leads are not.

3. *Layout of Salem Store and Job Duties*

The front half of the Salem store contains the customer-facing retail space. (GC Exh. 5). Upon entering that space, asset protection guards check identification and make customers aware of store policies. Ahead and to the right are the product displays and kiosks for placing online orders. Further down and to the left are display counters with cash registers. The retail associates work behind the counters assisting customers, handling all sales transactions, and delivering purchased products.

The back half of the store contains storage, break areas and offices. The largest room is "the Vault" where all cannabis products are stored and handled prior to purchase. The inventory specialists work in the Vault tracking inventory and processing orders. Left of the Vault is "the Cash Room." This is a secured, limited-access area where cash is taken and stored until it is picked up for deposit. Left of the Cash Room is the entrance to the employee break room. Straight ahead through the break room is the doorway to the training/conference room. To the left in that room is the doorway to the supervisors' office. To the right is the doorway to a storage room.

4. *Relevant Policies and Rules*

a. Attendance Policy

Under Respondent's attendance policy, employees are assessed "occurrences" for unexcused absences and tardies. (R Exh. 1, pgs. 54-55). An "unexcused absence" is when an employee fails to report for work without prior notice and supervisory approval, unless it is for an illness, and they have accrued sick leave to use.[9] A "tardy" is when an employee is not present at the start of their scheduled shift or leaves before it ends. A "no-call/no-show" is when an employee fails to report for work without notifying their supervisor within 2 hours after the start of their scheduled shift. (Tr. 746).

[8] Rodriguez worked as the Springfield store manager but covered shifts at the Salem store in early 2022.

[9] The Respondent provides employees with 40 hours of sick leave per year. If the sick leave absence is not foreseeable, the employee must notify their supervisor at least 2 hours before the start of their shift. If that is not reasonable due to an accident or sudden illness, notice must be provided as soon as practicable. If the employee fails to comply with the notice requirements, exhausts their leave, or uses their leave for a non-qualified purpose, the absence will be treated as unexcused. (R Exh. 1, pg. 50).

An unexcused absence counts as one occurrence and a tardy counts as one-half of an occurrence. The policy states that three occurrences will result in a documented discussion; four will result in an initial written warning; five will result in final warning; and six will result in termination. It also states that the first instance of a no-call/no-show will result in a final warning, and the second will result in termination. If an employee received discipline for attendance prior to the no-call/no show, they may be terminated.

The Respondent tracks occurrences per calendar year. Occurrences reset to zero at the end of the calendar year. Except that if an employee has attendance issues at the end of the year and does not show sustained improvement, discipline may progress from where it left off in the new calendar year. As a matter of practice, attendance discipline usually is tracked separately from other types of discipline, but it may be factored in when assessing discipline for other violations. (Tr. 747-748).

b. Food and Beverages Policies

The Respondent has several rules and policies aimed at preventing damage to its products. (R Exh. 1, pg. 30) (Tr. 1059; 1185). For example, it restricts employees from consuming food and beverages outside of the break room. In the Vault, "[d]rinks must be in sealable containers, there is no eating, and personal belongings should be stored in the break room." (R Exh. 40, pg. 3).

c. Masking Policy

In late 2021 and early 2022, there was a surge of COVID cases in the area. Respondent implemented a rule/policy requiring customers and employees to properly wear COVID masks over their nose and mouth while in the retail space of its stores. Employees working in the Vaults were required to wear masks and practice social distancing when working in proximity to other employees.

d. Cash Handling and Access Policies

The Respondent has policies and practices related to the proper handling, storing, securing, and transporting of money. (R. Exh. 1, pg. 43, R. Exh. 35, pg. 2, R. Exh. 48, pg. 3). Most money is kept in the Cash Room. Only the store manager, assistant store managers, and leads have access to the Cash Room. The Cash Room door always must be closed, including when people are inside. (Tr. 810-811).

e. Open Door Policy

The Respondent's policy is to encourage employees to first direct any questions or concerns to their direct supervisor, but they may bypass their supervisor and go directly to the Executive Team. (R. Exh. 1, pg. 7).

5. *Practice of Holding Meetings*

Since it opened the stores, Respondent's owners Gallagher and Gottschlicht periodically hold "town hall meetings" and "skip meetings" with employees. The "town hall meetings" are larger, more structured gatherings that occur once or twice a year. The owners typically present employees with an update on what is happening with the company and then answer questions. The "skip meetings" are smaller, more informal gatherings that occur a few times a year. The purpose is to allow employees and owners to "skip" over local management and meet directly with one another to discuss issues and ideas. Between 2019 and 2021, Respondent collectively held approximately 50 of these meetings. (Tr.

1247). In 2021, those meetings primarily were held virtually because of COVID. Later that year, Gallagher and Gottschlicht decided to return to in-person meetings beginning in the first quarter of 2022. (Tr. 1245-1249).

B. Organizing Efforts, Group Chats, and Collection of Electronic Signatures

In December 2021, Adam Lynch, an inventory specialist, and AJ Parker, a retail lead, began discussing organizing a union at the Salem store following the termination of a favored assistant store manager (Sara Dukeshire). Lynch contacted the Union and spoke with organizer Megan Carvalho. Carvalho then launched the organizing effort. Due to a surge in COVID cases at the time, she primarily communicated with employees remotely, via text, email, phone, and/or videoconference. Parker also set up an encrypted group chat using the Signal app. He personally invited employees to join the chat by texting them. The employees had to download the app and register an account using a username and password. (GC Exh. 15)(Tr. 290-294). Parker and Carvalho were the administrators of the Signal group chat. By January 12, there were 22 employees registered and participating on the group chat.

In mid-January, Carvalho used the group chat to provide registered employees with a link to the Union's website where they could complete and digitally sign an authorization card. The card stated, "I want the UFCW to be my partner on the job and represent me to obtain better wages, better benefits and a better life." (GC Exh. 6). By January 12, 20 of the 28 retail and inventory employees at the Salem store had digitally signed and submitted an authorization card. (GC Exhs. 19-20). Each employee who submitted a card received a personalized confirmatory email from the Union acknowledging receipt. The email contained the employee's name, email, phone number, employer, and department. As administrator of the Union's digital authorization card program, Carvalho received notification each time a confirmatory email was sent out and to whom. (Tr. 311-312). Also, most employees who submitted a card posted on the group chat that they had done so. (GC Exhs. 20-21).

Based on the high level of support, Carvalho prepared a letter demanding that the Respondent voluntarily recognize and bargain with the Union as the employees' chosen representative. She used the group chat to ask employees who had signed a card to manually sign a white piece of paper, take a photograph of the signature, and then text or email the signature to her for the letter. She posted a copy of the letter on the group chat for employees to review. All 20 employees who digitally signed an authorization card provided a photograph of their manual signature for the letter. (GC Exh. 16). When Carvalho received the signatures, she used an app to copy and paste them onto the bottom of the letter.

C. January 14 Demand Letter

On January 14, at about 3 p.m., Lynch led a group of about 7 employees who presented store manager Rialdi with a copy of the Union's demand letter. Among the 7 were inventory specialists James Bagnall and Rowan Cummings. The letter stated, in pertinent part, that:

> We are the union organizing committee at the INSA Dispensary in Salem, Massachusetts and we formally ask INSA to recognize our union. We are joining the United Food and Commercial Workers Union Local 1445 and we want the UFCW to be our partner on the job and representative as we bargain our contract.
> …
> We ask that you contact [Megan Carvalho] within 3 calendar days to continue this process. While we prefer to avoid an election, we will file for our election with the NLRB. We look forward to moving forward with this process.

(GC Exh. 7).

The letter contained the signatures of Parker, Lynch, Bagnall, Cummings, Alison Hallett, Gauge Clark, Kasey Harris, Aiesha Gordon, Jeanette Abbene, Megan Moulton, Strot Grissom, Matthew "MJ" Terry, Chris Jendraszek, Kathleen Moran, Latrelle Williams, Rosalie Post, Kathryn Cyr, Corey Foss, Gabriel Caruso, and Jose Gomez.[10]

Upon receipt, Rialdi forwarded the demand letter to corporate managers Morgan Carlone and Stephen Lemieux. (GC Exh. 35). He also exchanged text messages with Carlone (discussed below) in which they attempted to decipher whose signatures were on the letter. (CP Exh. 8).

On January 18, after the Respondent failed to voluntarily recognize the Union, Carvalho filed the petition for an election in this case. She included the digitally signed authorization cards and a declaration explaining the Union's process for gathering those signed cards. (Tr. 306-309). [11]

D. January 15 Discipline of Adam Lynch

In November 2021, Respondent hired Ryan Darling as human resources manager. One of his initial priorities was to ensure consistent enforcement of the attendance policy. (Tr. 741). He directed all store managers to review employee attendance for occurrences and to issue appropriate discipline. Before the end of the year, Rialdi disciplined several Salem store employees for attendance, including James Bagnall and Adam Lynch.[12]

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[10] Tracy Osterstruck also signed an authorization card and provided his signature for the demand letter. Osterstruck was an asset protection/security employee whose position was excluded from the Unit. I, therefore, have not considered Osterstruck when determining majority support for the Union.

[11] Carvalho's declaration, which is consistent with her testimony and the testimony of the other witnesses, states:

> Each employee interested in joining the Union's organizing drive visited a website the Union created. The employees filled out their names, email addresses, phone numbers, and employer name on an online form containing language stating that they designated the union as their representative for collective-bargaining purposes and clicked "Submit." The electronic signatures we are providing identify the signing employees and accurately reflect which workers signed the cards based on information the employees typed on the online form.
>
> After the employees electronically signed the cards, the Union sent a Confirmation of Authorization to the employees' email accounts. The Confirmation of Authorization ensured that the signatures were those of the workers who electronically signed the cards because the Confirmation was sent to the email addresses provided by the workers and set out and confirmed all the information that the employees provided on the website and that the Union received. The Confirmation of Authorization included the language providing that the employees wished to be represented for collective-bargaining purposes by the Union. No employee disputed that they signed a card after receiving the Confirmation of Authorization. We are providing a screenshot of the website the employees saw and copies of the Confirmations of Authorization that the signatory employees received.

(GC Exh. 19).

[12] These Salem store employees received attendance-related discipline in November and December 2021: Amari Boone (Initial Written Warning Attendance 12-10-21); Gabriel Caruso (Initial Written Warning Attendance 11-6-21); Jose-Gomez (Final Warning Attendance 12-23-21); Aiesha Gordon (Initial Written Warning Attendance 11-1-21); Kathleen Moran (Final Warning Attendance 12-17-21); Megan Moulton (Initial Written Warning Attendance 11-22-21); Rosalie Post (Documented Discussion Attendance 11-6-21); and Shakoiya Williams (Documented Discussion Attendance 12-1-21). (R. Exh. 15).

On December 19, 2021, Rialdi issued Bagnall a documented discussion for his 3 occurrences throughout the year (1.5 in January, .5 in November, and 1 in December). (GC Exh. 27, pg. 1). That same day, Rialdi issued Lynch a written warning for 8.5 occurrences, including being tardy on October 3, 7, 8, 10, 14, 15, 16, 17, 22, 27, and 31, November 10, 22, and 24, and December 8, and for calling off on December 9, 2021. (Jt. Exh. 2). When Rialdi gave Lynch the warning, Lynch informed Rialdi that he suffers from a chronic digestive condition and the symptoms affect his ability to show up for work on time. The two spoke and agreed to move Lynch's start time 30 minutes later, to 1 p.m., to accommodate Lynch's condition and symptoms. (Tr. 99-100; 1149).[13]

On January 10, Darling emailed Rialdi instructing him to go through the attendance records for each Salem store employee with prior attendance issues and address any occurrences that may have been missed from the end of the year. (R Exh. 15). Rialdi later spoke with Darling on January 13, and they discussed Lynch's continued attendance issues. (Tr. 763) (R Exh. 51, pg. 39).

The same day he received the Union's demand letter, Rialdi texted Carlone asking if he should hold off on issuing discipline to those whose signatures appeared on the letter. (CP Exh. 8). He stated he not yet issued prepared discipline for Aiesha Gordon and Katherine Cyr, who both signed the letter. Rialdi also texted Carlone that he had to do "research" but was "pretty sure" they were going to issue next step discipline to Lynch, who handed him the letter. (CP Exh. 8)(Tr. 1125).[14] Carlone eventually instructed Rialdi to issue "any pending attendance documents." (CP Exh. 8).

On January 15, Rialdi issued Lynch a final warning for his unexcused absence on December 18, 2021, and for his tardies on December 27, 2021, and on January 1 and 2. (Jt. Exh. 4). Lynch testified he called off on December 18 because he felt ill after receiving the COVID-19 vaccine the day before. He informed his supervisor, Kathleen Clough, about 2 hours prior to the start of his shift that he would not be in and the reason why. Lynch was informed later in December that he would not be allowed to use sick leave for that absence. (Tr. 93). On December 27, Lynch was scheduled to work with another inventory employee who he was concerned may have been exposed to someone with COVID. He called Clough and told her he would not be coming in to work that day because he did not want to risk possible exposure. At about 4:00 p.m., Rialdi emailed Lynch that the employee he was concerned about had been sent home. Lynch then reported for work, more than 3 hours late. As for January 1 and 2, Lynch does not dispute he was tardy, but there was no evidence offered as to why he was tardy. (Tr. 24-25; 140).[15]

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[13] Rialdi later notified Darling and Darling responded that requests for accommodation had to be approved by human resources. (R Exh. 1, pg. 8). Darling informed Rialdi he would meet with Lynch to discuss his need for an accommodation. (CP Exh. 6). On January 16, Darling emailed Lynch and provided him with information about the process for requesting an accommodation. Lynch later submitted a completed request, but it was not processed prior to his discharge.

[14] At the hearing, Rialdi did not explain what "research" he had to do or why he was only "pretty sure" Lynch would be disciplined for his attendance.

[15] In 2022, several Salem employees received progressive discipline for additional occurrences:

- Aiesha Gordon, who previously received a documented discussion for attendance, received a written warning in April following 4 more occurrences. In May, she received a final warning after 4.5 additional occurrences. (GC Exh. 27, pgs 55-61).
- Allison Hallett, who previously received a documented discussion for attendance, received a written warning in July following one unexcused absence. (GC Exh. 27, pgs. 66-67).
- Rosalie Post, who previously received a documented discussion for attendance, received a written warning in June after 4 additional occurrences. In July, she received a final warning after 2 additional occurrences. (GC Exh. 27, pgs. 105-110, 113).

E. January 17 Mandatory Meetings

On January 16, Rialdi emailed all Salem store employees announcing "mandatory" meetings with ownership the following day at 8 a.m. and 2:30 p.m. (GC Exh. 9). Employees were instructed to attend the meeting that best fit their schedule and that they would be paid for their time.

On January 17, Respondent held the two meetings as scheduled at the Salem store. Present were owner Gallagher, managers Rialdi, Carlone, Kendal Wagoner, Tom Davis, and Brian Hammond, and in-house counsel Steve Riley.[16]

Both meetings covered the same topics and unfolded in largely the same manner.[17] Gallagher began by giving a short opening statement in which he mentioned the demand letter and that the company wanted to take the opportunity to share its point of view about unions. He stated the company believed the employees were their own best advocates and did not need to pay a third party to represent them. He also noted the employees had a voice and a direct line of communication to leadership. (Tr. 1237). Gallagher later mentioned improvements the company had made since opening, both operationally and in employee pay and benefits (e.g., bereavement leave, vacation, 401(k) plans, etc.). He acknowledged the company had "made mistakes" and "want[ed] to get better," but he did not provide any specifics. Carlone then spoke primarily about communication. She noted the company was aware there were "communication issues" and it was working on fixing that, but, like Gallagher,

- Alexsall Sanchez Reyes, who previously received a documented discussion for attendance, received a written warning in August following 3.5 additional occurrences. (GC Exh. 27, pgs. 117-119).
- Megan Moulton, who previously received a documented discussion for attendance, received a written warning in November after missing work on October 20 because she was sick. (GC Exh. 27, pg. 88-90).
- Damien Williams, who previously received a documented discussion for attendance, received a written warning in May after 2.5 additional occurrences. In November, he received a final warning after 3.5 additional occurrences. (GC Exh. 27, pg. 124-128).
- Shakoiya Williams, who previously received a documented discussion for attendance, received a written warning in June after 1.5 additional occurrences. In July, Williams received a final warning after 1.5 additional occurrences. (GC Exh. 27, pgs. 134-140).
- Amari Boone, who previously received a documented discussion for attendance, received a written warning in July after 3 additional occurrences. In October, Boone received a final warning following 2 additional occurrences. (R Exhs. 16-18).
- Kyle Bates, who previously received a documented discussion for attendance, received a written warning in October following 1.5 additional occurrences. In December, Bates received a final warning after 2 additional occurrences. (R Exhs. 19-21).

The Respondent presented similar progressive discipline issued at its other locations. (R. Exhs. 22-28).

[16] I credit the overwhelming evidence that Gottschlicht was not at the Salem store on January 17, and did not attend either of the meetings.

[17] The General Counsel presented 1 witness from the morning meeting (Parker) and 4 witnesses from the afternoon meeting (Lynch, Bagnall, Abbene, and Terry). The Respondent presented Gallagher, Davis, Carlone, Rialdi, and Wagoner. It also introduced Wagoner's short-hand notes from the meetings. (R Exh. 47).

I primarily credit the managers over the employees regarding the contents of the meetings. The employees had limited or vague recollections, and they often appeared to testify based upon their impressions rather than what was actually said. Lynch, Bagnall, Abbene, and Terry attended the same meeting, but they offered inconsistent testimony and often failed to corroborate one another regarding key statements. The managers, in contrast, had far more detailed and logical recollections. They offered clear, consistent, and corroborative testimony. I, however, give limited weight to Wagoner's notes that were not supplemented or supported by testimony, as they otherwise lacked clarity and context.

she did not provide any specifics.[18] She mentioned the company's open-door policy, and that if employees had issues, they could raise them at the store level or directly with ownership. (Tr. 1199). Hammond then spoke at length about his personal experiences working in a unionized environment for 22 years, which were overwhelmingly negative. Rialdi then spoke about the bargaining process and how everything is negotiated, and that the parties would be bound to abide by the terms of the agreement. He also discussed the importance he placed on having open, direct communication with employees, and he feared that might change with a union.

Davis then spoke briefly about reports of bullying and harassment. He stated he had received reports employees were being told they would lose their job if they did not support the union. (Tr. 156; 229-231). He said such statements would not be tolerated. He added that everyone's point of view should be respected, and no one was going to be fired because of it. (Tr. 1196). Carlone later stated the company had zero tolerance for bullying or harassment, and regardless of whether employees voted for the union or not, their jobs were not at risk. She also stated the company would investigate reports of bullying, regardless of what side the person was on. (Tr. 1196-1197).[19]

At both meetings, employees asked questions about scheduling. Parker testified that two employees mentioned having difficulty getting to appointments and keeping up with health issues due to "scheduling issues." He recalled that management listened to the concerns but did not make any promises of any kind. (Tr. 207). Lynch recalled the topic of schedules was raised, and that employees raised concerns about child care and concerns over the lack of consistency and transparency regarding scheduling. (Tr. 106). Lynch did not recall what, if anything, was said in response. Terry recalled the topic of scheduling came up, and that Wagoner stated the company was looking into solutions, but there were no specifics. (Tr. 447).

At the end of both meetings, Gallagher stated he would make himself available the remainder of the day to answer any questions. He also reminded them of his email and cell phone number.[20]

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[18] Although Carlone did not explain what she meant during the meeting, she testified she was referring to Zipline, an internal communication software system that allowed the company to share information more easily with employees through an app on their work iPads. The Respondent decided to purchase the Zipline system in November 2021 but did not implement it until February. (Tr. 918-920)(1194-1195).

[19] At the end of the second meeting, Davis referred to setting up a tipline. The record does not reflect what, if anything, was said about why the tipline was being set up. (R. Exh. 47, pg. 33). Davis testified the comment was not in reference to his statements about bullying because management had been discussing establishing a tipline since 2019. (Tr. 1004). Absent clearer evidence, I decline to infer a correlation between the statement about setting up a tipline and the alleged bullying of employees related the organizing effort.

[20] There was conflicting testimony offered regarding how often and for how long these managers individually visited the Salem store before and after the January 17 meetings. The employees offered estimations that differed wildly from one another. I credit the managers on this topic, as their testimony was more consistent and logical.

Wagoner started with the Respondent in late November 2021. Prior to January 17, she visited the Salem store twice, and the Respondent's other stores once. From January through July, she visited the Salem store three or four times, and visited the other stores about the same. (Tr. 936-937). Davis started with the Respondent in April 2019. Prior to January 17, he visited the Salem store several times, including when it opened in 2019, a couple of busy weekends (like Halloween), for various trainings, for end-of-year fiscal inventory counts, and times when there was inadequate staffing due to the pandemic. (Tr. 980). After January 17, Davis visited the Salem store one more time, to introduce the new payroll and benefits manager. (Tr. 986). Carlone began working for the Respondent in July 2021. That same year, she visited the Salem store about four to six times. (Tr. 1190). She went to each of the stores to understand how they individually operated, to get to know the teams and understand the culture, and generally to observe customer experiences to see what was working and what was

F. Scheduling and Communication

Prior to February 2022, managers at the Salem store prepared the weekly schedules using an Excel spreadsheet. (R Exh. 49). Periodically, managers would solicit the employees' preferences and incorporate that information into the spreadsheet. (Tr. 427-428; 1013-1014). Manager Sara Dukeshire handled scheduling until her termination in November 2021. Then store manager Rialdi took over. According to employee MJ Terry, Rialdi typically continued using the same schedule week-to-week until an employee came to him and requested a change. He would make the change and then use that schedule until another change was requested. He continued this practice for the period of time he handled scheduling. (Tr. 428).

In late November 2021, managers Kendal Wagoner and Morgan Carlone began looking into purchasing a scheduling software program to use at all of Respondent's locations. To facilitate this process, they requested the store managers provide information on how they handled scheduling. Wagoner requested this information from Rialdi on December 28, 2021. (R. Exh. 43).

After reviewing the information and researching software programs, Wagoner and Carlone settled on a program called 7Shifts. On January 11, Wagoner contacted the provider about purchasing an account. (R Exhs. 44 and 53). On January 14, at about 12 p.m., Carlone finalized the purchase of an account. (R Exhs. 53-54)(Tr. 1169-1170).

On January 17, at 11:42 a.m., Rialdi emailed all Salem store employees requesting that they provide him with their shift availability. (GC Exh. 10).[21] He specifically asked for the timeframes they were available to work their shifts for each day of the week. (GC Exh. 10). Rialdi testified he requested this information because he was asked to do so to assist in implementing the new scheduling software program. (Tr. 1015-1016). Over the next 2 days, several employees responded to Rialdi with their availability, which he then provided to Wagoner. (CP Exh. 7)(R Exh. 50).

On January 18, Rialdi spoke individually with employees Lynch, Parker, and Terry, asking them to provide their availability. Each told him when they were available to work. (Tr. 109-110) (Tr. 429-430). Parker, who has another job as a weekend stage performer, approached Rialdi and asked if he could have 2 days off in a row, either Saturday and Sunday or Sunday and Monday. Rialdi said he would see what he could do, but he could not promise anything. Thereafter, Parker was scheduled to

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not. She visited the Salem store twice during the first half of 2022, on January 17 and in February. She visited about two to three more times during the second half of that year. She visited the company's other stores about the same number of times. (Tr. 1191-1192). Gallagher visited the Salem store regularly, at least monthly, from 2019 to mid-2020. From mid-2020 through the end of 2021, he reduced his travel due to the pandemic. (Tr. 1231). He continued to visit the Salem store in 2021, but on a less frequent basis. (Tr. 1260). In 2022, he resumed visiting stores, including the Salem store. He estimated he visited the Salem store a couple of times a month. (Tr. 1232). When he visited, he would say hello to the staff, check out the sales floor, and interact with customers. But most of his time was spent in the supervisor's office, on calls or in meetings, usually with the door closed. He had the same practice when he visited the other stores. (Tr. 1233-34). Gottschlicht visited the Salem store between three to five times a year after the store opened in 2019 through the end of 2021. This was the same frequency he visited the Springfield store. (Tr. 1287-8128). He usually would stay for 2-3 hours. His practice during those visits was largely the same as Gallagher's, spending most of his time on his computer or making calls from the supervisor's office, with the door closed. In 2022, Gottschlicht visited the Salem store a total of 3 to 4 times. This was about the same number of visits he made to the other stores. (Tr. 1293-1294).

[21] At hearing and in brief, the General Counsel conflates Rialdi asking employees for their "availability" with him asking for their "preferences." The record establishes he only asked for their availability.

be off Sundays and Mondays. (Tr. 210-212). Parker testified he had requested and was granted a similar arrangement from his prior supervisor, but it was not always consistent. (Tr. 294-295).

After acquiring the 7Shifts program, Wagoner was responsible for piloting and implementing it at each of Respondent's locations. (Tr. 1171). This included onsite visits. She started with the Salem store because it was the closest to her home. (Tr. 928-929). By early February 2022, the Respondent implemented the 7Shifts program at all its locations. (Tr. 1174).

G. January 28 Discipline of Parker and Cummings

Prior to November 2021, this policy requiring that the Cash Room door be closed at all times was not consistently followed. (Tr. 1047). Managers and leads would leave the door open while inside to have better airflow because the room is small and to be able listen to what was happening out in the sales floor. (Tr. 558-559). On November 19, 2021, retail district manager Steve Lemieux emailed all store managers instructing them to make sure that all secured doors are locked at all times. He wrote "I also expect that you will have no tolerance for violations of this policy going forward." (R. Exh. 9).

On November 20, 2021, Rialdi forwarded Lemieux's email to Salem assistant store managers Nicholas Novello and Sydney Saynganthone and leads Rowan Cummings and AJ Parker, adding:

> As you can see from the email below, it is imperative that the cash office door and the [asset protection] door are locked at all times, including when you are in there. I understand that those rooms are small, but it is a BIG DEAL if they are open. Please acknowledge this email with a response that you have read this and you understand the expectation!

(R Exh. 9).

Despite the emails, the credible evidence establishes that managers and leads, including Rialdi, continued to leave the Cash Room door open while inside.[22] On January 12, manager Wagoner was at the Salem store and observed Parker in the Cash Room with the door propped open. (Tr. 944). Two days later, she reported what she saw to her supervisor, Carlone. That same day, Rialdi received the demand letter. He texted Carlone, stating: "Found out that AJ, My lead, is behind all of this! He has organized it all. And Rowan my other lead is also involved and has been pressuring people." (CP Exh. 8). Later during that exchange with Carlone, Rialdi texted, "At this point I don't know who to trust? I think Syd is fine (I think!!??) I know Nick was close to [former assistant manager Sara Dukeshire] and has had conversations with Rowan when [Dukeshire] was fired so I'm not 100% there." (CP Exh. 8).

[22] Parker testified that following the November 2021 emails he and others, including Rialdi, continued to leave the Cash Room door open, without repercussions. (Tr. 290). Rialdi testified he was unaware of anyone leaving the door open, effectively denying that he did so. (Tr. 1053).

I credit Parker over Rialdi. I found his testimony to be candid, consistent, and logical. It also was corroborated by Bagnall, who testified to seeing Rialdi in the Cash Room with the door open "quite often" and that he saw other employees and managers do the same on a "daily basis." (Tr. 558). Bagnall worked in the Vault and passed by the Cash Room multiple times a shift. Additionally, I find it highly improbable that managers and leads went from not complying with the policy prior to the November 2021 emails, to complying with the policy following the emails through mid-January 2022, to them suddenly and en masse began not complying with the policy in mid-to-late January.

Carlone later reported to Darling about Parker leaving the door open. Darling told director of security Brian Hammond to review surveillance footage to determine if employees were following the policy. Hammond reviewed footage from January 12 through January 20, and he observed that Novello, Saynganthone, Parker and Cummings each left the door open on at least two occasions.[23]

On January 28, the Respondent disciplined all four for violating the Cash Room door policy. This was the first time anyone was disciplined for violating the policy. Saynganthone, Parker and Cummings each received a final warning. Novello was discharged because he had previously received a final warning. (Jt. Exh. 5)(R Exh. 36-38). Parker and Cummings had no prior discipline.

H. Communication Between Darling and Parker

On January 28, Parker went to speak to Darling to complain about the final warning. Parker complained that he had no prior discipline and that others, including Rialdi, have left the Cash Room door open multiple times. Darling responded that people were being treated fairly. (Tr. 234-235). The conversation was cut short because both had to return to work. Later that evening, Darling emailed Parker, stating:

> I would like to continue our conversation and get to understand the changes that you would like to see happen. Being new to the company and having several years' experience in the field, I believe I can offer an objective opinion and assist both sides to start to hear and understand each other.

(GC Exh. 18).

Parker and Darling spoke again on January 29. Parker raised a number of issues and explained why he and the other employees wanted the Union. Parker was particularly critical of Rialdi and his performance as store manager. Darling responded there was only so much he could do. (Tr. 239-240).

I. February 4 Discipline of Bagnall

On February 4, Respondent issued Bagnall a final warning for eating in the Vault on January 16. (Jt. Exh. 6). The incident was captured on film by the Vault's surveillance camera. (R. Exh. 10). Bagnall sat on a chair in the corner, with his mask down, unwrapping and eating a popsicle while looking at his cell phone. Later that day, Rialdi called Bagnall into his office. Bagnall admitted to the conduct and that he probably should not have done it. (Tr. 541)(R. Exh. 51, pg. 38). Rialdi consulted with Darling, and they concluded based on the "severity" of the violations that Bagnall should receive a final warning, even though he had no prior discipline other than his documented discussion for attendance. (Tr. 832).[24]

The final warning indicates that Bagnall violated Respondent's food and beverage policy and its COVID mask usage policy. (Jt. Exh. 6).[25] This was the first time Respondent disciplined an

[23] Neiter Cummings, Novello, Hammond nor Saynganthone were called to testify.
[24] Respondent offered no explanation for the 3-week delay between the policy violations and the final warnings.
[25] The Respondent contends the final warning was only for eating in the Vault, not for failing to wear a mask. It states the masking issue was referenced as a teaching moment. I reject the contention. Bagnall's warning clearly references his failure to wear a mask as part of the conduct for which he was being disciplined. Additionally, as

employee for violating either policy. This is true despite evidence that food and beverage policy was violated in the past. The inventory specialists who testified confirmed that employees and managers, including Clough, regularly drank and occasionally ate in the Vault. Examples include eating candy, snacks, pizza, and a burrito, all without any repercussions. (Tr. 74-76, 434-437, 476-478, 552).

Rialdi testified this was the first time he was made aware of anyone eating in the Vault. (Tr. 1059). Whether or not that is true, Clough was aware and participated in the offending conduct. Unlike with the Cash Room door, Respondent did not conduct a broader investigation and begin reviewing surveillance footage to determine if others were violating the policies at issue.

J. February 4 Discharge of Lynch

On the same day Respondent disciplined Bagnall, it discharged Lynch for a verbal altercation he had with a customer a month earlier. On January 4, a customer entered the Salem store and refused to properly wear her COVID mask. Parker, who was the lead at the time, was behind the counter with Lynch and two other (unidentified) employees, all properly masked. When the customer approached the counter, Parker informed her of the store's policy and asked her to wear her mask properly. The customer refused. Lynch then intervened and began yelling at the customer, telling her she did not have the right to risk the employees' health by refusing to comply with the policy. (Tr. 125). As he spoke, Lynch did not use profanity, but he was pointing his finger and clenching his fist up in the air. (R Exhs. 3(a)-(d)) (Tr. 284). The customer then "cussed [Lynch] out" before returning to talk to Parker. (Tr. 125). The timestamps on the photographs from the surveillance cameras show the exchange between Lynch and the customer lasted just over a minute. There was no audio or video evidence introduced from the surveillance cameras. Following the incident, neither Parker nor Lynch reported what happened to anyone in management.

At the time the altercation occurred, Rialdi was off work recovering from COVID. He testified he did not learn about it until the end of January, when Clough told him. (Tr. 1041-1042).[26] Rialdi then interviewed Parker and Lynch, separately. He interviewed Lynch on around January 27. Lynch told Rialdi the customer showed a "total lack of concern" for the employees' health and well-being. and he just "lost it." (Tr. 1043-1045) (R. Exhs. 29 and 51, pg. 39). Lynch also said he was "working on his anger issues." (R Exh. 51, pg. 39). Lynch was not suspended following the interview and he continued to work for another week.

Rialdi later consulted with Darling, and they decided that Lynch's conduct warranted discharge. They found he acted inappropriately and failed to comply with the company's de-escalation guidelines, and he failed to allow leadership (Parker, in this case) to handle the customer. (Tr. 1046)

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discussed below, when Bagnall was later discharged, the termination notice refers to his repeated failure to abide by company policies, which included his failure to wear the mask in this instance.

[26] The record does not reflect how or when Clough first learned of the January 4 confrontation. Clough no longer works for the Respondent and was not called to testify. Rialdi "believed" Clough told him as soon as she found out, but he failed to offer a basis for that belief. (Tr. 1042). Under the circumstances, I find it suspicious that a confrontation like this went undiscovered by management for nearly three weeks, only to be discovered after receipt of the demand letter. What also is unclear is whether the confrontation was reported or uncovered as part of a broader investigation. As discussed, at around this same time, the Respondent was reviewing surveillance footage to investigate possible violations of company policies.

(Jt. Exh. 7). Darling testified Lynch was discharged solely for the January 4 altercation, and that his prior attendance-related discipline was not a factor.[27]

On February 4, Rialdi met with Lynch before his shift to inform him that he was being discharged. Another employee was present at the time and made aware Lynch had been discharged.

[27] As comparables, the Respondent cites to Salem retail associate Marcus Calef, Easthampton kitchen associate Michael Howe, and Easthampton production associate Paul Ciarlone. Calef was discharged for using foul language, being disrespectful to his immediate supervisor, slamming doors, and "causi[ng] a scene" in front of customers. (GC Exh. 27, pg. 15)(Tr. 797-798). A few months earlier, Calef received a documented discussion for using "foul language" during a disagreement with a coworker "that could be heard by others, including customers." (GC Exh. 27, pg. 12)(Tr. 796-795). Howe was discharged following a verbal altercation with a manager and a lead while he was a customer at the Easthampton store making a purchase. Howe was unhappy with how the manager and lead informed him how to use a punch card. He "raised his voice" and then left the store. While in the parking lot, Howe was overheard stating, "Fuck, I'm so fucking frustrated." (R Exh. 32)(Tr. 798-799). Howe had no prior discipline. Ciarlone was discharged following an outburst at work. He had an initial confrontation with his supervisor in which he yelled and used profanity. He proceeded to leave the work room and walk down the hallway to the break room, screaming back at his supervisor and yelling at other people in the hallway. Once he was in the break room, other employees tried to calm him down, and he "continued to argue with them and behaved in an inappropriate manner, yelling and swearing at people, and making the team nervous and uncomfortable." (R. Exh. 33). Ciarlone's supervisor had to escort him from the break room to a separate office before he finally calmed down. Ciarlone was suspended pending an investigation and then discharged. He had no prior discipline. (Tr. 799-801).

The Respondent also discharged Tatiana Alcaide following a confrontation she had with customers. After a customer complained about how rude Alcaide had been to them, Alcaide walked back over toward the customers, paused at the door and stared at the customer (who was not paying any attention to Alcaide) until she got her attention, and then began yelling at the customer(s) about their complaints. (GC Exh. 29, pg. 7). Managers had to intervene and order Alcaide off the floor. (GC Exh. 28, p 8(c)). Like Calef, Alcaide previously received discipline for inappropriate behavior. About three months earlier, she received a written warning following a verbal confrontation she had with another employee where the two were shouting profanity at each other in the break room. Others intervened out of concern the confrontation would become physical. (GC Exh. 28, pg. 8(a)-(b)).

Respondent, in contrast, issued a final warning to Springfield security lead William Richmond following a confrontation he had with a customer. According to Darling, a customer entered the retail space wearing a Halloween mask and refused instructions by security to take it off. (Tr. 801-803). Richmond intervened and told the customer that if he did not comply, he would not be allowed to make a purchase and would need to leave. The customer grew agitated and began yelling and saying inappropriate things. The customer was escorted out of the store. When the customer returned and was denied access, he became physically aggressive, swinging at one of the guards and knocking his hat off. The customer eventually left and walked back to his car. Richmond followed him out into the parking lot and to his car. Darling testified that Richmond handled himself appropriately right up until he followed the customer to his car. Darling stated he was not discharged because he was not acting "intentionally." (Tr. 803). The final warning Richmond received tells a different story. It states the warning was for "an altercation" with a customer "on the sales floor" where he exhibited "inappropriate behavior" that was not in accordance with the company's de-escalation guidelines. (GC Exh. 28, pg. 4(e)-(f)). It further states Richmond's conduct "lead to the situation getting hostile" and created an "uncomfortable shopping and working experience." Two and half months prior to receiving the final warning, Richmond received a documented discussion for failing to correctly close the registers causing a variance of $720, and for accidently leaving the freezer door open resulting in a $760 loss in inventory. (GC Exh. 28, pg. 4(c)-(d)).

Another Springfield security lead, Anthony Donahue, also received a final warning for "an altercation" he had with a customer "on the sales floor" in which he exhibited "inappropriate behavior" that was not in accordance with the company's de-escalation guidelines. (GC Exh. 27, pg. 42). It is unclear from the record if he and Richmond were involved in the same incident, but both occurred on the same day. The record does not reflect whether Donahue had prior discipline.

K. February 11 Skip Meetings

As planned, Respondent resumed in-person "skip meetings" at its locations in early 2022. On February 9, Gallagher emailed Carlone and Rialdi that he and Gottschlicht wanted to conduct skip meetings at the Salem store on February 11. Gallagher proposed meeting with "groups of 4-5 people for 15 minutes to introduce ourselves, answer any questions, and get any feedback." (CP Exh. 11). On February 11, Gallagher and Gottschalk visited the Salem store and held these meetings. (CP Exh. 10). They thereafter held similar meetings at Respondent's other locations. (R Exhs. 56-59).

Bagnall attended one of the meetings with other employees. In that meeting, Gottschlicht discussed various topics, including improvements the Respondent implemented in the past, such as bonuses and sales-based incentive programs. Bagnall criticized both and explained how he thought they were flawed. Gottschlicht stated they were looking into implementing more or different incentive programs in the future. (Tr. 573). One of the other employees asked why retail employees were not able to accept tips from customers. Gottschlicht expressed concerns about the legality of tipping. Bagnall responded that management was either too lazy or too incompetent to do what the employees were asking. (Tr. 575). Bagnall raised concerns about homophobic online business reviews and graffiti in the restroom, and how it needed to be addressed because it made employees uncomfortable at work.

Parker attended one of the other meetings with other employees. Gallagher and Gottschlicht indicated the purpose of the meeting was to give the employees an opportunity to speak with them and say their piece, and to try to keep the lines of communication open. Parker raised concerns about employees having to come in and work during a snowstorm, and how dangerous that was. He also commented that the Salem store was understaffed, and people were forced to come in and work when they were ill with COVID.

Terry also attended one of the meetings with other employees. He raised concerns that the company, at the corporate level, prided itself on hiring internally and promoting from within, but that it had refused to promote from within at the Salem store. (Tr. 431). According to Terry, it appeared that Gallagher and Gottschlicht were unaware there had been any internal candidates for any of the positions at the Salem store, or that they had been passed over.

The owners and managers who attended these meetings listened, but there were no assurances or indications that Respondent was going to take action on any of the concerns that were raised.

L. February 16 Discharge of Bagnall

In early February, there were several changes made to Bagnall's schedule which caused him to alternate between working nights and mornings, and to work shifts that were normally not his. On February 9, Bagnall failed to report at the start of his 6 a.m. shift. His supervisor, Clough, contacted him, asking if he was okay because he was not at work. Bagnall told her he did not know he was scheduled to work that morning but that he would come in right away. He arrived about two and a half hours late for his shift. He worked his shift and asked and was allowed to work additional hours to make up for the time he missed. Clough gave him no indication he would be disciplined.

On February 16, Darling emailed Bagnall to inform him the Respondent was terminating his employment. (Jt. Exh. 8). In the termination notice, Darling summarized Bagnall's disciplinary history. Darling concluded stating, "After reviewing your previous infractions and considering that you have had three company policy violations in the span of a month, we have made the decision to

terminate your employment …" (Jt. Exh. 8).[28] This last sentence refers to the February 4 final warning Bagnall received for violating the food and beverage policy and the COVID mask policy.

M. Conversation Between Parker and Rodriguez

In February, Joel Rodriguez began covering shifts as an assistant store manager at the Salem store. Parker worked a couple shifts with Rodriguez. He later asked Rodriguez to meet outside of work to discuss some personal issues Parker was having. They later met for breakfast at a restaurant away from the Salem store. A few days after, Rialdi approached Rodriguez and asked if he had met with Parker for breakfast. Rodriguez stated that he had. Rialdi told Rodriguez there was "concern around the store" stemming from that meeting. (Tr. 715-717). Rodriguez later texted Parker asking how Rialdi knew they had met out for breakfast and that he did not appreciate being approached by Rialdi. Parker told Rodriguez he did not know. (GC Exh. 31).

Parker confirmed the above interactions with Rodriguez. He further testified that Rodriguez told him that Lemieux and Rialdi had asked Rodriguez to watch and listen to Parker to "try and find out what Rialdi could do to be a better manager, be better at his job, or…fix the ongoing situation at the store." (Tr. 263). Rodriguez denied making this statement. He also denied being asked, or telling employees he had been asked, by Rialdi or Lemieux to watch any employee. (Tr. 710-711).[29]

N. Restrictions on Union Solicitations and Discussions

On about March 11, Rialdi called Parker into his office and told him that he "should not be talking about the Union while on the clock" and that it was making other employees uncomfortable. (Tr. 251-252). Rialdi further stated, "While you're here, you should be focused on what you're doing here." (Tr. 253). Parker was irritated by this because the conversations he was having about the organizing effort were not interfering with his or any other employee's work. During this time period, employees were allowed to talk about other non-work topics while on the clock, like the news, entertainment, or their personal lives. (Tr. 252).

Rialdi acknowledged having the conversation with Parker in early March about discussing the Union while at work. He testified, "So during working hours, I had asked him not to discuss the Union

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[28] Darling testified that Bagnall's no-call/no-show itself would have resulted in a final warning. But based on Bagnall's prior warnings, Darling and Rialdi made the decision to terminate Bagnall's employment. (Tr. 834).

Respondent cites as comparables to Aiesha Gordon, a Salem retail associate, Joaquin Swanigan, a retail lead at the Springfield store, and Anthony Leone, an Easthampton kitchen associate. Gordon was discharged in late June following a no-call/no-show. She previously received progressive discipline for her attendance, including a documented discussion in late February, an initial written warning in early April, and a final warning in late May. She had a total of 14 occurrences over a 6-month period. (GC Exh. 27, pgs. 60-63). Swanigan was discharged in August following a second no-call/no-show in less than 6 months. He previously received a final warning in early March after his first no-call/no-show and excessive tardiness. (GC Exh. 28, pg. 3(c)). Leone was discharged in February after a second no-call/no-show in less than a month. He received a final warning in late January after his first no-call/no-show. (R. Exh. 42.)

[29] I credit Rodriguez's denials. I found him to have a sincere, honest, and straightforward demeanor and a clear and detailed recollection of the events. I further conclude he provided unbiased testimony despite continuing to work for the Respondent as a managerial employee. Furthermore, I find Parker's differing testimony to be illogical. Rodriguez came to Parker trying to find out how Rialdi learned they had met for breakfast. It is a non-sequitur for Rodriguez to then say, essentially out of the blue, that Lemieux and Rialdi had asked him to watch and listen to Parker for ways Rialdi could improve as a manager.

organization. I told him that on his time, lunch, he was absolutely -- you know, that was his right. But during company time, we needed to -- just focusing on our business, and to ensure that he wasn't talking to the other team members about that." (Tr. 1070). Rialdi also acknowledged that retail employees, like Parker, were permitted to discuss non-work matters during downtime at the store, including about something they saw on television or what was happening in their personal lives. (Tr. 1140). Implicit, if not explicit, in Rialdi's testimony was that he told Parker he could talk about the Union during his lunch break, but he could not discuss it during his downtime, even though Rialdi acknowledged employees were permitted to discuss non-work-related topics during downtime.

A few days later, Clough called Parker into her office and told him he needed to "chill out with the union stuff" and that his "social media posts were making people uncomfortable." (Tr. 253). Parker got upset, telling Clough that Rialdi had spoken to him a few days prior, and he did not understand where all this was coming from because he was not taking time away from work. Clough then backed off and stated she supported the organizing effort.[30]

O. April 13 Meetings with Labor Consultant Lev

The Respondent hired labor consultant Katherine Lev to meet with the Salem store employees prior to the union election. The meetings were held on April 13, and were mandatory for all store employees. At the meetings, Lev presented employees with information on the mail balloting process. (Tr. 656-657) (R. Exh. 11). After making her presentation, she opened the meeting up to questions.[31]

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[30] Again, Clough did not testify, leaving Parker's testimony, which I found credible, unrefuted.

[31] Two witnesses testified about the April 13 meetings: Lev and Salem retail associate Clark D'Agostino. D'Agostino attended the morning meeting and he generally recalled Lev made various statements in response to employees' questions. He recalled Lev said that if the Union won the election, "laboratory conditions would have to continue until the new contract was put in place and the bargaining would take around a year or a year and a half … And that if all of the co-workers didn't agree [to ratify the agreement] then it could take even longer … to get raises or performance reviews." (Tr. 379). D'Agostino initially testified Lev said performance reviews would remain "frozen" through the end of negotiations, but if the Union lost the election, the reviews would be done right away. (Tr. 381). On cross examination, D'Agostino was not certain that Lev used the word "frozen." (Tr. 399). Lev denied making these statements, stating she would not have commented on the topics of reviews and raises because she did not know what the Respondent's practices were on those matters. (Tr. 666-667). She testified she may have indicated she "would expect a labor attorney to tell their client to hold off on reviews" until after the election because employees might feel like it was somehow intended to influence their vote. (Tr. 668). As for negotiations, D'Agostino testified Lev said the parties "would start from scratch and that everything would be on the table so that we might not be able to keep things like our employee bonus, or our current schedules, or things like that." (Tr. 381-382). Lev denied making these statements. She stated that when discussing bargaining, her practice -- aside from telling employees they could get more, less, or the same through bargaining -- is to tell employees that "when a union wins an election, what a union wins is the right to participate in the collective bargaining process. … And [the sides] have to sincerely consider the proposals of the other. They have to reduce their agreements to writing. And neither party is required to agree to any proposal of the other. So nothing gets into the agreement unless both parties agree." (Tr. 672-673). D'Agostino further testified Lev said that if the union won and the parties negotiated a contract, managers would no longer have discretion to be lenient or flexible in how they reacted to situations, and that they would have to follow the contract. (Tr. 380). He also testified Lev said the Respondent did not want a union because it would prevent management from being able to communicate and work directly with partners, and that it would just take longer for the company to pivot its business. He also recalled she added the company would not be able to make changes in how the store worked unless it was written into the contract, and that would make them less competitive, and they were more likely to lose business and potentially shut down. (Tr. 382). On cross examination, after reviewing his pre-hearing affidavit, he clarified his testimony stating, "Lev said that if they could not pivot their

There were questions from employees, including about the bargaining process; how it worked and what would happen. Lev responded there was no way of knowing what the outcome of bargaining would be; employees could get more, less, or the same. She stated the average time it takes to reach an agreement is 409 days, but it could take more or less time. Once a union is elected, the employer cannot add or take anything away from employees without first negotiating with the union, and that it was illegal to make unilateral changes during that time period. Additionally, she said that prior to the election it was illegal for an employer to make changes, whether for better or worse, to influence the vote. Later, she commented that the parties would be bound to terms of the agreement. Managers would not be able to make exceptions when interpreting or applying the agreement without the employer first negotiating with the union. She told employees that whether they philosophically liked unions or not, there's no getting around that the employer must follow that agreement. And that's the very reason that some people like unions and some people do not.

P. Statements about Performance Reviews

As stated, in 2021, employees at the Salem store received performance reviews and their ratings on those reviews determined the amount of any wage increase. In early April, retail associate Clark D'Agostino was on the sales floor with other employees. During downtime, the employees were discussing the upcoming union election, and what it would entail. The topic of wage increases came up, and employees questioned when their performance reviews would be occurring. Assistant store

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business and keep up with competition, that an employer could go out of business." (Tr. 402). Lev denied making these statements. She testified her practice when asked whether the business will close if the union is elected is to respond, "It is unlawful to talk about whether a business will close. I've not seen businesses close as a result of a union coming in for the first time … If that's something that you're worried about, I would just not factor it into your decision because it's, it's just something that is rare in this type of instance." (Tr. 669). As for statements about the loss of competitiveness, she did not recall being asked about that, but her practice when addressing that topic is to say that "bringing a union in, in and of itself would not make an employer less competitive." She added she would say that if the bargaining agreement contained provisions the employer did not foresee could impact its business down the road, it would be unable to make a change to that provision without first bargaining with the union, which is not something it would need to do if there was no union. (Tr. 669-670). Later, when D'Agostino raised concerns about scheduling and the possibility of inserting a contract clause allowing for flexibility, he recalled that Lev told him that clauses like that probably would not be honored because the Respondent would be worried about being sued for applying it inconsistently. (Tr. 380). Lev denied making that statement. She testified she would have indicated the parties would need to negotiate over the terms and memorialize only those agreed upon in the agreement, and both sides would be bound to those terms.

I credit Lev over D'Agostino regarding the contents of the meetings. Lev had a candid, confident, and straightforward demeanor. While her recollection was at times admittedly incomplete, her testimony was otherwise logical and consistent. D'Agostino, on the other hand, was a highly unreliable witness regarding this meeting. For example, he recalled the meeting lasting 3 hours, when in reality it was closer to 1 hour. He also recalled there was somewhere between 7 and 15 employees present, which is a difference of more than double. Additionally, D'Agostino often failed to offer critical details or context when testifying about the meeting or Lev's alleged statements. I attribute this to his poor or incomplete recollection. But also, in part, to the General Counsel's questioning. Rather than asking open-ended questions allowing for a fuller narrative, the General Counsel asked directed, almost leading, questions, focusing D'Agostino on specific, narrow topics and statements. Additionally, as discussed, D'Agostino contradicted himself, and, at times, appeared to conflate topics. That leads me to believe he also likely conflated Lev's statements or recalled them inaccurately. Finally, D'Agostino's testimony was uncorroborated. Even though these meetings were attended by 20-30 other employees, the General Counsel's failed to call any other witnesses to testify about what was said. This was confounding considering Lev's alleged statements and their significance to the General Counsel's overall case.

manager T.J. Mercado was present. He said the employees "wouldn't be able to get raises and reviews until the election was done because they had to maintain … laboratory conditions." (Tr. 374-375).[32]

Q. Post-Election Wage Increases

Every year since the Salem store opened, the Respondent has given wage increases to hourly employees. In 2020, it gave a flat, across-the-board increase to all employees to remain competitive with other cannabis companies and retail businesses in the area. (Tr. 988). Those increases were given in the summer or early fall of 2020. In the spring of 2021, the Respondent gave wage increases based on employee performance ratings. The managers evaluated all hourly employees and granted increases based on their individual ratings. An overwhelming majority of the employees received the same wage increase, 3 percent, based on their ratings. (Tr. 988-989).

Chief financial officer Davis testified that in November 2021, the Respondent again made the decision to award wage increases in late April 2022. (Tr. 990-991) (R. Exh. 55). Initially, the plan was to conduct performance evaluations and award increases based on performance ratings, like the prior year. However, Davis testified the company later decided not to conduct the evaluations and simply give a flat 3-percent increase to every hourly employee hired before late 2021. According to Davis, this decision was made based on feedback from the managers that the evaluation process took too long to complete and did not seem to make sense considering that "at least 90 percent" of the employees received the same rating/increase the prior year. (Tr. 991). Although the plan had been to announce the increases in late April, management decided to wait until after the election was over because they did not want to create the perception that the company was trying to buy votes. (Tr. 990). It is not clear when management's plan to do-away with the performance evaluations, which was made in February, was communicated to the store managers and assistant managers.

On about May 9, following the ballot count, Rialdi announced the across-the-board wage increases for all hourly employees. The increases were retroactive to April 29, when they originally were going to go into effect. (Tr. 1181; 1184).[33]

LEGAL ANALYSIS

A. Overview of Allegations

The Amended Consolidated Complaint alleges the Respondent violated Sections 8(a)(1), (3), and (5) of the Act.[34] It alleges Respondent violated Section 8(a)(1), including when it: (1) conducted captive-audience meetings with employees to discourage union activity; (2) asked employees to ascertain/disclose to management other employees' union membership, activities, and sympathies; (3) solicited employee complaints and grievances, and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity; (4)

[32] Mercado did not testify. He no longer worked for the Respondent at the time of the hearing. I credit D'Agostino's testimony on this because, unlike the April 13 meeting, it was detailed, consistent and logical.

[33] I credit Carlone that management planned to implement the increases regardless of the outcome of the election, as the timing of the awards was consistent with the prior year's increases. (Tr. 1209).

[34] The Union alleges the Respondent engaged in objectionable conduct affecting the results of the election. The objections parallel the unfair labor practice allegations. It is unnecessary to address the objections because, for the reasons stated below, I conclude that Respondent's unfair labor practices warrant setting aside the results of the election and issuing a remedial bargaining order.

remedied grievances it solicited by granting changes to employees' work schedules; (5) had its owners and other high-ranking officials make unprecedented and repeated visits to the Salem store and created the impression that employees' union activities were under surveillance; (6) made statements that created the impression that employees' union activities were under surveillance; (7) threatened employees with various adverse consequences if they supported the Union; (8) restricted employees from talking about unions while allowing employees to discuss other, non-work-related topics; (9) made various statements that conditions would be frozen and changes delayed, benefits would be lost, and the store may close, if the employees selected the Union as their representative.

The Amended Consolidated Complaint alleges the Respondent violated Sections 8(a)(3) and (1) when it (1) selectively and disparately enforced its work rules and policies more strictly against employees who formed, joined, or assisted the Union; (2) disciplined Lynch, Cummings, Parker, and Bagnall because they engaged in union and other protected activities; (3) discharged Lynch and Bagnall, because they engaged in union and other protected activities; and (4) granted wage increases following the election, thereby discouraging membership in a labor organization.

Finally, the Amended Consolidated Complaint alleges the Respondent violated Sections 8(a)(5) and (1) by: (1) failing and refusing to recognize and bargain with the Union as the representative of the Unit employees since receiving the January 14 demand letter that demonstrated majority support; (2) by committing the serious and substantial violations alleged above; and (3) by failing or refusing to bargain with the Union regarding the discharges of Lynch and Bagnall.

B. 8(a)(1) Allegations and Related Objections

1. *Captive Audience Meetings*

Paragraph 7 of the Amended Consolidated Complaint alleges that beginning on about January 17, Respondent held mandatory (or effectively mandatory) captive-audience meetings to discourage union activity. The General Counsel alleges these meetings occurred on January 17, February 4, February 11, and April 13 at the Salem store. The evidence establishes the January 17 and April 13 meetings were mandatory, but the same was not established about the other meetings.

Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Section 7 of the Act provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(c) of the Act gives employers the right to educate its employees about labor organizations, collective bargaining, and the Act: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act if such expression contains no threat or force or promise of benefit." The Board employs an objective, totality of the circumstances standard when evaluating whether statements violate Section 8(a)(1) or are protected by Section 8(c) of the Act. *Multi-Ad Services*, 331 NLRB 1226, 1227-1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).

The Board has interpreted Section 8(c) as entitling employers to compel employees to attend individual or group meetings in which it expresses its views and urges employees to reject union representation. *Babcock & Wilcox Co*., 77 NLRB 577, 578 (1948). See also *NLRB v. Gissel Packing*

Co., 395 U.S. 575, 617 (1969).[35] In applying extant law, I find the Respondent did not engage in the alleged violative conduct when it held mandatory meetings to discuss the Union or the Union election.

2. *Asked to Ascertain/Disclose Employees' Union Membership, Activities, and Sympathies and Threatened Employees with Discipline for Engaging in Union Activity*

Paragraph 8 of the Amended Consolidated Complaint allege that on about January 17, Davis, at the Salem store, asked employees to ascertain and disclose to the Respondent the union membership, activities, and sympathies of other employees and threatened employees with discipline for engaging in union organizing activity. Paragraph 12(a) of the Amended Consolidated Complaint alleges that on about January 17, David threatened employees with discipline for engaging in union activity. The General Counsel does not analyze the paragraph 8 allegation in its post-hearing brief, but she does analyze paragraph 12(a). At issue in both, presumably, are Davis's comments about reports he received of bullying and harassment related to the organizing effort and implicitly was soliciting employees to report to management if they experienced either, which, in turn, would disclose the employees who supported the Union. However, the record establishes Davis stated that he had received reports that employees were being told that they would lose their job if they did not support the Union, and that such behavior would not be tolerated. He stated everyone's point of view should be respected and no one was going to be fired because of their point of view. Carlone later stated the company had zero tolerance for bullying, regardless of whether the employees involved supported the union or not. She also stated the company would investigate reports of bullying, regardless of whether the person supported the Union or not.

Section 7 of the Act allows employees the right to engage in persistent union solicitation even when it annoys or disturbs the employees being solicited. *Ryder Transportation Services*, 341 NLRB 761, 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005). An employer violates Section 8(a)(1) when it asks or encourages employees who feel annoyed or disturbed by the union solicitation to report it to management with an express or implied promise that management will investigate and take action. *Tawas Industries, Inc*., 336 NLRB 318, 322-323 (2001). The Board has held such statements are violative "because they have the potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities." Id. The Board has long held that such requests chill lawful solicitation because "such statements...indicate that the employer intends to take unspecified action against subjectively offensive activity without regard for whether that activity was protected by the Act." *Cayuga Med. Ctr. at Ithaca, Inc*., 365 NLRB No. 170 fn. 1 (2017) (quoting *Tawas Industries, Inc*., supra at 322).

However, in *Champion Home Builders*, 350 NLRB 788, 790 (2007). the Board drew a distinction between union solicitation and threats. In that case, the plant manager gave a speech to employees about complaints he received from employees about co-workers trying to get them to join or support the union, including by threatening job loss. He reassured employees they had the right to decide if they want to join the union or not, and they had the right to express their opinions and try to

[35] The General Counsel acknowledges that under *Babcock* these meetings were not unlawful. However, she argues the Board should overrule *Babcock* and hold that, as a matter of law, reasonable employees will perceive an implicit, if not explicit, threat of reprisal for exercising their right to refrain from listening to their employer's speech concerning their exercise of Section 7 rights when they are convened on paid time or cornered while performing their job duties. As stated, the General Counsel's arguments for changing established precedent are for the Board to consider, not me.

convince others, but no one had the right to threaten employees with job loss. He urged employees who are threatened that way to report it and the employer would put a stop to it. The Board held an employer may lawfully assure employees that it will not allow them to be threatened, and it may ask them to report such conduct because threats directed at employees are properly within the employer's legitimate concerns. The Board held requests to report this type of unprotected conduct to management do not reasonably tend to chill employees in the exercise of their Section 7 rights, but rather assisted in assuring employees of the free exercise of those rights.

In the present case, similar to *Champion Home Builders*, Davis's statements taken as a whole did not solicit reports of employees' protected activities, or contain threats for engaging in protected activities, but only addressed unprotected threats of job loss. Accordingly, based on the credible evidence, I find the Respondent did not engage in the alleged violative conduct.

3. *Soliciting Grievances and Promising Increased Benefits and Improved Terms and Conditions*

Paragraph 9 of the Amended Consolidated Complaint (as further amended at hearing) generally alleges the Respondent, through its managers and owners, held meetings or made statements in which they solicited employee grievances and impliedly promised increased benefits and improved terms and conditions of employment if employees refrained from organizing activity. This allegedly occurred by Gallagher, Gottschlicht, Davis, and Rialdi on January 17, by Rialdi on January 18, by Gallagher, Gottschlicht, and Davis on February 11, and by Darling on January 28 and 29.

Solicitation of employee grievances during an organizing campaign inherently constitutes an implied promise to remedy those grievances and is therefore violative of Section 8(a)(1), unless the employer establishes it has a past practice of soliciting grievances and does not significantly deviate from that practice. See *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000). In evaluating the statement, the failure of the employer's representative to make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. Id. (quoting *Capitol EMI Music*, 311 NLRB 997, 1007 (1993)). Statements that the employer cannot make any promises, or the employer's failure to offer any solution to address the grievance, may under the circumstances cut against finding of a violation. Compare *Southern Monterey County Hospital,* 348 NLRB 327, 329 (2006) with *Majestic Star Casino, LLC*, 335 NLRB 407, 407-408 (2001).

The General Counsel contends that at the January 17 mandatory meetings Gallagher and the other managers "created a forum in which employees were encouraged to become their own best advocates, emphasizing that there was an avenue for communicating directly with the leadership team, an avenue that had in the past led to improvements for [the company] and its employees … Employees understandably took that message to heart and voiced their concerns about their workplace, notably their concerns about scheduling …" (GC Br. 68). This contention, as well as the evidence, is unavailing. Prior to learning of the organizing effort, ownership had a practice of meeting with employees, or allowing employees to meet with them, to ask questions, raise concerns, and make requests related to their terms and conditions of employment. Aside from discussing unions, the January 17 meetings appear to be consistent with that practice and did not involve significant deviation.

The General Counsel further contends that at the end of the January 17 meetings management solicited grievances by telling employees they would make themselves available throughout the rest of the day to answer any questions. Respondent has a written open-door policy that allows employees to

meet directly with ownership or upper management to raise questions or issues. During the January 17 meetings, Carlone referred to this policy and its intended use. The invitation for employees to come and meet with Gallagher or other upper managers was consistent with that policy.

The General Counsel next contends that Rialdi's January 17 solicitation of employees' availability after the first mandatory meeting, and again during in-person conversations on January 18, is further evidence the Respondent was soliciting (and attempting to remedy) grievances, particularly regarding scheduling. As discussed below, Rialdi asked employees to provide their availability, not their preferences. There is no explanation by the General Counsel how requesting availability addresses the concerns employees raised about consistency and transparency. The General Counsel also contends this was the first time Rialdi personally communicated with employees to solicit their availability. While this may be true during the approximately one-month period Rialdi handled scheduling, Parker confirmed that prior to Rialdi taking over scheduling about a month earlier, managers regularly would request employees' availability, and, at times, their preferences, when putting together the weekly schedules. As such, Rialdi's inquiries, while potentially inconsistent with his (brief) past practice, are entirely consistent with the practice of the other managers who worked at the Salem store. Additionally, Terry testified that before the demand letter, when employees asked Rialdi to make changes to their schedules, he would make them and then continue to use that schedule moving forward, until the next time an employee requested a change.

Regarding the February 11 skip meetings that Gallagher and Gottschlicht held with smaller groups of employees, the General Counsel raises the same arguments, and the conclusions are the same. Prior to the pandemic, Gallagher and Gottschlicht held smaller skip meetings at each of its locations, about 2 or 3 times a year, to provide employees with information about the company, answer their questions, and listen to their concerns and ideas. Because of the pandemic, these meetings were held virtually in 2021. In late 2021, Gallagher and Gottschlicht decided to return to in-person meetings, starting in 2022. They scheduled skip meetings for the Salem store in early February. The contents of those meetings appear to be the same as those that occurred in the past, with the owners providing employees with information and listening to the employees' concerns and ideas. At these meetings there was no mention (by the owners) about the Union or the election, and there was no indication Respondent would make any changes based on what the employees raised.

As a result, based on the evidence presented, I conclude these meetings and communications were consistent with the Respondent's policies and past practices, and, therefore, do not constitute violative conduct.

I reach a different result regarding Darling's January 28 and 29 communications with Parker. Parker reached out to Darling because he was upset about the final warning he had received that day regarding the Cash Room door. The two spoke briefly and Darling later emailed Parker asking to continue their conversation. Darling stated he wanted "to understand the changes that [Parker] would like to see happen" and he believed he could "offer an objective opinion and assist both sides to start to hear and understand each other." Parker agreed to speak with Darling again on January 29. In that conversation, Parker explained to Darling why employees felt like they needed a union, focusing specifically on Rialdi's performance as the store manager. Unlike the other meetings and statements discussed above, there was no practice of managers, particularly from human resources, reaching out to employees, and certainly not to discuss the concerns that led them to support the Union. See generally, *St. Francis Medical Center*, 340 NLRB 1380, 1381 (2003). As a result, I conclude Darling's communications with Parker in this regard objectively tended to interfere with or coerce an employee in the exercise of their Section 7 activity, in violation of Section 8(a)(1).

4. *Remedied Grievances By Granting Changes to Employees' Work Schedules*

Paragraph 10 of the Amended Consolidated Complaint alleges the Respondent remedied grievances it solicited beginning on January 17 by granting changes to employees' work schedules in response to the organizing effort.

The Board has held that material changes to benefits granted during the critical period may be coercive. In *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000), the Board held:

> It is well-established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits that are granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits. Further, while an employer is not permitted to tell employees that it is withholding benefits because of a pending election, it may, in order to avoid creating the appearance of interfering with the election, tell employees that implementation of expected benefits will be deferred until after the election—regardless of the outcome.

Id. (internal quotations and citations omitted).

The argument is the Respondent solicited and then granted an important benefit from its employees' perspective regarding schedules and failed to demonstrate that it would have done so in the absence of the union organizing campaign. Presumably, the benefit at issue is the implementation of the new 7Shifts scheduling software program. However, as stated, managers Carlone and Wagoner began researching a scheduling software program in November 2021, and Carlone purchased the7Shifts account around noon on January 14, both prior to the Respondent learning about the organizing effort. After acquiring the program, Rialdi began soliciting information from employees regarding their availability, for the company to use in piloting and eventually launching the program, which went into effect at all of the Respondent's locations in early February. I conclude Respondent would have purchased and launched the new scheduling software program regardless of the organizing effort. I, therefore, find the Respondent did not engage in the alleged violative conduct.

The Union argues the Respondent unprecedently solicited employee availability in a comprehensive manner, and it used that information to better conform the schedule to employee preferences, and the fact that it did so almost immediately after the demand letter demonstrates it intended this benefit to undermine support for the organizing effort. Again, the Respondent solicited availability, not preferences. The only evidence of an employee who requested and received a change in their schedule at this time was Parker. When Rialdi spoke to Parker on around January 17 about his availability, Parker requested to have either Saturday and Sunday or Sunday and Monday off. Parker later received Sunday and Monday off on a consistent basis. The issue is whether this constitutes a change. Parker testified he requested and received a similar scheduling arrangement from his prior supervisor, but it was not always consistent. Parker did not provide any further specifics. MJ Terry testified that when Rialdi took over scheduling following Dukenshire's termination he would recycle

the same schedule week-to-week unless an employee requested a change. Rialdi would make the change and then continue to use that schedule until he received another request for a change. In light of this evidence, I decline to conclude Rialdi's granting of Parker's request for two consecutive days off constituted a change, or that it was part of a larger scheme to undermine support for the Union.

5. *Visits By Owners and Upper Management and Impression of Surveillance*

Paragraph 11(a) of the Amended Consolidated Complaint alleges that since January, the Respondent, by having high-ranking officials, including Gallagher, Gottschlicht, Davis, Morgan, Carlone, and Wagoner, make unprecedented and repeated visits to the Salem store, creating the impression among employees that their union activities were under surveillance.

The Board has held that routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. *Aladdin Gaming, LLC.*, 345 NLRB 585, 586 (2005). An employer crosses the line when it surveils employees by observing them in a way that is "out of the ordinary" and thereby coercive. Id. Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. Id. Ultimately, the test is an objective one and involves a determination as to whether the employer's conduct, under the totality of the circumstances, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7. *Sage Dining Services, Inc*., 312 NLRB 845, 846 (1993); *Brown Transportation Corp*., 294 NLRB 969, 971-972 (1989).

The General Counsel argues the Respondent's decision "to flood the Salem store" with an owner and several high-ranking corporate managers three days after receiving the demand letter, along with their actions upon arrival at the store on January 17, were not in keeping with their past practice and were plainly intended to stifle union activity. The en masse presence of Gallagher and the other corporate managers was unprecedented, but the General Counsel and the Union cite to no authority where that alone was enough to constitute coercive conduct. As noted, Gallagher and Gottschlicht had a practice of holding town hall meetings with employees at the Salem store. At the January 17 meetings, Gallagher stated at the outset that management had received the demand letter and wanted to meet with employees to share information and their points of view about unions. As previously discussed, based on the evidence presented, I find no unlawfully coercive statements were made by managers during the January 17 meetings. In the days and weeks following, the credited evidence shows the owners and managers individually visited the Salem store with the same level of frequency as they had previously. Additionally, when they visited the store after January 17, they largely followed the same routine as they had in the past, unless they had new or different job-related tasks (e.g., implementing the new scheduling software program). While they spent some time interacting with customers and employees, most of their time was spent in the supervisors' office. There was no evidence presented that any owner or manager engaged in any prolonged or unusual observation of employees or engaged in any other coercive conduct. Consequently, I find the General Counsel failed to establish Respondent engaged in the alleged violative conduct.

Paragraph 11(b) of the Amended Consolidated Complaint alleges on about February 2022, on an exact date unknown to the General Counsel, Respondent, by Joel Rodriguez, at its facility, created an impression of surveillance of employees' union activities by telling employees that Rialdi and Lemieux asked him to watch employees. The General Counsel does not analyze this allegation in her post-hearing brief. Presumably, this allegation is based on Parker's testimony that Rodriguez told him that Lemieux and Rialdi had asked Rodriguez to watch and listen to Parker to "try and find out what

Rialdi could do to be a better manager, be better at his job, or…fix the ongoing situation at the store." Rodriguez denied making this statement, which I have credited. I also credit his denial that he was never asked, or told employees he had been asked, by Rialdi or Lemieux to watch any employee. I, therefore, conclude the General Counsel failed to establish Respondent engaged in the alleged violative conduct.[36]

6. *Threatened Loss of Access to Management*

Paragraphs 12(b) and (c) of the Amended Consolidated Complaint allege that on about January 17, Davis and Gottschlicht threatened employees at the Salem store with the loss of a direct relationship with management if they selected the Union as their bargaining representative. "Although an employer can legitimately make a prediction . . . regarding the precise effects of unionization, the prediction must be carefully made on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond its control." *NLRB v. Gissel Packing Co.*, 395 U.S. at 618. In *Tri-Cast, Inc*., 274 NLRB 377, 377 (1985), the Board held that an employer does not violate the Act by informing employees that when they select a union to represent them the relationship that existed between the employees and the employer will not be the same as before.[37]

Although the Amended Consolidated Complaint alleges Davis and Gottschlicht committed these violations, the General Counsel argues in brief the statements at issue were made by Gallagher and Rialdi. During the January 17 mandatory meetings, Gallagher told employees that the company did not believe they needed a third party to represent them because they had a voice and a direct line of communication to leadership. Also, during these same meetings, Rialdi discussed the importance he personally placed on having open, direct communication with employees, and that he feared that might change with a union. Neither of these statements were threats; they were statements about possible changes if the Union was elected. The General Counsel does not contend that either statement violates the Act under extant Board law. As a result, I conclude the Respondent did not commit the violations as alleged (or as modified in brief).

7. *Prohibiting Employees from Talking about Union During Working Hours and Talking about Union Made Employees Uncomfortable*

Paragraph 13(a) of the Amended Consolidated Complaint alleges that on about March 11, Rialdi, at the Salem store: (i) prohibited employees from talking about the union during working time while permitting employees to talk about other subjects; (ii) prohibited employees from engaging in union activity during working hours, as opposed to just working time; and (iii) told employees that talking about the union made other employees uncomfortable. Paragraph 13(b) of the Amended Consolidated Complaint alleges that on about March 15, Clough, at the Salem store: (i) prohibited employees from talking about the union during working time while permitting employees to talk about other subjects; (ii) told employees that talking about the union made other employees uncomfortable; (iii) told employees that the union was fearful of them because they changed things; and (iv) told employees to keep their conversations private.

[36] The General Counsel does not allege that Rodriguez's asking Parker how Rialdi knew about their breakfast meeting created the impression of unlawful surveillance or otherwise violated the Act.

[37] The General Counsel argues the Board should overrule *Tri-Cast, Inc.* As stated, I am bound by current precedent and leave it to the Board to evaluate potential changes to the law.

An employer may prohibit discussion about the union during "working time" but not during "working hours" or "company time." *Our Way, Inc*., 268 NLRB 394 (1983). See *Essex International, Inc*., 211 NLRB 749, 750 (1974) (Board drew distinction between "working hours" and "working time," observing that the former "connotes the period of time from the beginning to the end of a work shift," whereas the latter "connotes the period of time that is spent in the performance of actual job duties, which would not include time allotted for lunch and break periods.") However, an employer may not prohibit discussion about the union during working time if it allows discussion of other, non-work topics during that time. The Board has held that an employer violates Section 8(a)(1) when it permits employees to discuss non-work-related subjects during working time or company time but prohibits them from discussing union-related matters. See generally, *BMW Mfg. Co*., 370 NLRB No. 56, slip op. at 1-2 (2020); *Orchids Paper Products Co*., 367 NLRB No. 33, slip op. at 2 fn. 8 (2018).

Additionally, as stated, employees are entitled to try to persuade each other regarding support for the union, and to either engage in or refrain from other protected concerted or union activities. Sometimes, these discussions can be uncomfortable or unpleasant, but that alone does not make them unprotected. See, e.g., *Hispanics United of Buffalo*, 359 NLRB 368, 370 (2012); *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1156-1157 (2004).

In applying the above, I conclude that on about March 11, Rialdi engaged in violative conduct when he called Parker into his office and told him he should not be talking about the union during working hours and that it was making other employees uncomfortable, and when he further told Parker that during company time he needed to be focused on the company and performing his job. I also conclude that on about March 15 Clough also engaged in violative conduct when she called Parker into her office and told him he needed to chill out with the union stuff and that his social media posts were making people uncomfortable. These statements were overly broad and discriminatory considering the Respondent allowed employees to discuss other, non-work-related topics, such as the news, entertainment, and their personal lives, during working time. I, therefore, conclude Respondent, through Rialdi and Clough, violated Section 8(a)(1) when they prohibited Parker from talking about the Union during working time while permitting employees to talk about other subjects, prohibited employees from engaging in union activity during working hours, as opposed to just working time, and told employees that talking about the Union made other employees uncomfortable. I find no evidence supporting the remaining allegations.

8. *Lev's Alleged Statements*

Paragraphs 13(c)-(d) and 15 of the Amended Consolidated Complaint allege that Labor Consultant Katherine Lev made various threatening statements during her April 13 meetings with employees. Lev allegedly threatened employees with loss of benefits if they selected the Union as their bargaining representative by telling employees that: (i) if the Union won the election, Respondent would not make any changes for at least another year, because it could take up to a year to get a contract; (ii) things would stay frozen during bargaining until a contract was approved; (iii) a contract would be more rigid than the current system and contain less leniency; (iv) employees could not receive employee reviews or wage increases until the election and bargaining had concluded; and (v) if the Union lost the election Respondent would be able to conduct employee reviews. Lev further allegedly threatened the Respondent would close the Salem store if the employees selected the Union as their bargaining representative. Finally, Lev allegedly told employees that the Respondent would not follow proposals the employees desired in an agreement with the Union and informed employees that it would be futile for them to select the Union as their bargaining representative.

In determining whether remarks violate the Act, the test is "whether the remark can reasonably be interpreted by the employee as a threat." *Consolidated Bus Transit, Inc*., 350 NLRB 1064, 1066 (2007), enfd. per curiam 577 F.3d 467 (2d Cir. 2009). The actual intent of the speaker or the effect on the listener is immaterial. Id.; see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133 (2001).

Tentative language about adverse consequences can be coercive, particularly where the employer's prediction is not based on objective facts or the nature of the collective-bargaining process. *Daikichi Sushi*, 335 NLRB at 622, 623-624, enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 1 fn. 3 (2020); *Metro One Loss Prevention Services Group,* 356 NLRB 89 (2010); compare *Jefferson Smurfit Corp*., 325 NLRB 280, fn. 3 (1998). An employer may lawfully communicate to its employees "carefully phrased" predictions about "demonstrably probable consequences beyond [the employer's] control" that unionization will have on the company, provided that the predictions are based on objective facts. *Gissel*., 395 U.S. at 618.

As discussed, I credit Lev over D'Agostino that the allegedly offending statements were not made. Lev's credited statements were based on objective facts (e.g., the average length of time it takes to negotiate an initial contract), her past experience, and her understanding of labor law. She explained how the give-and-take process of bargaining worked, that both sides would be required to negotiate and be bound by the terms of any agreement, and that no changes could be made by the employer without first bargaining with the Union. I, therefore, conclude the General Counsel failed to establish Respondent committed the alleged violative conduct.

9. *Statement about Delayed Performance Reviews*

Paragraph 14 alleges that in April, assistant store manager TJ Mercado told employees that their performance reviews (which affected their wage increases the year before) would be withheld until the upcoming election was over. While a union election is pending, an employer must decide whether to grant benefits precisely as it would if the union were not on the scene. *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). However, an employer may postpone an expected wage or benefits increase so long as it makes clear to employees that: (1) the sole purpose of the postponement is to avoid the appearance of influencing the election's outcome; and (2) the employees will receive their increases after the election regardless of the outcome. *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995); and *Uarco, Inc*., 169 NLRB 1153, 1154 (1968). In so doing, an employer also must avoid placing blame for the postponement on the union. *Uarco*, supra.

Mercado told employees they wouldn't be able to get their reviews and raises until the union election was done because the Respondent had to maintain laboratory conditions. I find this to be analogous to *Sam's Club*, 349 NLRB 1007, 1012-1013 (2007), in which the employer met with employees after the filing of a representation petition and announced that merit raises would be frozen or put on hold pending the election so it would not appear as though they were trying to sway someone's vote, but that the increases would be reinstated after the vote. Id. at 1013. The judge found the statement did not satisfy the second factor because it did not expressly indicate the increases would resume regardless of how the employees voted. The Board reversed, holding the employer's statement made clear the increases were being put on hold to avoid any appearance that it was attempting to influence votes and that they would be reinstated after the election. Id. The Board concluded the only plausible interpretation of that statement was that employees would receive their merit increases after the election, regardless of the outcome. Id. Mercado similarly made clear that employees' reviews and

raises were being postponed until after the election because the Respondent wanted to maintain laboratory conditions. He did not place blame or disparage the Union regarding the delay. Nor did he indicate the outcome of the election would have any effect on the raises or reviews. I, therefore, conclude the Respondent did not engage in the alleged violative conduct.

C. 8(a)(3) and (1) Allegations

1. Overview Regarding Discipline and Discharges

Paragraphs 17-18 of the Amended Consolidated Complaint allege that since January 14, the Respondent violated Sections 8(a)(3) and (1) by selectively and disparately enforcing its work rules and policies concerning attendance, food and beverage consumption, keycard/cash door, and COVID mask usage more strictly against employees who formed, joined or assisted the Union. The Board has held the employer violates Section 8(a)(3) when it more strictly enforces its work rules and policies in response to union activities. *Kitsap Tenant Support Services*, 366 NLRB No. 98, slip op. at 21 (2018) (citing *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987), enfd. 928 F.2d 609 (2d Cir. 1991)). "If the General Counsel demonstrates that the pattern of discipline after the commencement of union activity deviated from the pattern prior to the start of union activity, a prima facie case of discriminatory motive is established requiring the Respondent to show that its increased discipline was motivated by considerations unrelated to its employees' union activities." Id (citing *Jennie-O Foods*, 301 NLRB 305, 311 (1991)).

Specifically, the General Counsel alleges Respondent violated Sections 8(a)(3) and (1) when it issued final warnings to Lynch, Parker, Cummings and Bagnall between January 15 and February 4, and then when it discharged Lynch and Bagnall on February 4 and 16, respectively, because they each engaged in union and other protected activities. When assessing the lawfulness of an adverse action that turns on employer motivation, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (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), approved by *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983). Under *Wright Line*, the General Counsel must initially show that: (1) the employee engaged in union or other protected activity, (2) the employer had knowledge of the activity, and (3) the employer had animus against union or other protected activity. *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1-2 (2020), enfd. 5 F.4th 759 (7th Cir. 2021). Motivation is a question of fact that may be inferred from both direct and circumstantial evidence on the record as a whole. *Intertape Polymer Corp*, 372 NLRB No. 133, slip op. 6-7 (2023). Circumstantial evidence of discriminatory motive may include, among other factors, the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons, offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee. Id.[38]

If the General Counsel establishes these factors, the burden shifts to the employer to show it would have taken the same action in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1089. An employer cannot simply present a legitimate reason for its action; rather, it must persuade by a preponderance of the evidence that the same action would have taken place in the

[38] In determining whether circumstantial evidence supports a reasonable inference of discriminatory motive, the Board does not follow a rote formula and has relied on many different combinations of factors. *Starbucks Corp*., 372 NLRB No. 122, slip op. at 3 fn. 13 (2023).

absence of the protected conduct. *NCRNC, LLC d/b/a Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 1–2 fn. 5 (2022), and cases cited there.

The employer's burden also cannot be satisfied by proffered reasons that are found to be pretextual, i.e., false reasons or reasons not in fact relied upon. Indeed, where the reason advanced by an employer for the adverse action either did not exist or was not actually relied on, the inference of unlawful motivation remains intact, and is in fact reinforced by the pretextual reason proffered by the employer. *Intertape Polymer Corp*, supra slip op. at 7. Unexplained delays between rule violations and the resulting adverse actions may be evidence of pretext. *Vista Del Sol Healthcare*, 363 NLRB 1193, 1215 (2016); *New Haven Register*, 346 NLRB 1131, 1143 (2006).

a. Discipline of Lynch

The General Counsel alleges that on January 15, the Respondent violated Section 8(a)(3) and (1) when it selectively and disparately enforced the attendance policy and issued Lynch the final warning over his unexcused absence on December 18, 2021, and his tardies on December 27, 2021, and on January 1 and 2.

In applying *Wright Line*, I conclude the General Counsel has met her initial burden. Lynch engaged in protected activity known to the Respondent when he signed the demand letter and then led a group of employees in presenting it to Rialdi on January 14. See *Igramo Enterprise , Inc*., 351 NLRB 1337, 1339 (2007), rev. denied 310 Fed. Appx. 452 (2d Cir. 2009); *Liberty Natural Products*, 314 NLRB 630 (1994), enfd. 73 F.3d 369 (9th Cir. 1995). The next day, Rialdi issued Lynch the final warning. The timing of the discipline is sufficient to establish that anti-union animus was a motivating factor in the Respondent's disciplinary decision.[39] See *KAG-West, LLC*, 362 NLRB 981, 982 (2015) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action.") (citing *Masland Industries*, 311 NLRB 184, 197 (1993) (quoting *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984)).

The Respondent contends the decision to discipline Lynch was made on January 13, before Rialdi received the demand letter, when he and Darling met to discuss Lynch's attendance. That contention is not supported by the documented evidence. Rialdi's text to Carlone on January 14 states he had to do "research" but was "pretty sure" they were going to issue next-step discipline to Lynch. Rialdi never explained what "research" he had to do, why he was only "pretty sure" they were going to issue the decision, or what, if anything, other than the letter led the decision to become final. I, therefore, conclude the evidence supports that the letter was a motivating factor in the decision.

The burden then shifts to the Respondent to establish it would have issued Lynch the warning in the absence of his protected activity. In its defense, the Respondent points to its attendance policy and its practice of issuing progressive discipline when employees accrue additional occurrences.

The General Counsel and the Union dispute the underlying occurrences Lynch accrued. Both contend Lynch's absence on December 18 – for feeling ill after receiving the COVID vaccine -- should have been excused because he provided his supervisor with notice of his absence more than 2 hours prior to the start of his shift, and he was never informed that he could expect to be disciplined for the

[39] The General Counsel also cites to the "numerous and contemporaneous unlawful statements [made] at captive meetings and other settings" to establish animus. Those alleged statements have been discussed and I do not rely upon them in finding animus regarding the adverse employment actions at issue.

absence.[40] Regardless of whether Lynch was explicitly told he would be disciplined, he acknowledged he was informed, in December 2021, that he would not be allowed to use sick leave to cover the absence, which means the absence would be treated as unexcused. Lynch knew from his prior written warning that another unexcused absence would result in progressive discipline.[41]

The General Counsel and the Union next argue the warning was improper because Rialdi told Lynch during that human resources would reach out to him about accommodating his medical condition, but Darling did not contact Lynch to begin this process until after the final warning issued. They assert that assessing any additional occurrences should have been placed on hold until that accommodation process was completed. When Lynch informed Rialdi about his medical condition and the related symptoms on December 19, 2021, the two discussed and informally agreed to move Lynch's start time to 1 p.m. as an informal accommodation. Lynch never raised any issue that the proffered accommodation was inadequate. Moreover, Lynch never explained that the additional occurrences at issue were related to his medical condition. His December 18 absence was due to his reaction to the COVID vaccine; his late arrival on December 27 was due to his concern about working with an employee who may have been exposed to COVID; and his January 1 and 2 tardies were left unexplained.

Finally, the General Counsel claims disparate treatment. She points to Julio Colon Skerrett, a probationary employee who had 4.5 occurrences during his first 90 days of employment. The Respondent drafted two disciplinary documents for Skerrett addressing these same occurrences: a May 29 final warning and a June 3 documented discussion. (GC Exh. 27, pgs. 18-19). The General Counsel argues the documents suggest Skerrett received downgraded discipline, even though he had more occurrences than Lynch when he received his final warning. Darling, however, credibly testified Skerrett only received the final warning. (Tr. 851-852). He explained that when a new employee, like Skerrett, has excessive attendance issues in their first 90 days, they are immediately issued a final warning. If their attendance does not improve thereafter, they are discharged, without further progressive discipline. (Tr. 778). The record corroborates Darling's testimony because it shows the Respondent treated other probationary employees the same as Skerrett. (GC Exh. 27, pg. 78; R Exh. 14, 27). However, this evidence is largely irrelevant because Lynch was not a probationary employee, and Lynch's initial discipline for attendance – the December 19, 2021 written warning -- was for 8.5 occurrences, which was nearly double what Skerrett was discharged for.

Based on the foregoing, the Respondent acted consistently with its attendance policy and established practice on January 15 when it assessed Lynch progressive discipline for the additional occurrences at the end of the prior year and start of the new year. The Respondent, therefore, has met its burden of establishing it would have issued Lynch the final warning in the absence of his protected activity. Accordingly, I conclude the Respondent did not engage in the violative conduct as alleged.

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[40] The Union contends the December 18 absence should have been excused under a Massachusetts' executive order providing for emergency paid leave for COVID-related absences, including for reactions to vaccines. I make no findings as to whether the Respondent complied with the executive order. But even if that absence should have been treated as excused, Lynch's final warning also covered the additional 1.5 occurrences he accrued for the tardies toward the end of the year. Other employees, including Hallett, Williams, Moulton, and Bates, above, each received progressive discipline after accruing 1 to 1.5 additional occurrences, and there are no allegations any of those disciplines were unlawful.

[41] Assessing Lynch an occurrence for the December 18 absence is consistent with Moulton, who progressed from a documented discussion to a written warning after missing one day of work due to illness.

b. Discipline of Parker and Cummings

The General Counsel next alleges that on January 28, the Respondent violated Section 8(a)(3) and (1) when it selectively and disparately enforced the Cash Room door policy more strictly against Parker and Cummings by issuing them each a final warning despite them having no prior discipline.

The General Counsel has met her initial burden under *Wright Line*.[42] Parker and Cummings each engaged in protected activity known to the Respondent when they signed the demand letter. Cummings also was part of the group that, along with Lynch and Bagnall, delivered the letter to Rialdi on January 14. That same day, after receiving the letter, Rialdi texted Carlone that he just found out Parker was "behind all of this!" and Cummings was "involved and has been pressuring people." Two weeks later, Parker and Cummings received their final warnings for violating a rule that up to that point had not been enforced to result in discipline. The timing of the discipline combined with Rialdi's texts sufficiently establish discriminatory animus.

The burden then shifts to the Respondent to establish it would have issued the final warnings to Parker and Cummings in the absence of their protected activities. In its defense, the Respondent points to the Cash Room door policy, which it is mandated by state regulations to maintain, and which it argues it has consistently applied since the late November 2021 emails were sent to employees. After those emails, Respondent claims the first notice it had that the policy was not being followed was in mid-January when Wagoner visited the Salem store and saw that Parker left the Cash Room door open. It investigated over the next two weeks. Through that investigation, it discovered and immediately disciplined those found to have violated the policy, which included assistant managers Saynganthone and Novello.

The General Counsel counters the policy is pretext because the Respondent never enforced it prior to the union organizing effort, and then it suddenly and selectively began targeting union activists and supporters who were found to have violated the policy. As for Saynganthone and Novello, the General Counsel contends they were viewed as sympathetic to the organizing effort and likely disciplined as cover. For support, she cites to Rialdi's January 14 texts to Carlone stating: "At this point I don't know who to trust? I think [assistant manager] Syd [Saynganthone] is fine (I think!!??) I know [Novello] was close to [former assistant manager Sara Dukeshire] and has had conversations with [Cummings] when [Dukeshire] was fired so I'm not 100% there."

In reviewing the evidence, I credit that even after the November 2021 emails, employees and managers, including Rialdi, continued to keep the Cash Room door open while inside, without repercussions. It was only after the Respondent learned of the organizing effort that it began investigating and enforcing the policy. The Respondent's sudden reliance on a previously unenforced

[42] The Respondent argues the allegation regarding Cummings is barred under Sec. 10(b) because the first time Cummings' discipline was alleged to constitute an unfair labor practice was in the Amended Consolidated Complaint, which was issued more than a year after the discipline. As stated, Sec. 10(b) will not preclude finding a violation where the later charged complaint allegation is closely related to timely filed charge allegation. See *Redd-I Inc*., 290 NLRB supra at 1115-1116. In this case, Respondent issued the same discipline to Cummings that it issued to Parker, at the same time and for the same infraction. In applying the *Redd-I* factors, I conclude that: (1)) the timely and amended allegations arise from the same set of factual situations or sequence of events; (2) they involve the same legal theory; and (3) Respondent would raise (and, in fact, has raised) similar defenses to both. Moreover, Respondent had a full opportunity to prepare and present its defense. Accordingly, the Sec. 10(b) defense fails.

policy to discipline union supporters is evidence of pretext and discriminatory motive. See *Wexler Meat Co*., 331 NLRB 240, 242 (2000); *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989). Respondent's stated reason for issuing Parker and Cummings the warnings is pretext, and it, therefore, has not met its burden of establishing it would have enforced the policy and issued the discipline in the absence of their protected activity. Thus, I conclude the Respondent engaged in the violative conduct as alleged.

c. Discipline and Discharge of Bagnall

The General Counsel argues the Respondent violated Sections 8(a)(3) and (1) on February 4 when it issued Bagnall a final warning for violating the food and beverage policy and the mask usage policy nearly 3 weeks earlier on January 16, and then on February 16 when it discharged Bagnall following his February 9 no-call/no-show.

In applying *Wright Line*, I conclude the General Counsel has established her initial burden. Like Lynch and Cummings, Bagnall engaged in protected activity known to the Respondent when he signed the demand letter and was part of the group who delivered it to Rialdi on January 14. Animus is established from the timing of Bagnall's final warning, as well as the other discriminatory adverse actions issued at around this time to Union supporters Parker, Cummings, and Lynch.

The burden shifts to the Respondent to establish it would have issued Bagnall the final warning in the absence of his protected activity. Respondent cites to the policies and their intended purposes. However, similar to the Cash Room door policy, the Respondent failed to enforce either of the policies at issue prior to the organizing effort, despite evidence that each was regularly ignored by employees and managers who removed their masks to drink and eat while in the Vault. The Respondent cannot deny knowledge of these violations because Clough was present and participated in the violations. Furthermore, as Bagnall's situation indicates, Respondent has video surveillance cameras inside the Vault that monitor and record what is happening. And, unlike with the Cash Room door violations, the Respondent did not conduct a broader investigation and review surveillance footage of the Vault to determine if others were violating the policies prior to or after Bagnall's violations.

Respondent next contends the only other employee caught eating in the Vault (Mica Buchanan) was treated more harshly than Bagnall because he was discharged. The circumstances surrounding Buchanan are distinguishable. He took his full-hour break, returned to the Vault, and proceeded to eat a meal containing shellfish while handling customer product. Bagnall sat in the corner away from product and ate a popsicle while looking at his phone. Buchanan previously received a documented discussion, a written warning, and a final warning for performance issues, all within a four-month period. Bagnall's only prior discipline was a documented discussion for attendance.

Based on the overall evidence, I conclude the Respondent's stated reason for issuing Bagnall the warning is pretext. This conclusion is bolstered by the nearly 3-week delay between the violations and the final warning. Respondent, therefore, has failed to meet its burden of establishing it would have enforced the policies and issued the discipline in the absence of his protected activity. Thus, I conclude the Respondent engaged in the violative conduct alleged.

About two weeks later, on February 16, the Respondent discharged Bagnall following his February 9 no-call/no-show. The termination notice states that "[a]fter reviewing your previous infractions and considering that you have had three company policy violations in the span of a month, we have made the decision to terminate your employment …" The Board has held that when an

employer "disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful." *Hays Corp.*, 334 NLRB 48, 50 (2001); *Care Manor of Farmington, Inc*., 318 NLRB 725, 726 (1995); *Asociacion Hospital del Maestro*, 283 NLRB 419, 425 (1987), enfd. 842 F.2d 575 (1st Cir. 1988). The termination notice lays bare that Respondent's decision to discharge Bagnall was tainted by its prior unlawful discipline, causing the discharge also to be unlawful.

In this situation, the employer must establish it would have taken the same action even without reliance on the prior unlawful discipline. See *Southern Bakeries, LLC*, 366 NLRB No. 78, slip op. at 2 (2018); *Celotex Corp*., 259 NLRB 1186, 1186 fn. 2 (1982). Respondent argues it would have discharged Bagnall based on his no-call/no-show alone. The attendance policy allows the company to discharge an employee for an initial no-call/no-show if they previously received attendance-related discipline. As stated, Bagnall received a documented discussion for attendance in December 2021. Respondent, however, has cited to no other employee who it has discharged following an initial no-call/no-show when the employee previously received less than a final warning for their attendance. The comparables Respondent cites to, and discussed in the Findings, are distinguishable. Each of them either had a prior no-call/no-show or had a pattern of discipline for excessive attendance issues at the time they were discharged.

I, therefore, find the Respondent has failed to meet its burden of establishing it would have discharged Bagnall without relying on his prior unlawful discharge. Accordingly, I conclude the Respondent engaged in the violative conduct alleged.

d. Discharge of Lynch

The General Counsel next argues the Respondent violated Sections 8(a)(3) and (1) on February 4 when it discharged Lynch for his January 4 verbal altercation with the customer who refused to properly wear her COVID mask while inside the Salem store.

For the same reasons the General Counsel met her initial burden under *Wright Line* regarding Lynch's final warning, I conclude she has met that burden regarding his discharge.[43] The discharge occurred three weeks after Lynch led the group of employees in delivering the demand letter, and at around the same time the Respondent also discriminatorily enforced policies to discipline Union supporters Cummings, Parker, and Bagnall. Thus, the burden shifts to the Respondent to establish it would have discharged Lynch in the absence of his protected activity.

As discussed in the Findings section, Respondent discharged three employees who, like Lynch, engaged in aggressive or inappropriate conduct *toward a customer*.[44] Alcaide, a retail associate, was discharged after she approached customers who had complained about the service she had provided them, waited to get their attention, and then proceeded to verbally confront them to the point that

[43] At the hearing, the General Counsel indicated she believed Lynch was engaged in protected concerted activity when he confronted the customer about not wearing the COVID mask because it related to employee safety. (Tr. 906-907). However, the General Counsel's brief does not pursue that claim. I, therefore, conclude the contention has been abandoned and will make no findings as to whether Lynch engaged in protected activity separate from his union activities.

[44] Respondent cites as comparabales to employees who were discharged for engaging in profane, aggressive, and/or insubordinate behavior toward a supervisor in the presence of, or that could be overheard by, customers. I do not find those situations to be comparable to Lynch's situation.

managers had to intervene and remove her from the floor. However, months earlier, Alcaide received a final warning for a verbal confrontation she had with another employee in the break room, which escalated to the point that others intervened out of concern it was going to become physical.

Richmond, a Springfield security lead, received a final warning following his interaction with a customer who initially refused to remove a Halloween mask covering his face while in the retail space. The customer was told by security that he would not be allowed to make a purchase if they could not see his face. The customer became hostile. Richmond was involved in responding to the customer. Darling testified Richmond handled the interaction appropriately up until he followed the customer out into the parking lot and to his car. The final warning itself -- which I find more credible than Darling's testimony -- tells a different story. It states Richmond was involved in "an altercation" with a customer "*on the sales floor*" in which he exhibited "inappropriate behavior" and failed to comply with the company's de-escalation guidelines. Richmond previously received a documented discussion for errors resulting in cash register variances and product loses totaling nearly $1,500.

Donahue, a Springfield security lead, also received a final warning for "an altercation" he had with a customer "on the sales floor" in which he exhibited "inappropriate behavior" and failed to comply with the company's de-escalation guidelines. There was no testimony or additional evidence presented about this altercation, other than it happened on the same date as Richmond's altercation with the masked customer. The record also does not reflect whether Donahue received any prior performance-based discipline.

In reviewing the evidence, I conclude Lynch's situation was analogous to Richmond's. They both had a verbal altercation with a customer on the sales floor after the customer refused to comply with store policy designed to ensure the health and safety of employees and customers. Both failed to follow the company's de-escalation guidelines and engaged in inappropriate behavior, which affected both customers and fellow employees in the store. However, unlike Richmond, Lynch had no prior performance-based discipline. His prior discipline was limited to attendance, which Darling confirmed played no role in his discharge. Despite having no prior performance-based discipline, Lynch received a harsher penalty (discharge) than Richmond (final warning). Based on this evidence, Respondent failed to establish it would have discharged Lynch in the absence of his Union activity.[45]

As a result, I conclude the Respondent engaged in the violative conduct as alleged.

[45] Rialdi testified he first learned about the altercation with the customer from Clough on around January 25, but there was no evidence how or when Clough first learned of it. Rialdi "believed" she learned about it at the same time she told him, but he offered no basis for that belief. What has been established is that following the demand letter, Respondent selectively began reviewing surveillance footage to investigate potential violations of company policy. At some point, it viewed the surveillance footage from the January 4 confrontation. What is unclear is what lead to that review: was it an unsolicited report/complaint from an employee or customer or was it part of a general search for evidence of wrongdoing? Furthermore, Lynch admitted during his January 27 interview with Rialdi to his behavior during the altercation. Despite that admission, Respondent did not suspend Lynch. It allowed him to continue working for another week, which went unexplained. (GC Exhs. 30-31). In the end, while I find Respondent's unexplained discovery of the altercation and the timing of Lynch's discharge to be troubling, it is not enough to find pretext.

2. Post-Election Wage Increases

Paragraph 16 of the Amended Consolidated Complaint alleges that on about May 12, Respondent granted a wage increase to discourage employees' union activity. The General Counsel argues the company-wide wage increases were unlawful because they were neither expected nor announced, and occurred immediately after the initial election results were announced but while the objections period was active, challenges were pending, and the possibility of a rerun election existed.

The Board has held the granting of wage increases and/or benefits during the pendency of a representation proceeding, including the pendency of objections to an election, is not per se unlawful. *Marine World USA*, 236 NLRB 89, 90 (1978), enf. denied 611 F.2d 1274 (9th Cir. 1980). Rather, the test is whether, based on the circumstances of each case, the granting of the increases and/or benefits is calculated to impinge upon the employees' freedom of choice in an upcoming scheduled election or an election which might be directed in the future. Id. The granting of new wages and benefits under those circumstances has been held to be lawful where an employer has established that such action was consistent with past practice, such action had been decided upon prior to the onset of union activity, or business justifications prompted the adjustment. Id. (footnote citations omitted).

In reviewing the evidence, I conclude the General Counsel has not established the Respondent granted the increase for an unlawful purpose. First, the timing of the increases was largely consistent with those granted the year before. Second, management made the decision to grant the increases at issue in November 2021, at least 2 months prior to learning of the organizing effort. Although management made the decision to do away with performance evaluations and tying the increases to the ratings after it learned of the organizing effort, I credit it was a decision made based on the time it took managers to prepare the reviews and the lack of any significant effect the reviews ultimately had on the amount of the increases. Third, management consciously delayed announcing and implementing the increases until after the voting was completed so as not to create the impression it was attempting to influence the vote. Fourth, I credit that management discussed and planned to implement the wage increases following the vote, regardless of the outcome. Finally, there is no evidence the eventual announcement and implementation of the increases were accompanied by any reference to the Union or the representation proceedings.

Based on the foregoing, I conclude the granting of these wage increases was not calculated to impinge upon the employees' freedom of choice or discourage union activity. As such, I find the Respondent did not engage in the violative conduct as alleged.[46]

D. 8(a)(5) and (1) Allegations and Bargaining Order

Paragraphs 21 and 22 of the Amended Consolidated Complaint allege the Respondent violated Sections 8(a)(5) and (1) by refusing to recognize and bargain with the Union after it established its majority status through the January 14 demand letter, by engaging in serious and substantial unfair labor practices that destroyed that majority support and seriously impeded the election process, and by failing to bargain with the Union over the discharges of Lynch and Bagnall. The General Counsel and the Union argue the severity of the unfair labor practices warrant a bargaining order. The Respondent counters that a bargaining order is inappropriate.

[46] The General Counsel does not allege the wage increase also violated Section 8(a)(5). I, therefore, make no findings as to whether the Respondent violated its duty to bargain with the Union over the increases.

Recently, in *Cemex Construction*, supra, the Board reversed *Linden Lumber Division, Summer & Co*., 190 NLRB 718 (1971), revd. sub nom 487 F.2d 1099 (D.C. Cir. 1973), affd. 419 U.S. 301 (1974) and reinstated a modified version of *Joy Silk Mills, Inc*., 85 NLRB 1263 (1949), enfd. in relevant part, 185 F.2d 732 (D.C. Cir. 1950), cert. denied 341 U.S. 914 (1951). It announced a new framework, which is to be applied retroactively to all pending cases, when an employer unlawfully refuses to recognize and bargain with the designated majority representative. The framework is as follows:

> [A]n employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly [within 2 weeks of the demand for recognition] files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A). …
>
> However, if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order. Thus, this accommodation of the Section 9(c) election right with the Section 8(a)(5) duty to recognize and bargain with the designated majority representative will only be honored if, and as long as, the employer does not frustrate the election process by its unlawful conduct…If the employer commits unfair labor practices that invalidate the election, then the election necessarily fails to reflect the uncoerced choice of a majority of employees. In that situation, the Board will, instead, rely on the prior designation of a representative by the majority of employees by nonelection means, as expressly permitted by Section 9(a), and will issue an order requiring the employer to recognize and bargain with the union, from the date that the union demanded recognition from the employer.

372 NLRB No. 130, slip op. 25-26 (footnotes omitted).

In doing away with re-run elections in this context, the Board held:

> Given the strong statutory policy in favor of the prompt resolution of questions concerning representation, which can trigger labor disputes, we do not believe that conducting a new election -- after the employer's unfair labor practices have been litigated and fully adjudicated -- can ever be a truly adequate remedy. Nor is there a strong justification for such a delayed attempt at determining employees' free choice again where the Board has determined that employees had already properly designated the union as their majority representative, consistent with the language of the Act, before the employer's unfair labor practices frustrated the election process. Simply put, an employer cannot have it both ways. It may not insist on an election, by refusing to recognize and bargain with the designated majority representative, and then violate the Act in a way that prevents employees from exercising free choice in a timely way.

Id. at 26 (footnotes omitted).[47]

[47] The Board further held it will no longer look to the orders addressed in *Gissel*—that is, bargaining orders imposed based on employer unfair labor practices only where the unlikelihood of holding a future fair election is proven. It held that "Our experience leads us to conclude that the application of the *Gissel* standard has

In applying the new framework, a remedial bargaining order is appropriate when: (1) the employer refuses the union's request to bargain; (2) at a time when the union had in fact been designated as representative by a majority of employees; (3) in an appropriate unit; and then (4) the employer commits unfair labor practices requiring the election to be set aside.

I conclude each factor is met in this case. Respondent refused the Union's January 14 demand for recognition and request to bargain signed by 20 of the 28 Unit employees who confirmed they wanted the Union as their "partner on the job and representative as we bargain our contract." The Union also had digitally signed and dated authorization cards from 20 of the 28 Unit employees, stating "I want the UFCW to be my partner on the job and represent me to obtain better wages, better benefits, and a better life." In *Cumberland Shoe*, 144 NLRB 1268, 1269 (1963), enfd. 351 F.2d 917 (6th Cir. 1965), the Board held that an unambiguous petition or card is valid unless and until it is rendered invalid through solicitation misrepresenting the sole purpose of the card. A card may be ambiguous, and thus facially invalid, through either the words on the card or through the manner in which the card is presented to the signee. There is nothing ambiguous about the wording of the above authorization cards or the demand letter, and there was no evidence supporting cancellation of any of the signatures. Union organizer Meghan Carvalho's messages on the group chat to card signers asking them to provide photographs of their signatures stated they would be placed on the letter the Union would deliver to Respondent demanding recognition and to begin bargaining.

The Board has ruled that signatures on petitions or authorization cards can be authenticated by the signers, a witness who observed the signing, the person who solicited the signatures and received them back, even if the solicitor did not actually observe the signing, or by signature comparison. See *Novelis*, 364 NLRB 1452, 1454-1455 (2016), enf. denied in part 885 F.3d 100, 107 fn. 7 (2d Cir. 2018); *Evergreen America Corp*., 348 NLRB 178, 179 (2006), enfd. 531 F.3d 321 (4th Cir. 2008); and *McEwen Mfg. Co*., 172 NLRB 990, 992 (1968), enfd. 419 F.2d 1207 (D.C. Cir. 1969), cert. denied 397 U.S. 988 (1970)(cases cited therein).

All 20 signatures have been authenticated. Parker, Bagnall, Lynch, Terry, and Abbene authenticated their signatures during their testimony. Carvalho, who solicited and gathered all the signatures, authenticated the rest. She placed a link to the card on the group chat that was only available to invited and registered employees, who then had to provide their name, email address, telephone number, and employer/department before digitally signing and submitting the card. In her capacity as administrator for the Union's digital authorization program, Carvalho was alerted each time the Union issued a confirmatory email response to the employee acknowledging receipt of their signed card. She also was able to verify those confirmations from the posts on the group chat of those who stated they submitted cards, as well as from those who provided their manual signatures for the demand letter.

Separately, I compared the signatures on the demand letter with the notarized signatures on the Massachusetts' Cannabis Control Commission's Agent Registration Attestation & Acknowledgement Forms that each employee signs when they begin working for Respondent. (GC Exh. 25). Based upon my review, I confirmed the authenticity of the 20 signatures. See *U.S. v. Rhodis*, 58 Fed. Appx. 855, 856-857 (2d Cir. 2003) and *Traction Wholesale Ctr. Co*., 328 NLRB 1058, 1059 (1999).

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resulted in persistent failures to enable employees to win timely representation despite having properly designated a union to represent them, and thereby satisfying the Act's requirement for recognition." *Cemex Construction*, supra slip op. 27.

There is no evidence that any of the employees who signed a card attempted to retract or rescind their card or have it returned by the Union. The same is true regarding the signatures on the demand letter. Respondent also has raised no claim that any of the signatures are not authentic or should be invalidated. The result is that, as of January 14, Respondent refused the Union's request to bargain at a time the Union had demonstrated majority support among the Unit later determined by the Regional Director to be appropriate within the meaning of Section 9(b) of the Act.

The final factor is whether the Respondent then committed violations requiring the election to be set aside. In *Cemex,* the Board held:

> Under long-established Board law, an election will be set aside when an employer violates Sec. 8(a)(3) of the Act during the "critical period" between the filing of an election petition and the election. See, e.g., *Lucky Cab Co*., 360 NLRB 271, 277 (2014) (citing *Baton Rouge Hospital*, 283 NLRB 192, 192 fn. 5 (1987)). An election will be set aside based on an employer's critical-period violation of Sec. 8(a)(1) unless the "violations . . . are so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results.'" Id. at 277 (quoting *Longs Drug Stores California*, 347 NLRB 500, 502 (2006), and *Clark Equipment Co*., 278 NLRB 498, 505 (1986)). In determining whether unlawful misconduct could affect the results of an election, the Board considers all relevant factors, including the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election (if one has been held), the proximity of the conduct to the election date, and the number of unit employees affected. See, e.g., *Bon Appetit*, above, 334 NLRB at 1044 (citing cases).

Id. slip op. at 26 fn.142.

The Board further held the remedies previously available for violations of Section 8(a)(3) and (1), "no matter how serious, are, in many cases, incapable of rectifying the harm that can be caused to the election process." Id. slip op. at 28 fn. 152. In particular are "nip-in-the-bud" discharges of union supporters that send the message that any employee engaging in union activity could be next, which can irreparably harm the organizing process. In those situations, the Board held a bargaining order "is the most effective deterrent to this kind of misconduct, which must be highly disincentivized if the integrity of the election process is to be strengthened." Id.

The Respondent discriminatorily discharged Lynch, the lead employee organizer, and discriminatorily disciplined and then discharged Bagnall, a vocal union supporter, a few weeks after they personally presented Rialdi with the January 14 demand letter. Respondent also discriminatorily issued final warnings to Cummings and Parker. Rialdi knew at that time that Parker was the person behind the organizing effort and that Cummings was another person who was involved and pressuring employees to support the Union. The Respondent's swift and decisive reaction, including selective and disparate enforcement of previously ignored rules and policies against the organizers and key supporters clearly was intended to send a message to the other Unit employees who supported or were contemplating supporting the Union that such support could result in their discipline or discharge, which, as the Board held, irreparably harms the organizing effort and undermines the integrity of the election process. Under these circumstances, these violations require setting aside the results of the election and issuing a remedial bargaining order.

CONCLUSIONS OF LAW

1. I.N.S.A., Inc. ("Respondent") is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Food and Commercial Workers International Union Local 1445 ("Union") is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by: (a) soliciting grievances and impliedly promising increased benefits and improved terms and conditions of employment if employees refrain from union organizational activity, on January 28-29, 2022; (b) prohibiting employees from talking about the union during working time while permitting employees to talk about other subjects, on March 11 and 13, 2022; (c) prohibiting employees from engaging in union activity during working hours, as opposed to just working time, on March 11 and 13, 2022; and (d) telling employees that talking about the union made other employees uncomfortable, on March 11 and 13, 2022.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by: (a) enforcing work rules and policies concerning attendance, food and beverage, Cash Room door, and mask usage policies selectively and disparately by applying them more strictly against employees who formed, joined, or assisted the Union, on various dates; (b) issuing a final warning to Rowan Cummings on January 28, 2022, because of their union activity; (c) issuing a final warning to AJ Parker on January 28, 2022, because of his union activity; (d) issuing a final warning to James Bagnall on February 4, 2022, because of his union activity; (e) discharging Adam Lynch on February 4, 2022, because of his union activity; and (f) discharging James Bagnall on February 16, 2022, because of his union activity.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative in the following appropriate of: "[a]ll full-time and regular part-time retail associates, retail leads, retail inventory specialists, and inventory leads employed at the Respondent's Salem, Massachusetts location, but excluding asset protection employees, managerial employees, guards and professional employees and supervisors as defined by the Act." The Respondent further violated Section 8(a)(5) and (1) of the Act by engaging in the conduct described above that undermined the Union's support and prevented a fair rerun election, and by failing to bargain with the Union over the discharges of Bagnall and Lynch on the dates set forth above.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent violated Sections 8(a)(1) and (3) of the Act by discharging James Bagnall and Adam Lynch, I shall order Respondent to reinstate them and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Respondent shall compensate Bagnall and Lynch for any adverse tax consequences of receiving a lump–sum backpay award in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). Respondent shall also compensate Bagnall and Lynch for their search–for–work and interim

employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers*, Inc., 364 NLRB No. 93 (2016). Backpay, search–for–work, and interim employment expenses, 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 *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016), Respondent shall also file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar years. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration. In addition, pursuant to *Cascades Containerboard Packaging–Niagara,* 370 NLRB No. 76 (2021), Respondent must file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order or such additional time as the Regional Director may allow for good cause shown, a copy of Lynch's and Bagnall's corresponding W-2 forms reflecting the backpay award. The Respondent shall also be required to expunge from its files any references to the unlawful discipline of Rowan Cummings, AJ Parker, and Bagnall, as well as the unlawful discharges of Lynch and Bagnall, and notify each and the Regional Director of Region 1, in writing, that this has been done and that these unlawful employment actions will not be used against them in any way. The Respondent shall also post the attached notice at its Salem, Massachusetts store in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010), and *Durham School Services*, 360 NLRB 694 (2014). In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[48]

Additionally, in accordance with *Thryv, Inc*., 372 NLRB No. 22 (2022), the Respondent shall also compensate Lynch and Bagnall for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge.

Having found that the Respondent violated Sections 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative of its employees in an appropriate bargaining unit, while engaging in the conduct described above that undermined the Union's support and prevented a fair rerun election, I shall order the Respondent to meet with the Union on request and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees, and, if an agreement is reached, embody such agreement in a signed contract.[49] Where Respondent has denied the Union's majority-supported request for recognition, Respondent is ordered to bargain with the Union retroactively to January 14,

[48] In the Amended Consolidated Complaint and in brief, the General Counsel requests extraordinary remedies, including letters of apology to Lynch and Bagnall, and requiring the Respondent to convene a mandatory meeting during which the owners read, or be present while a Board agent reads, the Notice to Employees and the Explanation of Rights to employees, and also have the Respondent distribute a video of this reading in a manner that can be accessed by employees. While requesting these extraordinary remedies, the General Counsel does not provide argument or legal authority for doing so in this case. In the absence of such, and in noting that the record in this case does not show a prior history of violations, I decline to order the extraordinary relief requested. See *Chinese Daily News*, 346 NLRB 906, 909 (2006) enfd. 224 Fed.Appx.6 (D.C. Cir. 2007).

[49] Based on my findings and conclusion that Respondent discharged Bagnall and Lynch in violation of Section 8(a)(3) and (1) of the Act, it is unnecessary for me to separately address its failure or refusal to bargain with the Union over those discharges in violation of Section 8(a)(5) as it will not materially affect the remedy.

2022, when the Respondent declined to recognize the Union's claim to represent its employees in the above appropriate Unit. This section should be read together with the following[50]

ORDER[51]

The Respondent, I.N.S.A., Inc.in Salem, Massachusetts, its officers, agents, successor, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances and impliedly promising increased benefits and improved terms and conditions of employment if employees refrain from union organizational activity;

(b) Prohibiting employees from talking about the union during working time while permitting employees to talk about other subjects;

(c) Prohibiting employees from engaging in union activity during working hours, as opposed to just working time;

(d) Telling employees that talking about the union made other employees uncomfortable;

(e) Enforcing work rules and policies selectively and disparately by more strictly applying rules and policies against employees who formed, joined, or assisted the Union

(f) Disciplining, discharging, or otherwise discriminating against employees because they engaged in union or other protected activity;

(g) Failing or refusing to recognize and bargain with the Union over wages, hours, and other terms and conditions of employment affecting the full-time and regular part-time retail associates, retail leads, retail inventory specialists, and inventory leads employed at the Respondent's Salem, Massachusetts location, but excluding asset protection employees, managerial employees, guards and professional employees and supervisors as defined by the Act.

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

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

(a) Within 14 days from the date of this Order, offer Adam Lynch and James Bagnall each full reinstatement to their former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Lynch and Bagnall each whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them, in the manner set forth above.

(c) Compensate Lynch and Bagnall each for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

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

[51] 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."

(d) File with the Regional Director for Region 1, within 21 days of the date the among 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 Lynch's and Bagnall's corresponding W-2 form reflecting the backpay award.

(e) Within 14 days of the date of this Order, remove from its files any reference to the unlawful discipline of Rowan Cummings, AJ Parker, and Bagnall, and the unlawful discharge of Bagnall and Lynch, and within 3 days thereafter, notify each that this has been done and that the discipline/discharge will not be used against them in any way.

(f) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time retail associates, retail leads, retail inventory specialists, and inventory leads employed at the [Respondent/Employer's] Salem, Massachusetts location, but excluding asset protection employees, managerial employees, guards and professional employees and supervisors as defined by the Act.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 1 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.

(h) Post at its Salem, Massachusetts facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 14, 2022.[52]

(i) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in 01-RC-288998 is set aside.

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

Dated, Washington, D.C. September 21, 2023

Andrew S. Gollin
Administrative Law Judge

NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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 do anything to interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail or refuse to recognize and bargain collectively with the United Food and Commercial Workers International Union Local 1445 ("Union") as the exclusive collective-bargaining representative of the employees in the following appropriate unit ("Unit"):

> All full-time and regular part-time retail associates, retail leads, retail inventory specialists, and inventory leads employed at the Respondent's Salem, Massachusetts location, but excluding asset protection employees, managerial employees, guards and professional employees and supervisors as defined by the Act.

WE WILL NOT solicit grievances or complaints and impliedly promise you increased benefits and improved terms and conditions of employment if you refrain from union organizational activity;

WE WILL NOT prohibit you from talking about the union during working time while permitting employees to talk about other subjects;

WE WILL NOT prohibit you from engaging in union activity during working hours, as opposed to just working time;

WE WILL NOT tell you that talking about the Union made other employees uncomfortable;

WE WILL NOT selectively and disparately enforce work rules and policies by more strictly applying them against employees who formed, joined, or assisted the Union;

WE WILL NOT discipline, discharge, or otherwise discriminate against you because you engaged in union or other protected activity;

WE WILL NOT in any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain collectively with the United Food and Commercial Workers International Union Local 1445 as the exclusive collective-bargaining representative of the employees in the Unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

WE WILL offer Adam Lynch and James Bagnall full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed; **WE WILL** make them whole for any loss of earnings and other benefits suffered as a result of our unlawful termination, plus interest; **WE WILL** make them whole for reasonable search-for-work and interim employment expenses, plus interest; **WE WILL** compensate them for the adverse tax consequences, if any, of receiving a lump-sum backpay award; **WE WILL** compensate Lynch and Bagnall for any other direct or foreseeable pecuniary harms incurred as a result of their unlawful discharges; **WE WILL** compensate Lynch and Bagnall for any adverse income tax consequences of receiving a lump-sum backpay award; **WE WILL** file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to Lynch and Bagnall to the appropriate calendar year(s); and **WE WILL** file with the Regional Director for Region 1 a copy of corresponding W-2 forms reflecting the backpay awards to Lynch and Bagnall.

WE WILL remove from our files any reference to the unlawful discipline issued to Rowan Cummings, AJ Parker, and Bagnall, and to the unlawful discharges of Lynch and Bagnall, and **WE WILL**, within 3 days thereafter, notify each in writing that this has been done and that their discipline/discharge will not be used against them in any way.

I.N.S.A., INC.
(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:

10 Causeway Street, 10th floor, Boston, MA 02222-1001
(617) 565-6700 Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-RC-299998 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 OFPOSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHERMATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITHITSPROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (617) 565-6700