JD–82–23
Superior, CO

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

STARBUCKS CORPORATION

and **CASE 27–CA–307542**

WORKERS UNITED - CHICAGO AND MIDWEST NATIONAL JOINT BOARD (SEIU), LOCAL 304

Isabel C. Saveland, Esq.,
for the General Counsel.
Ethan D. Balsam **and** ***Emily J. Carapella, Esqs.,***
(Littler Mendelson, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The allegations before me arise from an amended complaint and notice of hearing (the complaint) issued on April 27, 2023, based on charges that the Charging Party (the Union) initially filed against the Respondent (Starbucks or the Company) on November 21, 2022.[1] The complaint alleges that the Company committed violations at its Superior, Colorado facility (the store or Superior), where the Union has represented a unit of full-time and part-time baristas and shift supervisors since May 3. (GC Exh. 8.)

Pursuant to notice, I conducted a trial in Denver, Colorado, from September 27–29, 2023, during which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

ISSUES

On September 18, 2023, counsel for the General Counsel (the General Counsel) filed a Notice of Intent to Amend Complaint at Hearing, relating to alleged Section 8(a)(1) violations

[1] All dates hereinafter occurred in 2022 unless otherwise indicated.

committed by Interim Store Manager Caroline (Carie) Cooney (Cooney). (GC Exh. 1(r).) The complaint alleged two separate Section 8(a)(1) violations committed by Cooney on November 18; the General Counsel sought to add a third allegation, that she committed other Section 8(a)(1) violations in about August.[2] On September 26, 2023, the Respondent filed an opposition to the motion to amend the complaint. (GC Exh. 1(t).)

At the hearing, I allowed the amendment pursuant to Section 102.17 of the Board's Rules, which provides that a complaint may be amended before, during, and after the hearing "upon such terms as maybe deemed just." The General Counsel provided advanced notice to the Respondent, the amended allegation involved the same individual already named in the complaint, and the Respondent had a full opportunity to litigate it. In sum, allowing the amendment resulted in no prejudice to the Respondent's ability to present its defenses.

Therefore, the following issues are before me:

(1) Did Cooney:

(a) In August/September, threaten employees (partners) that their incoming store manager would be anti-union?[3]

(b) On November 18, interrogate employees about their union activities?

(c) On that same date, threaten employees with surveillance of their union activities?

(2) Did the Respondent issue a final written warning to Shift Supervisor Alendra (Len) Harris (Harris) on October 21 and discharge her on November 18, because she assisted and supported the Union and to discourage employees from engaging in those activities?

(3) Did the Respondent violate Section 8(a)(5) and (1) by issuing those disciplines to Harris without first providing the Union with notice and an opportunity to bargain?

WITNESSES AND CREDIBILITY

The General Counsel called:

(1) Harris.
(2) Emily ("Ash") Alvarez (Alvarez), shift supervisor.
(3) Bryah ("Bryan") McNaughton (McNaughton), shift supervisor.
(4) Elizabeth Nielsen (Nielsen), shift supervisor.
(5) Saga Quist (Quist), barista and barista trainer.
(6) Lillianna Long (Long), former shift supervisor.

[2] The notice of intent erroneously gave the dates as occurring in 2023. At trial, the General Counsel corrected the year to 2022.

[3] Employees testified that their conversations with Cooney were either in August or in September.

The Respondent called:

(1) Cooney.
(2) Jennifer Durham (Durham), partner relations consultant.

Initially, I cite two well-established judicial precepts. Firstly, when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69, slip op. at 1 fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

Secondly, "'[N]othing is more common in all kinds of judicial decisions than to believe some and not all' of a witness' testimony." *Jerry Ryce Builders, Inc.,* 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). The trier of fact must consider the plausibility of a witness' testimony and appropriately weigh it with the evidence as a whole. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 798–799 (1970).

Harris testified candidly. As an example, she did not deny to Cooney and District Manager Jared McCarthick (McCarthick), and in her testimony, that she violated the cash handling policy in late October by leaving cash on the counter. She also made no apparent efforts to exaggerate her conversations with Cooney or McCarthick to bolster her case. On cross-examination, she answered questions without hesitation, and she offered satisfactory explanations for possible discrepancies between her affidavit and her testimony, which in any event would have been insufficient to seriously undermine her overall credibility. The same holds true for her somewhat vague answers on the shift supervisor training that she received; other witnesses of the General Counsel substantially corroborated much of her testimony, and none contradicted it.

As to Alvarez, McNaughton, Neilsen, and Quist, "[T]he testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest." *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). Thus, current employee status may serve as a "significant factor," among others, on which reliance can be placed in resolving credibility issues. *Avenue Care & Rehabilitation Center,* 360 NLRB 152, 152 fn. 2 (2014); *Flexsteel,* ibid. Moreover, these witnesses generally appeared candid, they answered questions responsively on both direct and cross examination, and they made no apparent efforts to exaggerate their testimony to slant it against the Company. The same holds true of Long. Moreover, the General Counsel's witnesses corroborated one another to a high degree.

In contrast, Cooney and Durham appeared uncomfortable (Cooney's face got red during the course of her testimony), were reticent in providing details, failed to provide specific examples to support their assertions regarding general disciplinary and investigative policies and practices, and gave contradictory testimony regarding the decision to discharge Harris.

Notably, Cooney's testimony about her conversations with McCarthick concerning disciplining Harris were very conclusionary and lacking in detail, and she frequently professed not to recall events and conversations that occurred only last year and not a long time ago when one would expect some natural diminution of memory. She directly contradicted herself, for example, on whether she had any input into Harris' termination, and her testimony conflicted with statements attributed to her in Partner Relations investigation records and with her sworn testimony at Harris' unemployment hearing.

McCarthick is no longer employed by Starbucks and was not called as a witness. The Respondent's counsel asserted that McCarthick was contacted but was not responsive and that counsel felt there was no need to call him. The General Counsel contends that I should draw an adverse inference for the Respondent's failure to call him as a witness. (GC Br. at 26–27.) However, Board law is settled that an adverse inference should not be drawn from an employer's failure to call a former supervisor or manager because it cannot be reasonably assumed that the witness would be favorably disposed toward the employer. *Reno-Hilton Resorts*, 326 NRB 1421, 1421 fn. 1 (1998); *Irwin Industries, Inc.*, 325 NLRB 796, 811 fn. 12 (1998); *Goldsmith Motors Corp.,* 310 NLRB 1279, 1279 fn. 1 (1993).

Accordingly, I will not draw an adverse inference as the General Counsel requests, nor will I second-guess the Respondent's decision on how to present his case, Nonetheless, in the absence of McCarthick's testimony, there is no way to ascertain the accuracy of the conflicting testimony of Cooney and Durham regarding who made the final decision to discharge Harris. For similar reasons, I will not draw an adverse inference against the Respondent for not calling former Store Manager Annie Wong (Wong), whom it discharged, but the testimony of the General Counsel's witnesses about conversations with her therefore went unrebutted.

I do draw an adverse inference from the fact that, although Cooney was a witness, she was not asked about statements that Harris and other witnesses of the General Counsel attributed to her in August/September, on November 18, and on other occasions. When a party does not question a witness about damaging or potentially damaging testimony, it is appropriate to draw an adverse inference and find that the witness would not have disputed such testimony. See *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996); see also *NCRNC, LLC*, 372 NLRB No. 35, slip op. at 1 fn. 3 (2022).

For the above reasons, I generally credit Harris and the other General Counsel's witnesses.

FACTS

Based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, and the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

At all material times, the Respondent has been a corporation with an office and place of business in Seattle, Washington, and in various locations throughout the United States, including

Superior, Colorado, engaged in the retail sale of coffee and quick-service food. Board jurisdiction is stipulated in Joint Exhibit 1, and I so find.

The Store's Operation

The store is one of 10 or 11 in Starbuck's District 460. It operates in three shifts: opening, mid-morning, and closing. The normal staffing contingent is three, usually one shift supervisor and two baristas but sometimes two shift supervisors and one barista. When the store is busy, four partners may be on duty. Customer orders are taken through the point of service (POS) stations or cash registers in the lobby, the drive-through, or the mobile app.

The front of the store includes the lobby, where customers are served, whereas the back of the store is where the sinks are located and dishes and supplies kept. (See GC Exh. 2, a floor plan of the store, not to scale, as it was at the time of Harris' discharge.)

Barista duties include crafting beverages, servicing customers, and ringing out customer transactions. Regarding cash handling, the role of baristas is limited to taking cash when customers pay in cash and placing it in the cash register.

Shift supervisors perform regular barista duties and have additional responsibilities. They have keys to open and close the store and keys to unlock the cash register box, till box, and safe, to make deposits. The shift supervisor whom the store manager assigns as the "cash controller" on a shift is responsible for performing cash management activities throughout the shift. At the beginning and end of the day, the shift supervisor validates the amount of cash in the till by counting the money, and in the midday, validates the number of deposits. Throughout the day, the shift supervisor takes the cash drawers, counts the money, logs it into the system, secures the money in a deposit bag, and secures the bag in the safe. Counting the safe is done before open, midday, and at close.

The store manager and shift supervisors can issue baristas verbal coachings for not following company policy. Verbal coachings are not considered discipline. Only the store manager has the authority to issue disciplines.

Relevant Company Policies

Company policies relevant to Harris' discipline and discharge are contained in the following documents that are maintained on the Partners Hub, the Company's internal general resource network that is accessible to partners:

(1) The Company-Operated Store Operations Manual dated May 24, 2018 (R. Exh. 9) states:

> The safe must not be opened or the time delay activated during last hour of customer operations. At close, this means that the safe must be securely closed 30 minutes before the posted closing time and that the time delay must not be set until the store is cleared of customers and the doors locked.

According to this policy (the 30-minute rule), shift supervisors are prohibited from opening the safe during the first half hour and last half hour that the store is open to customers.

(2) The Partner Hub Steps to Excellence–Cash Handling (R. Exh. 10), which sets up detailed procedures for baristas, shift supervisors, and store managers to ensure that store funds are protected in a safe and secure way.

(3) Partner Guide U.S. Store Edition (R. Exh. 11): all partners must "[s]ecure the cash register appropriately before leaving it unattended." This is also accessible in the store on the iPad and in hard copy at three locations.

(4) The Cash Handling—How to Par a Till Quick Reference Guide (R. Exh. 26) states that handling cash in view of nonpartners is to be avoided, and cash and open safe should never be left unattended by the cash controller.

The job description for shift supervisor (R. Exh. 12), includes "follow[ing] Starbucks operational policies and procedures, including those for cash handling and safety and security, to ensure the safety of all partners during each shift." This is provided to applicants for the position.

Shift Supervisor Training

New shift supervisors are trained through a series of online modules or videos that they access on worktime on the store's iPad. Following each module, the store manager conducts in-person or walk-through exercises. The store manager conducts a skills check 30 days after the completion of training and fills out a skills check form, which lists key responsibilities, including cash management. (See R. Exh. 14, the form that was completed for Harris, presumably by Wong). After becoming shift supervisors, Harris, Alvarez, McNaughton, and Neilsen received in-person or walk-through shift supervisor training from Wong.

Quarterly module training on safety and security is given to all partners, annual training on de-escalation, and other training as the Company deems appropriate. Shift supervisors usually receive an additional level of training. Partners can call the Partner Contact Center if they have any questions about policy.

Several witnesses of the General Counsel credibly testified, consistently with one another, on their requests for additional training, and I credit the following unrebutted testimony.

Subsequent to her initial training, Harris made several requests for additional training. Shortly after April, Harris asked Wong for retraining or additional training on, inter alia, ordering and cash handling. Wong responded that she could help her with ordering but that the Company did not offer further training on cash handling. In approximately late July, Harris asked McCarthick for additional training on cash handling. He replied only that he would see what could be done. In late August or early September, Harris asked Cooney for retraining on cash handling. Cooney repeated what Wong had told her.

Neilsen requested additional shift supervisor training from Cooney when she realized that Long, a brand new shift supervisor, knew more than she did. The first time was in approximately early September during a shift supervisor meeting. Cooney acknowledged that they had inadequate training and said that she understood. On two or three later occasions in September, when Neilsen and Cooney opened the store together, Neilsen asked for more training, specifically on cash handling. Cooney repeated that she understood the need for more training.

About a month after Harris' discharge, Cooney held a regular meeting with all shift supervisors. At the meeting, McNaughton requested more training on cash handling, to which Cooney responded that would be addressed at another time. Alvarez testified that after the discharge, the shift supervisors collectively requested that Cooney provide more training on cash handling because they were concerned about being unaware of some of the policies.

The only testimony that Cooney offered on the subject was that prior to October, no shift supervisor other than Harris brought to her attention that they did not know the policy about when to count cash. However, she did not directly refute the testimony of Alvarez, McNaughton, or Neilson, which I credit.

Harris' Employment

Harris was first employed by Starbucks as a barista in about October 2016 at a store in Kentucky, where she worked for 3 years before taking a year off. She next worked for a store in Maine, before transferring to Superior on about May 17, 2021. In November 2021, she was promoted to shift supervisor.

When Harris started at Superior, Elise Rodriquez was the store manager. In July 2021, Wong took her place. She was followed by Cooney, who was interim store manager from August 15 through November. Kevin Pierso was the district manager until January 1, when McCarthick assumed the position, which he held until December 31.

As shift supervisor, Harris usually worked with two baristas, sometimes three when the store was busy. She directed them based on customer needs and determined when they took breaks and went home. When she was not performing shift supervisor responsibilities, she assisted them with barista duties. She was a shift supervisor on all three shifts but usually worked the closing shift. Her normal hours were 10:30 a.m. to about 6:30–7 p.m. On average, she stayed 30–45 minutes after the store was closed to the public.

As shift supervisor, she was responsible for cash handling and accounting and ensuring that registers and the safe had the correct amounts of money from customer payments and tips. A counter separated the lobby that was open to the public from the employees' area. The safe was located on the employees' side under the counter and between two POS stations. Twice daily, at mid-day and at the end of the night shift, Harris opened the safe and made deposits.

Harris had keys to lock the front door, the back door,[4] and the safe. As closing shift supervisor, she was responsible for ensuring that everything was properly locked up and cleaned before she left. All employees left the store together as per the Company's safety policy. The only individuals who had access to the store after it was closed were people who delivered milk and foodstuffs for the next morning's orders, usually late at night. The landlord employed an after-hours cleaning crew, but Starbucks did not.

Harris' Pre-November Union Activities

In December 2021, Harris reached out to Starbucks baristas in Buffalo who had voted to unionize. They directed her to the Union, which provided her with recommended procedures for organizing that she followed.

On December 30, 2021, the Union's organizing committee at the store sent a letter to Kevin Johnson, Starbuck's president and CEO, and to District Manager Pierso, announcing that they were forming a union. (GC Exh. 3.) Harris drafted the letter, guided by a template that the baristas in Buffalo had provided. Her name was the first of 13 on the list (with "several" members remaining anonymous).

During the organizing campaign, Harris maintained social media accounts, primarily Twitter, discussing the Union and the store unionizing. Wong told Harris that she had seen her Twitter and wished that Harris had come to her with her concerns.

Harris wore a union pin on her apron almost every single day and occasionally wore a union shirt. After the Union was elected in May, and after Cooney came as interim store manager, she continued to wear the pin.

A petition was filed on December 30, 2021, leading to the Union's certification on May 3. I will later detail Harris' participation in the strike that the Union conducted on November 17.

Harris' Verbal Counseling, Mid-September

In about mid-September, in the front of the house, Cooney came up to Harris. She stated that she had a log on the iPad showing that Harris had counted the safe in violation of the 30-minute rule and asked if that was true. Cooney then stated that Harris was not allowed to count the safe at that time because Starbucks had a policy that safe counting not be done a half hour before closing or a half hour after opening, due to safety concerns. Harris stated that she had not been aware of that policy but would comply with it. Cooney stated nothing about an investigation or potential discipline.

Alvarez, McNaughton, and Neilsen all testified that only after Harris was discharged on November 18 did they first became aware of this rule. Thus, McNaughton and Neilsen both testified that they learned of the policy from Harris on November 18 when partners asked her

[4] The back door leads to a hallway and a bathroom that is shared with another business. When the store is open for customers, the back door is unlocked.

why she had been fired. Alvarez testified that she was unaware of the policy until probably later the same week that Harris was fired, when a shift supervisor asked Cooney why Harris had been terminated. According to Alvarez, the shift supervisors, including Alvarez, expressed shock that she was fired for that reason because many of them were unaware of such a policy.

Harris' Final Written Warning, October 21

Cooney, upon her arrival on the morning of October 7, discovered that the back door to the store had been left unlocked. She asked Quist, the shift supervisor, if she had opened the door, to which Quist replied no. Other persons with keys to the door were Cooney, the landlord, building maintenance, and Starbucks delivery drivers.

Cooney later called Partner Resources, headquartered in Seattle, which deals with partner and leader concerns, investigations, and accommodations. The Partner Resources consultant with responsibility for Superior is Durham, whose geographical jurisdiction extends from Colorado to Hawaii.

All stores are equipped with video camera surveillance capabilities, for the safety and security of customers and partners. The cameras run continuously every hour every day. A typical store has four or five cameras that capture different views of the store. Partner Relations can review their footage through a video program.

Cooney testified that she asked if Partner Resources could determine who had left it unlocked or why. However, the Partner Resources case handling record (GC Exh. 12) indicates that on October 10, Krista Walnoha of Partner Resources, as the initial consultant, sent an email to Cooney and McCarthick, stating "Thank you for calling the PCC regarding your concerns related to Alendra or Len Harris. . . ."

Walnoha also notated that Cooney stated this was a "certified' store. When asked about this at trial, Cooney responded that "I was asked to inform [the Partner Resources Center] that I was at a certified store every time I called."[5] When the General Counsel asked who told her that, the Respondent's counsel interposed an attorney-client privilege and directed her not to answer. However, when the General Counsel asked if she received such an instruction from any management, she replied that she received those instructions "in a Littler meeting."[6]

Partner Resources assigned Daylen Bruns to the case. Cooney testified that she did not ask Harris, the closing shift supervisor on October 7, if she had left the door unlocked, and Cooney could not remember if she called the security company. On the contrary, Bruns' notes reflect that Cooney reported to her that she had called the security company, which had no record of its being opened or closed, and that "Closing SS Len does not recall leaving it unlocked."

[5] Tr. 581.
[6] Tr. 583.

Bruns' notes also reflect that Cooney told her that "SS Len is a union leader" and that Cooney requested video footage "to ensure that SS Len did or did not leave the door unlocked." Cooney testified that she could not recall making the statement or the request.

Cooney testified that in a virtual meeting between October 7 and 15, Bruns told her and McCarthick that she had reviewed the footage but could not determine who left the door unlocked; however, in reviewing footage from a camera at a different location, she saw that the safe was left open and unattended prior to 30 minutes before to closing. She showed them video footage and, according to Cooney, recommended a corrective action.

On cross-examination, Cooney affirmed that she testified under oath at Harris' unemployment hearing on April 5, 2023, that:

> We ended up needing to review footage because the back door of the building was left unlocked overnight by the cleaning crew. And when we reviewed the footage, we found the safe had been left open, or had been not left open but had been accessed in the last 30 minutes.[7]

When the General Counsel asked why she so testified about the cleaning crew, Cooney answered that she had discussed with the landlord that the back door kept being left unlocked, and after that discussion, it stopped, so that was her assumption. She conceded that she did not articulate that at the unemployment hearing.

On October 18 and 19, Cooney and Durham exchanged several emails, as follows. (R. Exh. 13.) On October 18, Cooney sent Durham a proposed final corrective action for Durham's review, concerning the unattended safe. Durham responded that day, asking if Cooney ever had a conversation with Harris to get her side so Durham could review it before delivery of a final written warning. The next day, Cooney responded, saying that she had told Harris that she was supposed to wait until everyone (the public) was gone before starting her closing routine (counting the safe and finalizing the deposit). Harris had responded she had been starting her closing routine earlier because she had been running out of time and keeping people late. Cooney further said that she has emphasized to Harris that it was a safety issue to have the safe open in the first and last 30 minutes of business operations because that was when theft and robbery were most likely to occur.

On October 21, Haris was outside the store when McCarthick, in Cooney's presence, issued her a final written warning dated October 15. (GC Exh. 4.) It stated that she had failed to follow the Company's safety and security and cash managements policies on October 7 by finalizing the safe count prior to the store's closure and that "[u]pon further review it was found that the safe was open and accessible in the 30 minutes prior to the store's closure, and before the store had been cleared of customers."

[7] Tr. 587.

The warning cited cash handling provisions that I described earlier under relevant company policies, contained in the shift supervisor job description, Partner Guide, Store Operations Manual, and Steps to Excellence Cash Handling.

McCarthick told Harris that they had to issue it, and he proceeded to read everything below the statement of situation. Both he and Cooney emphasized that it was a safety issue because her conduct put her coworkers in danger. Harris thanked them, pointed out that she had asked about being retrained, and said that she would follow the directive going forward.

Cooney testified that no set level of discipline is imposed upon a single infraction of a cash handling violation but that the actions are considered in the context of consistent enforcement of policy. Cooney had no direct experience with any shift supervisors other than Harris violating the 30-minute rule. She further testified that Partner Relations recommended that Harris receive a final written warning and that she did not recall any specific conversations with McCarthick on whether he agreed or disagreed.

The A-frame Incident, October 29

In the early afternoon that day, the store was understaffed, and Harris contacted Cooney to ask if they could close the lobby and turn off mobile orders for at least an hour or so until another barista came in, so that they could get caught up. Harris had previously asked Cooney for such authorization on about five or six occasions. Cooney testified that she gave Harris permission to close the lobby until 1 p.m. but that Harris needed Cooney's further permission to extend the closure.

Harris closed the lobby, and Cooney turned off mobile orders, so that only the drive-through remained open.

The A-frame sign is so named because it looks like an A and has a support bar in the middle. It serves as chalkboard for messaging the public about promotions or the lobby being closed. Harris wrote on the sign that the lobby was closed, drive-through only. After about an hour, upon another barista's arrival, Harris reopened the lobby. She asked a barista to move the sign out of the way, which he or she did not do, but the store was unlocked. Cooney turned the mobile orders back on.

The following facts are undisputed. At approximately 3:45 p.m., Cooney arrived at the store and observed that the A-frame with the "lobby closed" message was still near the front door. Cooney called her from the parking lot and asked why the store were still closed. Harris responded that she had asked a partner who had been leaving earlier to move the sign, but the partner had apparently not followed her instruction. Harris came to the front and opened the lobby door for her. That evening, Cooney reported the incident to McCarthick and then sent him a summary of what had occurred.

McCarthick initiated an investigation of Harris on November 1, which investigation led to her later discharge. Nothing in the record explains why an investigation had to be done when Harris had already explained to Cooney why the sign had not been moved. Durham testified that

the initial subject of the investigation concerned the A-frame sign that was left in front of the door and blocked customers from being able to enter the building on October 29. However, when Partner Relations reviewed the footage covering other areas of the store on October 29, they discovered that Harris had walked away from the till and left money and cash unsecured.

Respondent Exhibit 2(a) is the Partner Relations case record related to Harris' termination. It includes screen shots showing what Partner Relations viewed on a video concerning the A-frame and Harris' leaving cash and the till unattended. Respondent Exhibit 2(b) consists of those screen shots in color. Respondent Exhibits 3(a)–(e) are on a master USB thumb drive and show video footage. Respondent Exhibit 3(b) is from October 7, while the others are different views from October 29. The screenshots reflect that the issue with A-frame sign happened around 3 p.m. but that at 4:43 p.m. Partner Resources started reviewing point of sale and safe shots. Durham testified that she could not recall why there was this discrepancy in time. She later testified that there is no specific time frame Partner Resources uses when reviewing video footage. Durham testified that in her experience, it is typical to start investigating one type of incident and then uncover a different policy violation, but she provided no specifics of any kind.

Harris met with McCarthick and Cooney on November 9 at about three or four p.m. The following is her detailed account, which I credit, noting that it is substantially consistent with Cooney's testimony and notes. (See GC Exh. 13, Cooney's notes that she emailed to McCarthick that day.)

Harris was doing a closing shift when McCarthick and Cooney showed up. McCarthick asked to speak with her in the back. Once there, he stated that he wanted to have a short discussion about some questions that they had. McCarthick was sitting at the back desk and had a laptop, which he shifted toward her. He showed her a video of the front of the store that showed her outside the front door shifting the A-frame sign stating that the lobby was closed, and then going inside. He asked Harris what the situation had been, and she explained to him what had occurred.

McCarthick told Harris that they had evidence that there were purchases from the lobby after Harris unlocked the store so they knew the store was reopened prior to Cooney's showing up later (even though the sign was still up). Cooney confirmed on cross-examination that she had also heard this from McCarthick.

McCarthick then said that he had another video to show her and that "I don't have any control who sends this to us, it was just sent to us. . . . "[8] He showed her the video and stated that it showed her walking away from cash on the countertop during her shift (at the end of October) . Harris replied that she did not remember the incident specifically but that she likely had to attend to an emergency, such as the oven beeping or the sink overflowing, because she did not have enough staff to delegate it.

[8] Tr. 121.

Cooney stated that Harris could not leave cash unattended. Harris replied that she knew this, but it was unintentional. Cooney asked what Harris could do to prevent that from happening in the future. Harris stated she would appreciate any tips, and Cooney gave her one.

November 17 Strike

On November 17, the Union called a coordinated nationwide strike called the "Red Cup Rebellion," to coincide with Starbucks offering customers every year a reusable red cup when they purchase a holiday drink, to celebrate Starbucks' holiday launch.

That morning, Harris emailed McCarthick, Cooney, and Fuller, the incoming permanent store manager, a letter with the union logo and signed first by Harris and then by 14 other employees, informing them that the store's employees would be on strike effective 6 a.m. that day. (GC Exh. 5.) It further stated that the strike would conclude at 11:59 p.m. that day and that the strikers would unconditionally return to work on November 18.

About 16 of Superior's 18–20 employees participated in the strike, including Harris, Long, McNaughton, and Quist. Harris and a union representative were the strike captains who directed the strikers so that they kept moving and stayed in appropriate areas. Harris also marched with signs and participated in strike chants.

The store was closed for the day. Cooney and Fuller were physically present during the strike. Cooney told Harris that she had gotten her email, that the employees were allowed to strike, and that she would see them at work the next day.

The Union had provided posters that read "No contract, no coffee." Quist taped one of them on the mobile order and pay sign behind a customer only parking space, located near the front entrance to the store. (See GC Exh. 7, showing the location of the sign.)

Harris' Discharge, November 18

Cooney did not testify credibly about who made the decision to discharge Harris, and when. Cooney first testified that she had no involvement in the decision to terminate Harris for violating cash handling procedures but believed it was Partner Relations. On cross-examination, she contradicted herself; first testifying that on a date she could not recall, she recommended to McCarthick that Harris be terminated; later testifying that the decision was a "collective" one between Partner Relations, McCarthick, and herself;[9] and finally testifying that she did not know who made the final decision.

Further contradicting Cooney, Durham testified that she did not decide what discipline Harris would receive. Rather, the decision would have been made by the "business leaders"—store manager, district manager, and, in some situations, regional director. She had no personal knowledge of who actually made the decision and any discussions on the subject. In view of Durham's testimony, Cooney's position as store manager, and Cooney's involvement in the

[9] Tr. 624.

various incidents, I highly doubt that Cooney had no major involvement in the decision to terminate Harris. As I noted earlier, McCarthick did not testify, so there is no way to know with any certainty who made the decision to discharge Harris, and when.

Cooney further testified that, at McCarthick's request, she typed and prepared Harris' notice of separation prior to November 17 (the date of the strike), but she provided no details and could not remember when. She also testified that she had the authority to override McCarthick's decisions, testimony I find runs counter to normal managerial practices in the absence of any special circumstances that were not presented here. She conceded that she never did so.

I credit Harris' account of what occurred on November 18, as follows.

At around 10:20 or 10:30 a.m., Cooney came to the bar and asked Harris to accompany her and McCarthick to one of the hallways. Once there, McCarthick told Harris that she was being terminated, and he read through a notice of separation. (GC Exh. 6.)

The document stated that she was being separated for failure to meet Starbucks cash handling policies and procedures.

Two incidents were cited: (1) on October 17, she was captured on video leaving the safe open and accessible in the 30 minutes prior to close, for which a final written warning was delivered on October 21;[10] and (2) on October 29, she was captured on video leaving cash till drawers and a deposit bag unattended on the counter while the store was open and customers were present in the lobby.

The warning cited cash handling provisions that I described earlier under relevant company policies, contained in the Partner Guide, shift supervisor job descriptions, Steps to Excellence Cash Handling, and Cash Handling How to Par a Till guide.

The notice referenced the same cash handling provisions that were cited in the October 21 final warning and concluded by stating that the decision had been made to separate Harris' employment "[d]ue to a pattern of actions" violating the Starbucks cash handling policy. McCarthick reviewed her company benefits that would carry over, after which they escorted her to the back of house, where she gathered her personal effects.

Treatment of Other Employees

Following are final written warnings that have been issued to other shift supervisors for cash management violations, in chronological order:

[10] The October 21 final written warning gave the date of the incident as October 7. The October 17 date in the notice of separation was an apparent inadvertent error.

(1) D.F.[11] on April 3, 2020, for (1) opening the safe within 30 minutes of the end of business hours on March 23, 27, and 29; and (2) reports by baristas that D.F. put away the tills so early that he told them to tell customers that they could only take credit cards and mobile apps, not cash. (R. Exh. 21.)

(2) B.T. on August 25, 2022, for reporting that she had lost her safe and store keys, which she had left on the back of house desk between August 8 and 11 and were now missing. (R. Exh. 19.)

(3) L.N. on September 21, 2022, for two violations: (1) failing to lock the drive through window overnight on September 6; and (2) not charging a separated partner for drinks on September 21. (R. Exh. 18.)

(4) W.W. on October 19, 2022, for not securing the cash controller keys when leaving for the day. (R. Exh. 22.)

(5) H.K. on June 28, 2023, for reporting on June 23 that her keys had been stolen, resulting in the store needing to be re-keyed. (R. Exh. 20.)

B.T. was terminated on October 6, 2022. (R. Exh. 27.) The notice of separation set out her prior disciplines: a final written warning on September 8 for loss of her store keys (not in the record) and her documented coaching on September 20 for violating the dress code policy. The notice then states that her register till was used on September 21 for (free) drinks for a separated partner and cites the following policies that she violated:

(1) Each partner will be held responsible for each transaction at the assigned cash register.
(2) The cash register should be secured appropriately before leaving it unattended.
(3) The Till drawer should be secure.
(4) Free beverages should not be given away.
(5) Starbucks service recovery coupons and cards should not be misused.

There is further mention that Cooney advised her on the proper cash handling policy on August 25 and on September 2 and 9. Because the Respondent did not produce a final written warning to B.T. dated September 8, but one on August 25 for the offense of losing her store keys, the Respondent's evidence is confusing.

The violation that led to B.T.'s discharge related to her either deliberately giving away or negligently allowing free drinks to a separated partner whom she likely knew, strongly suggesting that she had an improper motive.

It also appears from this separation notice that B.T. had violated the cash handling policy on at least three occasions prior to her discharge. Thus, B.T.'s separation does not support the Respondent's assertion that shift supervisors other than Harris have been discharged for a second

[11] Employees' initials will be used in the interest of protecting their privacy.

violation of the cash handling policy, and the Respondent provided no other evidence in support thereof.

Cooney testified that in March 2023, she issued a documented coaching for violating the beverage policy to a partner who claimed unawareness of the policy. She provided no further details, and the Respondent produced no documentation, so no fact has been established. She further testified that before March 2023, the only time that she issued a discipline to a partner claiming unawareness of a policy was to Harris.

Alleged Violations of 8(a)(5) and (1)

It is undisputed that the Respondent did not give the Union prior notice of, or an opportunity to bargain over Harris' final written warning or her discharge.

Statements by Cooney, August/September

On about August 1, Harris had a short discussion with Cooney, at or near the POS station. Cooney spoke of coming in to try to address chaotic conditions in the store. Harris brought up the Union and her role as the leader. Cooney stated that there would likely be an antiunion manager that would be replacing her and that she wanted employees to get prepared for the expectations that the new manager would have.

They had a second conversation in about mid-August in the back room. Harris stated that Cooney was suddenly enforcing dress code, being on time, and other policies much more vigorously than before, and this was difficult for employees. Cooney responded that she knew it was tough but repeated that there was likely to be an antiunion manager brought in as her replacement because the employees were union, so she needed to prepare them for what might be thrown at them. She stated that the new manager was not going to be lenient with dress code or time as it was before.

Alvarez recalled that she, Cooney, McNaughton, and Neilsen had a discussion of the dress code shortly after Cooney became interim manager. During their conversation, Cooney commented, "I'm trying to help you guys out, your next manager is very likely to be anti-union."[12]

McNaughton and Neilsen each testified about conversations with Cooney after B.T. was disciplined for violating the dress code.

When McNaughton was working with Cooney in opening shift, she (they) asked Cooney where there was a specific policy regarding dress code because she (they) could not find it. Cooney could not show her (them).[13] They then went to the back room to look for it, but she could not find it. She told her (them) that she (they) still could not wear it, saying, "I'm not

[12] Tr. 333.

[13] McNaughton's preferred gender pronouns are "they/them."

doing this to be an asshole. I'm doing this to prepare you guys and help you because the next person they bring in is going to be a lot meaner than I am, and more—most likely anti-union."[14]

In the conversation between Neilsen and Cooney, Cooney said that as a supervisor, she had reinforced the dress code policy and was planning on reinforcing policies strongly and strictly "because she needed to prepare us for an incoming manager that would, undoubtedly, be even harsher than she was, and anti-union. And that we needed to be ready for an anti-union manager and she was going to whip us into shape to be prepared. . . ."[15]

Cooney's Statements, November 18

Several employees gave accounts of Cooney's conduct relating to the "No contract, no coffee" sign (sign) that Quist had posted. Their unrebutted testimony was credible and substantially consistent, and I therefore find the following.

Harris reported to work at around 6 a.m. for the opening shift. After the peak time of about 9:30 a.m., as Harris was operating the bar, she observed Cooney in the lobby. Cooney was holding the sign and asking a number of employees, "Did you do this? Did you do this?"[16] Harris testified that she could not hear anything else that Cooney said or any of the employees' responses. Based on Cooney's facial expressions body language, and the tone of her voice, Harris concluded that she was upset.

Cooney asked Long if she knew who had taped the sign, and she replied no. Cooney said that she was frustrated and was going to call the district manager to see if they could get to the bottom of who taped the sign and when. Long witnessed Cooney asking other partners present about the sign. Afterward, Long heard Cooney call McCarthick from the back of the house (Long recognized his voice). Long did not hear their conversation because Cooney then went outside.

Quist arrived to work at about 9:45 a.m. on November 18. A coworker informed her that Cooney had called her to the back and had been asking people about the sign that she posted the previous day. When Quist went to the back, Cooney and Fuller were there. Cooney was very red in the face and held the sign. She shook it in Quist's face and asked her if she knew who had put it up. Quist replied, yes, she had put it up on the day of the strike. Cooney stated that did not make sense because there had been a storm the previous day but the sign was not wet, and that she could check the cameras. Quist responded that there had been a plastic film over the poster and that the cameras would prove that she had posted it the day before. Quist added that the Union had advised her that putting up the sign was protected activity. Cooney then accused her of vandalism and obstruction of property.

Long and McNaughton substantially corroborated Quist's testimony.

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[14] Tr. 307.
[15] Tr. 353–354.
[16] Tr. 146.

Long was right at the door separating the back of the house and the front of house registers when she witnessed and heard part of an interaction between Cooney and Quist. Cooney told Quist that she was upset and asked her if she had any knowledge or if she had been the person who had taped a sign to the front door. Quist replied that it was taped the day of the strike. Cooney responded to the effect that she did not believe her and was going to get to the bottom of it.

McNaughton was in front of the ovens that morning when Cooney approached. Quist was in the vicinity. Cooney was waving the sign and asked McNaughton if she (they) had put it up. McNaughton replied no. Quist stated that she had done so yesterday. Cooney responded that she would have to check the cameras and then asked Quist to accompany her to the back room.

ANALYSIS AND CONCLUSIONS

Alleged Section 8(a)(1) Violations

Threats in August/September

Cooney did not dispute the testimony of Harris, Alvarez, McNaughton, and Neilsen that in about August/September, she told them on separate occasions that she was enforcing the dress code and other policies more strictly to prepare them for the next store manager, who likely would be antiunion.

An objective standard is used in determining whether a statement amounts to an unlawful threat of retaliation for engaging in union or other protected activity. *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 3 (2021); *Midwest Terminals of Toledo*, 365 NLRB No. 158, slip op. at 21 (2017), enfd. 783 Fed.Appx. 1 (D.C. Cir. 2019). The questionable threats "need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). When applying this standard, the Board considers the totality of the relevant circumstances. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 541 (2003); *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

It is well-established that threatening employees that work rules or policies will be more strictly enforced because of their union support violates Section 8(a)(1). See, e.g., *Keystone Automotive Industries, Inc.*, 365 NLR No. 60, slip op. at 1 fn. 2 (2013), citing *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1074, 1083 (2004), and *Avecor, Inc.*, 296 NLRB 727, 732–733, 746 (1989), enfd. in relevant part 931 F.2d 924 (D.C. Cir. 1991), cert. denied 502 U.S. 1048 (1992).

I therefore conclude that Cooney's statements amounted to unlawful threats that the Respondent would retaliate against employees for having voted to unionize by more strictly enforcing dress code and other policies. Accordingly, they violated Section 8(a)(1).

Interrogation and threat of surveillance, November 18

Cooney did not dispute the testimony of the General Counsel's witnesses that on the morning after the November 17 strike she was visibly upset when she went around and asked a number of partners if they had posted the "No contract, no coffee" sign near the front door.

Cooney called Quist to the back, where incoming store manager Fuller was also present. Cooney shook the sign in Quist's face and asked her if she knew who put it up. After Quist responded that she had put it up the day of the strike, Cooney expressed doubt that she had put it up that day (rather than on November 18) and stated that she would have video camera footage pulled. Quist stated that the Union had advised her that putting up the sign was protected activity. Cooney then accused her of vandalism and obstruction of property.

In assessing whether questioning amounts to unlawful interrogation, the Board applies the totality of circumstances test set out in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *U.S. Cosmetics Corp.*, 368 NLRB No. 21, slip op. 6 (2019). In applying this test, the factors set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) ("Bourne factors") are considered: (1) the truthfulness of the replies from the employee being questioned; (2) the nature of the information sought; (3) the identity and rank of the questioner; (4) the place and method of the interrogation; and (5) the background between the employer and union, i.e., whether there is a history of employer hostility and discrimination. These factors are not mechanically applied but are used as a starting point for assessing the totality of circumstances. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000).

Section 7 of the Act gives employees the right to keep confidential their union activities. *Guess?, Inc.*, 339 NLRB 432, 434 (2003); *National Telephone Corp.*, 319 NLRB 420, 420 (1995). Here, the Respondent has not demonstrated that it had a need for the information that justified impinging on that right. See *Guess?* at 435. Indeed, there is no contention by the Respondent that the mere posting of the sign created any issues of safety or security or interfered with its operation on November 18. Regardless of the other factors, factor 2 weighs heavily in finding Cooney' questioning was unlawful interrogation. The same holds true for factor 4; Cooney called Quist away from her work area and to the back room, where incoming Store Manager Fuller was also present.

Significantly, after Quist responded that she had posted the sign the day before, Cooney essentially accused her of posting it on November 18, said that she would have video footage pulled to establish the date, and accused Quist of vandalism and obstruction of property, suggesting that she could be charged with criminal misconduct. The nature of the conversation was clearly coercive.

I therefore conclude that Cooney violated Section 8(a)(1) by interrogating employees, including Quist, about their union activities.

In the same conversation, Cooney threated Quist that she would have camera footage pulled specifically for the purpose of determining on which date Quist had posted the sign.

Placing employees under surveillance while they are engaging in union activities is unlawful. See, e.g., *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), motion for

reconsideration denied, 372 NLRB No. 157 (2023); *St. Mary's Hospital*, 316 NLRB 947, 947 (1995). Here, Cooney threatened Quist with actual surveillance, even if it was after the fact of the activity.

The Respondent cites *Wal-Mart Stores, Inc.*, 350 NLRB 879, 883 (2007), for the proposition that monitoring union activity that is conducted openly does not constitute unlawful surveillance, particularly when it occurs on company premises, unless the officials act in a manner that is out of the ordinary. (R. Br. at 19–20.) However, even though Quist's activity occurred in an open area, Cooney's threat that the camera footage would be pulled solely for the specific purpose of determining when Quist had posted a sign in support of the strike was clearly "out of the ordinary." See *Rogers Electric , Inc.*, 346 NLRB 508, 509 (2006), citing *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003).

It is true that Quest had already admitted that she posted the sign, so that her union activity was already known to the Respondent. Nonetheless, the Respondent has not demonstrated any valid reason for needing to know on which date the sign was posted. Moreover, Cooney's threat to pull the footage was in conjunction with her accusing Quist of engaging in illegal conduct.

In these circumstances, I conclude that Cooney unlawfully threatened Quest with surveillance of her union activities.

Harris' Final Written Warning and Discharge

Section 8(a)(3) Framework

In cases in which the issue is the motive behind an employer's action against an employee (was it legitimate or based on animus on account of the employee's protected concerted activities?), the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see also *Auto Nation, Inc.*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).

Under *Wright Line,* the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. *Wright Line*, above at 1089. The Board has held that the General Counsel can meet this burden by establishing (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the employer's part. See, e.g., *Consolidated Bus Transit*, *Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

In *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5–8 (2019), the Board clarified the animus element of this test, explaining that the General Counsel "does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity." Id., slip op. at 7 (emphasis in original). "Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Id., slip op. at 8.

The Board clarified the application of *Tschiggfrie Properties* in *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 2 (2023), stating that *Tschiggfrie Properties* "did not add to or change the General Counsel's burden under *Wright Line*. Rather, the Board merely reaffirmed the principle, already embedded in the *Wright Line* framework, that the General Counsel is required to establish that protected activity was a 'motivating factor' in the adverse employment action alleged to be unlawful."

Once the General Counsel makes out a prima facie case, the burden shifts to the respondent to show that the same action would have taken place even in the absence of the protected activity. *Wright Line*, above at 1089; *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 (2018); *Consolidated Bus Transit*, *Inc.*, 350 NLRB 1064, 1066 (2007). Where the General Counsel has made a strong showing of discriminatory motivation, the employer's defense burden is substantial. *East End Bus Lines*, ibid; *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011).

If a respondent's proffered justification for its action is found pretextual, it must be determined whether surrounding facts tend to reinforce that inference of unlawful motivation. *Electrolux Home Products, Inc.*, 368 NLRB No. 34, slip op. at 3–4 (2019), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Harris' Union Activity and Employer Knowledge

Harris' union support was well known to the Respondent prior to the issuance of the final written warning to her on October 21, 2022. Her name was the first of the 13 employees whose names were on the December 31, 2021 letter that the store's "Union's organizing committee" sent to Starbucks' president and to District Manager Piero, announcing that they were forming a union.

During the organizing campaign, Harris, on her Twitter account, discussed the Union and the store organizing, and Wong told her she had seen Harris' Twitter and wished that Harris had come to her with her concerns. Harris wore a union pin on her apron almost every single day and occasionally wore a union shirt. After the Union was elected in May, and after Cooney came as interim store manager, she continued to wear the pin. On about August 1, during a conversation with Cooney, Harris brought up the Union and her role as the leader.

After the October 21 warning and before her discharge on November 18, Harris on November 17 emailed McCarthick, Cooney, and Fuller a letter with the union logo that listed Harris first of 15 employees, informing them that the store's employees would be on strike effective 6 a.m. that day. Harris served as a strike captain. During the strike, Cooney told Harris that she had gotten her email.

Animus

Inferred animus for the final written warning is found in notations in the Partner Resources records relating to who had left the back door open on October 7. They show that Cooney, in initiating the investigation, raised concerns only about Harris and not the other shift supervisor or others who might have been responsible, and stated that the store was "certified" and that Harris was a "union leader."

Further inferred animus for the discharge is found in its timing—the day after Harris notified management of the strike and served as a strike captain. See *Healthy Minds, Inc.*, 371 NLRB No. 6, slip op. at 7 (2021); *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1 (2020); *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 10–11 (2019).

I further infer animus from the fact that, both in the final written warning and the discharge, Harris was disciplined because the investigations revealed evidence that she violated policies at locations in the store unrelated to the original loci and subjects of both investigations. Although Durham testified that in her experience, it is typical to start investigating one type of incident and then uncover a different policy violation, she provided no specific examples, and the record is devoid of any such evidence.

In light of these findings, I need not base a finding of animus on Cooney's 8(a)(1) violations in August/September or on November 18, which were not specifically tied to Harris.

Accordingly, I conclude that the General Counsel has made out prima facie cases that the final written warning and discharge were motivated by antiunion considerations.

Respondent's Rebuttal

The Respondent's contends that it has met is burden of showing that Harris would have been issued a final written warning and then discharged even aside from her union activities. I disagree for the following reasons.

Harris had worked for Starbucks at three different stores since 2016, with a year hiatus, and thus must have had a good record with the Company. After she was made a shift supervisor in October 2021, she received no disciplines until October 21, 2022—after the Respondent had actual knowledge of her union support.

Based on the statements that Cooney made to Partner Relations regarding the unlocked back door, it is patently clear that Harris was being targeted because of her union activities. Durham offered no satisfactory explanation of why, when the back door and front of the store were the locations of the issues brought to Partner Relations by Cooney (the unlocked back door) and McCarthick (the A-frame), respectively, Partner Relations chose in both instances to look at footage of other areas. In this regard, Durham provided no examples of when she has ever done this on other occasions, and the Respondent otherwise provided no evidence in support of her bare assertion. I also question why an investigation needed to be done regarding the A-frame

when Harris conceded to Cooney at the outset that it had not been moved because a barista did not follow her direction.

As I noted earlier, Cooney was an unreliable witness in describing the events that led to Harris' discharge in that she failed to give a cogent, credible account of who made the decision to terminate Harris, and when. I note that although Cooney testified that the decision to discharge Harris was made before the strike took place on November 17, the Respondent waited until the day after the strike to effectuate her termination.

There is no contention by the Respondent that Harris engaged in deliberate malfeasance, either on October 7 or October 29. I credit Harris' testimony that her leaving money on the counter on October 29 resulted from exigent circumstances over which she had no control. Based on Harris' testimony and that of other shift supervisors, I also credit her that management did not adequately train her on cash handling policies. Despite these policies being embodied in various company documents, Starbucks clearly did not take sufficient steps to impart them to the shift supervisors at the store.

Cooney and Durham contended that Harris' discharge following the final written warning, both for cash handling violations, was consistent with the Respondent's disciplinary policy that termination is the appropriate discipline for a second offense. However, if Harris' final written warning was based on antiunion considerations, it cannot possibly serve as a legitimate predicate on which to base her discharge.

In any event, none of documented written warnings issued to other shift supervisors that the Respondent produced establish that they were based on two cash handling violations alone, and all involved actions that had more serious implications as far as potential negative impact on the store:

(1) D.F. opened the safe within 30 minutes of the end of business hours on three separate. occasions and put away the tills so early that he told baristas not to accept cash from customers.

(2) B.T. reported on August 25, 2022 that she had lost her store keys between August 8 and 11 (at least 2 weeks earlier) and were now missing.

(3) L.N. both failed to lock the drive through window overnight and failed to charge a separated partner for a drinks, indicating deliberate misconduct.

(4) W.W. failed to secure the cash controller keys when leaving for the day.

(5) H.K. reported that her keys had been stolen, resulting in the store needing to be rekeyed.

B.T.'s separation notice indicates that she violated the cash handling policy on a least three occasions, as well as violated the dress code and either deliberately gave away or negligently allowed a former partner to get free drinks, strongly suggesting deliberate misconduct on her part.

Not only do those disciplines fail to support the Respondent's position that Harris' discharge was consistent with discipline meted out to other shift supervisors, but D.T.'s final written warning and B.T.'s termination (which occurred when Cooney was interim store manager) contradict the Respondent's contention that two violations of the cash handling policy lead to discharge. Thus, both D.T. and B.T. continued employment after each had committed three such violations. Moreover, D.T.'s misconduct was aggravated by his instructions to baristas not to accept cash from customers, but he was not terminated.

Therefore, the way that the Respondent disciplined other employees constitutes yet another indication that Harris was treated disparately because of her protected activity on behalf of the Union. See *Mondelez Global*, above at 4; *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002), affd. 71 Fed. App. 441 (5th Cir. 2003).

Conclusion

The Respondent having failed to rebut the General Counsel's prima facie case, I conclude that its issuance of a final written warning to Harris on October 21 and its discharge of her on November 18 violated Section 8(a)(3) and (1) of the Act.

Alleged Section 8(a)(5) Violations

It is undisputed that the Respondent did not give the Union prior notice of, or an opportunity to bargain over, the disciplines that Harris received.

In *800 River Rd. Operating Co.*, 369 NLRB No. 109 (2020), enfd. 848 Fed.Appx. 443 (D.C. Cir. 2021) (unpublished), the Board overruled its previous holding in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), and held that an employer has no obligation to bargain with a union regarding disciplinary actions imposed on bargaining unit members following certification of the union but prior to negotiation of an initial collective bargaining agreement.

The General Counsel argues that the Board should overrule *800 River Rd.* and adopt a new standard that comports with *NRLB v. Katz*, 369 U.S. 736 (1962). (GC Br. at 50, et. seq.) However, the question of whether existing Board precedent should be reversed is for the Board to decide, not me. *Western Cab Co.*, 365 NLRB No. 78, slip op. at 1 fn. 4 (2017), citing *Waco, Inc.*, 273 NLRB 746, 749 fn.14 (1984); *Austin Fire Equipment, LLC*, 360 NLRB 1176, 1176 fn. 6 (2014). Because I am constrained to follow current Board precedent, I recommend dismissal of this allegation, without making any judgment on the General Counsel's arguments.

CONCLUSIONS OF LAW

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

2. Workers United - Chicago and Midwest National Joint Board (SEIU), Local 304 is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act: issued a final written warning to Alendra Harris on October 21, 2022, and discharged her on November 18, 2022.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act:

(a) Threatened employees with stricter enforcement of work rules because of their union activities.

(b) Threatened employees with surveillance of their union activities.

(c) Interrogated employees about their union activities.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Alendra Harris, it must offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed; and make her whole for any losses of earnings and other benefits suffered as a result of her discharge. Backpay 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), enf. denied on other grounds, 647 F.3d 1137 (D.C. Cir. 2011).

Pursuant to *Thryv, Inc.*, 372 NLRB No. 22 (2022), I further order that the Respondent compensate Harris for any other direct or foreseeable pecuniary harms incurred as a result of its unlawful conduct.[17] Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

In addition, the Respondent shall compensate Harris for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for

[17] The Respondent's arguments against the compensatory damages mandated by *Thryv* (R. Br. at 22, et. seq.) are appropriately addressed to the Board, not to me. See *Western Cab Co*, and *Austin Fire Equipment,* supra. I make no judgment on the merits of those arguments.

Region 27, 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 years. *Advoserv of New Jersey, Inc.*, 363 NLRB 1324 (2016); *Don Chavas, LLC*, 361 NLRB 101 (2014). The Employer shall compensate Harris for her expenses for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable next backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above. In addition to the backpay-allocation report, the Employer shall file with the Regional Director copies of Harris' corresponding W-2 forms reflecting the backpay awards. *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021).

In the complaint, the General Counsel requests a number of special remedies, arguing that the Respondent's conduct at this store "is part of its broad and pervasive pattern of misconduct" nationwide:

1. Post and electronic distribute Notices to Employees, including via any test-based mobile message platform if the Respondent communicates with its employees through such electronic means.

I will order that the Notice to Employees be disseminated in accordance with the Board's standard language.

2. Send copies of the Notice to Employees, via email and U.S. mail, to Harris.

3. Electronically distribute the Notice to Employees to all supervisors and managers at the store.

4. At a facility wide meeting or meetings scheduled to ensure the widest possible attendance, a responsible management official read the Notice to Employees and the Explanation of Rights to employees, in English, or, in the alternative, by a Board Agent, in the presence of supervisors and managers, with Charging Party representatives being permitted to attend all such readings or, where appropriate, video recording of the reading of the notice and the Explanation of Rights, with the recording being distributed to employees by electronic means or by mail. A copy of the recording and documentation of attendance should be provided to Region 27.

5. Make Harris whole, including making her whole for consequential damages for economic losses.

I addressed this above.

6. If sought, provide a Board agent with immediate access to the Respondent's Superior store, without prior notification, for the purpose of inspecting the posted Notice to Employees at the store.

7. Provide training to Respondent's managers and supervisors about Section 7 rights under the National Labor Relations Act.

8. Notify the Charging Party of any discretionary discipline it seeks to issue to unit employees and, if sought by the Charging Party, bargain about such discipline prior to implementation.

9. If sought, bargain with the Charging Party concerning Harris' discipline and discharge.

I deny the General Counsel' request for remedies 8 and 9 because the Respondent has no obligation to provide notice to, or bargain with, the Union prior to issuing discretionary discipline.

10. Provide Harris a letter of apology for discharging her.

As to requested special remedies 2–4, 6 and 7, and 10, the Board in *Starbucks Corp.*, 372 No. 122, slip op. at 1 fn. 3 (2023), rejected imposition of a number of special remedies and found standard remedies "sufficient to address the Respondent's unfair labor practices in this case," implicitly limiting consideration of the Respondent's conduct to the one venue. Those denied special remedies included posting a Notice and an Explanation of Rights for 90 days, as well as training on the Act.

This is not a situation where the Respondent at this location has committed a multitude of unfair labor practices or has a history of violating the Act. Therefore, I will not order special remedies. See *Drs. Mesh P.C.*, 372 NLRB No. 106, slip op. at 1 fn. 2 (2023) ("The General Counsel has not shown that these additional measures are needed to remedy the effects of the Respondent's unfair labor practices."); see also *Los Robles Regional Medical Center,* 372 NLRB No. 120, slip op. 1 at fn. 3 (2023).

For the above reasons, I deny the General Counsel's request for special remedies.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Starbucks Corporation, Superior, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(a) Discharging or otherwise discriminating against employees because of their support for Workers United - Chicago and Midwest National Joint Board (SEIU), Local 304.

(b) Threatening employees with stricter enforcement of work rules because of their union activities.

(c) Threatening employees with surveillance of their union activities.

(d) Interrogating employees about their union activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Alendra Harris full reinstatement to her 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 Harris whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful final warning and discharge of Harris and within three days thereafter notify her in writing that this has been done and that the final warning and discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Superior, Colorado, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms

[19] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens 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]." 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

provided by the Regional Director for Region 27, 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 noticer, 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. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If during the pendency of these proceedings, the Respondent has gone out of business or closed its Superior, Colorado facility, 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 August 1, 2022.

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

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. December 19, 2023.

Ira Sandron
Administrative Law Judge

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."

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against you for supporting Workers United—Chicago and Midwest National Joint Board (SEIU), Local 304.

WE WILL NOT threaten you with stricter enforcement of work rules because of your union activities.

WE WILL NOT threaten you with surveillance of your union activities.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Alendra Harris full reinstatement to her former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Harris whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to our unlawful final written warning to, and discharge of, Harris, and within three days thereafter notify her in writing that this has been done and that the final written warning and discharge will not be used against her in any way.

Starbucks Corporation
(Employer)

Dated _____ By _____
(Representative) (Title)

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/ 27-CA-307542 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY OTHER MATERIAL. ANY QUESTEIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (720) 598-7398.