UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

BIG GREEN
Respondent

and **Case 27-CA-276068**

KELSEY GRAY, an Individual
Charging Party

and **Cases 27-CA-280760**
27-CA-280764
27-CA-280819
27-CA-283572
27-CA-299716

DENVER NEWSPAPER GUILD-COMMUNICATIONS WORKERS OF AMERICA, LOCAL 37074, AFL-CIO
Charging Party

Jose R. Rojas Esq., and Noor I. Alam, Esq., for the General Counsel.

David A. Campbell Esq., Donald G. Slezak, Esq., Andrea V. Arnold, Esq., Lewis Brisbois Bisgaard & Smith, LLP, for the Respondent.

William Reinken Esq., Rosenblatt & Associates, LLC, for the Charging Party.

DECISION

STATEMENT OF THE CASE

Dickie Montemayor, Administrative Law Judge. This case was tried before me on June 7–10, 2022, August 22–24, 2022, and February 14, 2023, via the Zoom for Government videoconferencing platform. Charging Party Gray filed a charge on April 22, 2021, and an amended charge on May 18, 2021. The Charging Party union filed charges on July 30, 2021, August 2, 2021, September 28, 2021, January 7, 2022, August 9, 2022, July 20, 2022, December 20, 2021, and January 27, 2022. A complaint was issued on April 18, 2022. The complaint alleged violations by Big Green (Respondent) of Section 8(a)(1), (3), and 5 of the National Labor

Relations Act, as amended (Act). On May 2, 2022, Respondent filed an answer to the complaint denying that it violated the Act. On May 11, 2022, an amendment to the complaint was filed adding an allegation that Respondent violated Section 8(a) (4) of the Act. Respondent filed an amended answer on May 25, 2022, again denying that it violated the Act. On that same day, May 25, 2022, a second amended consolidated complaint was filed adding another revision which included the allegation of supervisory\agent status of an employee and another allegation that Section (8)(a)(4) of the Act was violated. Respondent on June 7, 2022, filed an answer admitting the supervisory /agent status of the employee but denying the other allegations. A motion to amend the second amended complaint was filed on August 11, 2022. The motion sought to amend the second amended complaint to include allegations that Respondent reorganized its operations in violation of Section 8(a)(1), (3), (4), and (5) of the Act. The motion was granted over Respondent's objection on August 22, 2022. Respondent thereafter filed its answer to the August 23, 2022, amended complaint, again denying it violated the Act. On August 23, 2022, Respondent filed a Partial Motion to Dismiss. General Counsel filed its response on September 16, 2022. On December 5, 2022, Respondent's Partial Motion to Dismiss was denied. On August 29, 2022, a new complaint alleging that Respondent violated Section 8(a) (1) by issuing a subpoena to the union was issued. On September 12, 2022, Respondent filed a motion to dismiss and on September 13, 2022, filed its answer denying it violated the Act. The motion to dismiss was eventually referred to the Board. On December 2, 2023, General Counsel filed a motion for evidentiary sanctions. On December 23, 2022, the Board issued an Order denying Respondent's motion to dismiss. On March 21, 2023, Respondent filed its response to General Counsel's motion for sanctions.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs which were received on March 21, 2023. I carefully observed the demeanor of the witnesses as they testified, and I rely on those observations in making credibility determinations. I have studied the whole record, the posttrial briefs, and the authorities cited.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and I find that

A. At all material times, Respondent, a Colorado corporation with a principal place of business in Broomfield, Colorado and regional offices in Denver, Colorado; Los Angeles, California; Indianapolis, Indiana; Chicago, Illinois; Detroit, Michigan; Pittsburgh, Pennsylvania; and Memphis, Tennessee (jointly Respondent's facilities and individually Respondent's Denver facility, Los Angeles facility, Indianapolis facility, Chicago facility, Detroit facility, Pittsburgh facility, and Memphis facility), has engaged in the business of growing and supporting a network of learning gardens at schools and community sites across the United States.

B. During the fiscal year ending May 10, 2022, which is representative of its annual operations generally, Respondent, in the course and conduct of its business operations

provided services valued in excess of $50,000 directly to customers outside the State of Colorado.

C. At all material times, Respondent has been engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

D. At all material times, Charging Party Union has been a labor organization within the meaning of Section 2(5) of the Act.

E. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Kimball Musk - Founder
Courtney Walsh - Communications Director
Nicole Alamo - Director of Marketing Campaigns
Tighe (Hutchins) Brown - President
Robin Martin - Chief Operations Officer (COO)
Dianna Zeegers - Manager
Ava Jackson - Manager

II. ALLEGED UNFAIR LABOR PRACTICES

A. FACTUAL BACKGROUND

Respondent is a nonprofit that was operating in various regions of the country. The mission statement "Growing Food Changes Lives" succinctly characterized its mission of creating healthy places where kids can learn and grow. In support of its mission, Big Green developed a system of on-site gardens that were set up directly at school locations. Approximately 650 gardens were built at schools in various locations around the country. The gardens or "learning gardens" functioned as a hands-on tool for Big Green employees and teachers to assist students to learn firsthand about gardening and healthy food choices and helping them to understand, "how food related to their overall health in fun ways that…resonated with kids." (Tr. 1564.)

After the gardens were constructed, they were staffed by Big Green employees whose job title was Program Coordinator. These Program Coordinators worked with teachers and administrators at the schools to assist in the proper use of the gardens for learning purposes and to ensure that the gardens use was maximized to its fullest extent.

The Program Coordinators were directly supervised by Program Managers. In addition to Program Managers there was an employee whose dedicated position was that of Project Manager whose general duty was to oversee construction of the gardens. Big Green also had in place an executive leadership team that was headed by Tighe (Hutchins) Brown who held the title of President.

B. THE DEI COUNCIL

In February 2021, Respondent on the initiative of its president, Tighe (Hutchins) Brown, created a Diversity, Equity, and Inclusion Council (DEI Council). Prospective members were sent an application and several employees were eventually selected. Those selected were from different regions and held a variety of positions. As assembled the council included National Curriculum Manager Dianna Zeegers; Systems Architect Keegan Amrose; Detroit Regional Director Ken Elkins; Chicago Program Manager Sam Koentopp; Indianapolis Program Manger Laura Henderson; Memphis Program Coordinator Evan Davis; Memphis Program Manager Marie Dennan; Denver Program coordinator Kelsey Gray; Chicago Program Coordinator Amina Bahloul. Members understood the mission of the council was to "examine" and "guide" policy "within the organization through lines of DEI." (Tr. 378). To that end the council began meeting in March set off to work on drafting a charter to govern the council's activities. (R. Exh. 17.)

At a meeting on March 19, 2021, during a "pulse check" members of the Chicago team Amina Bahloul and Sam Koentopp brought to the group's attention an issue regarding a perceived problem with one of Chicago Region's community partners Chicago Grows Food, a non-profit led primarily by people of color within the Chicago community. What was at issue was the perception that Respondent's newly created initiative called the "Million Gardens Movement" appeared to be an exact copy of an initiative previously launched by Chicago Grows Food. The DEI council's concern was that Respondent had appropriated the concept and was marketing it as its own. The Chicago team expressed their frustrations and described how it affected their working relationship with the community partner. Ms. Bahoul, when asked how it affected her working relationship with the Chicago Grows Food Coalition answered, "it affected work negatively. The work that we do in Chicago is strongly based on partnerships, and the harm that was inflicted made members not want Big Green members present during Chicago Grows Food meetings. Members asked Big Green staff to not attend Chicago Grows Food meetings until that was resolved." (Tr. 377, 378.)

After discussing the matter amongst themselves, the DEI council determined that the best course of action would be to draft and issue a "Statement of Advocacy." The statement was drafted and after consensus was reached regarding the contents and distribution it was distributed to Respondent's employees via a companywide email. The "Statement of Advocacy" read as follows:

It has come to our attention that there are many problematic and harmful elements resulting from the Million Gardens Movement, specifically the ways in which it was created and rolled out. The entire premise and website for MGM are carbon copies of work pioneered in Chicago by the grassroots organization Chicago Grows Food. By promoting and branding MGM as a new movement without working directly with Chicago Grows Food, Big Green has betrayed and exploited our partners, damaged crucial relationships, and caused existential harm to ourselves as an organization. These actions have led to a crisis that is indicative of systemic and cultural racism and whiteness present within the structures and culture of Big Green. As a result, Big Green has actively upheld and enforced a history of systemic oppression and erasure. Processing these breaches of trust will require further conversation as a DEI council, as the Chicago region, and as an entire organization. (GC Exh. 3.)

On that same day, March 19, 2021, Robin Martin sent an email response to the DEI council members noting that she was speaking as the "head of Human Resources." (GC Exh. 4.) In her response she also indicated," the message sent today from the council to the staff at Big Green was at best inappropriate and at worst a violation of our Values Based Behavior and Ethics & Standards of Conduct policies." (GC Exh. 4.) Her response further outlined her objections to the "Statement of Advocacy," stating:

> These types of allegations are serious and from what HR has discovered since receiving this company wide email is: 1. there has been no formal creation, adoption or distribution of a DEI charter or guidance on how and when the DEI Council distributes messages as a sanctioned Big Green operating group 2. the DEI council has not followed protocol nor policy to submit a complaint or report to our third-party administrator alleging wrongdoing by the company or an individual 3. there is no formal partnership agreement, or partnership policy that has been created or accepted by Big Green 4. there has been no authorization from the President or for anyone on the DEI council to distribute an org wide message of this type with serious and grave accusations that assails, denigrates, and impugns the actions of the advancement function and/or Big Green as an organization. (GC Exh. 4.)

She ended her email with a pledge to hold those responsible accountable stating, "Big Green believes in accountability. To that end, please provide me with information on who authorized and sent this message. I plan on meeting with the person(s) responsible. (GC Exh. 4.)

On March 22, 2021, she sent another email to the council members stating, "Council members, I expect to hear from you by COB today. If I do not hear from anyone, I will hold the entire council responsible and respond accordingly." (GC Exh. 6.) On that same day March 22, 2021, Evan Davis, the program coordinator from Memphis, responded to Martin's email indicating in part that, "the statement sent on Friday was drafted and approved with unanimous consensus by the DEI council. We are committed to continuing this conversation as a council with you, and Tighe in the hope of moving this conversation forward with the organization at large." (GC Exh. 7.)

The next day the DEI council was sent an email from the President, Tighe Hutchins (Brown), which informed them that the statement of advocacy had been, "escalated to the governing board and Big Green's attorney." (GC Exh. 8). The notice also informed them that an internal investigation would be conducted and further that "until the completion of the investigation" all further "meetings or initiatives" of the council would be placed on hold and that "its meetings and activities" would be "at a standstill until further notice." (GC Exh. 8.)

In keeping with this notice, meetings were held with all the DEI council members from March 23-April 30, 2021. The meetings began with an admonition to the interviewees that the discussions were to be kept confidential and not shared with others. In Kelsey Gray's interview (which was recorded) Gray asked for clarification about the confidentiality and was told by Martin, "I'm telling you not to talk about this, what we've talked about here, um, with anyone but us. So after, after today's conversation, we don't expect you to share your, to compare notes of your conversation that you had with us today with anyone else on the DEI Council or anyone

else in Big Green." (GC Exh. 9 App. A p.2.) A central theme in the meetings was Respondent's reiterated position that the "Statement of Advocacy" violated Respondent's Values Based Behavior and Ethics & Standards of Conduct policies. For example, in Gray's interview Hutchins (Brown) characterized the email as "a direct violation" of the Ethics and Values policy. (GC Exh. 9 App. A p. 4.) After the interviews were concluded no other DEI council meetings were held and for all intents and purposes the "standstill" referenced in Tighe Hutchins (Brown) email became permanent. (Tr. 384.)

C. THE ALLEGED UNFAIR PRACTICES RELATED TO THE DEI COUNCIL.

1) **The Statement of Advocacy was Protected Concerted Activity under the Act**

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 guarantees employees the right 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 7 protects the right of employees to "seek to improve working conditions through resort to . . . channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978). Activity is "concerted" if it is engaged in with or on behalf of other employees, and not solely by and on behalf of the employee. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom *Prill v. NLRB*, 755 F.2d 941, 244 U.S. App. D.C. 42 (D.C. Cir. 1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481, 266 U.S. App. D.C. 385 (D.C. Cir. 1987), cert. denied 487 U.S. 1205, 108 S. Ct. 2847, 101 L. Ed. 2d 884 (1988).

To be protected under Section 7 of the Act, the actions of the employee(s) must be both concerted and for the purpose of "mutual aid and protection." *Fresh & Easy Neighborhood Market, Inc.,* 361 NLRB 151 (2014). The link between the employee(s) actions between their co-workers determines whether it is concerted or not. "The concept of "mutual aid or protection" focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978).

The group action of the council and its decision reached by "consensus" to issue the statement easily meets the concerted element. See *CKS Tool & Eng*'G., 332 NLRB 1578 (2000), (finding concerted activity where group consensus was reached).

Additionally, the "Statement of Advocacy" sought to address what was described as "systemic" and "cultural racism" "present within the structure and culture of Big Green." Discussions among groups of employees that revolve around an employers perceived systemic and/or cultural racism are inherently concerted. See T*rayco of South Carolina, Inc*., 297 NLRB 6730 (1990). *County Regional Opthamology Center,* 317 NLRB 218 (1995*). Hoodview Vending Co*., 359 NLRB 355 (2014).

The Board has also recognized that concerted action seeking to address racial discrimination in the workplace falls within the protection of the "mutual aid and protection" clause and thus protected. *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 1 fn. 2 and 11 (2020); *PruittHealth Veteran Services-North Carolina, Inc.*, 369 NLRB No. 22, slip op. at 1 fn. 1, 8-10 (2020). *Dearborn Big Boy No.3, Inc.*, 328 NLRB 705, 705 fn. 2 and 710 (1999); *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986). *Franklin Iron and Metal Corp*., 315 819 (1994), enfd. 83 F.3d 156 (6th Cir. 1996).

In addition, there is other more direct and compelling evidence that the statement's goal falls within the "mutual aid and protections clause." Amina Bahoul testified that the controversy surrounding the actions which served as the catalyst for the "Statement of Advocacy" directly impacted her interactions with her community partner Chicago Grows Food. She testified that in fact they were advised to not attend future meetings with the group. (Tr. 378.) The position description under which Amina Bahoul, and other Program Coordinators, worked specifically required that she engage with the community as Program Coordinators were the "most direct link" to local schools and school communities. An essential duty of the Program Coordinator contained within the position description was to coordinate gardening and food-based programming activities and services for diverse population of teachers, parent, community members and students. (R. Exh. 2.) The controversy in question was directly impacting an essential element of her job as it related to engagement with other community members and when she raised the issue with the DEI council sought to improve the conditions upon which she and others could continue their work within their respective communities. This easily meets the requirement that the activity have a goal to improve the terms and conditions of employment. Applying the applicable standards to the facts leads to the conclusion that the Statement of Advocacy was both concerted and protected under the Act.

2) **The March 19 and 22, 2021 emails of Robin Martin threatened employees with unspecified reprisals in retaliation for their March 19, 2021 "Statement of Advocacy."**

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct would reasonably tend to restrain, coerce, or interfere with employees' rights guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994); *Sunnyside Home Care Project, Inc.*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American. Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)). It is the General Counsel's burden to prove 8(a)(1) allegations by a preponderance of the evidence. See *Cinelease, Inc. , 2017 NLRB LEXIS 371, *28-29 (NLRB July 19, 2017).*

To assess whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire and Automotive Testing of Texas, Inc.*, 308 NLRB 72 (1992). The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); see also *Wyman-Gordon Co. v. NLRB*, 654

F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). 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, 133 (2001).

Applying the applicable law to the facts of the case, I find that the two email communications individually and when read together could reasonably be interpreted as a threat. On their face the emails openly pledge to hold DEI members "responsible" For what Martin characterized as a violation of the "Values Based Behavior and Ethics & Standards of Conduct." Any reasonable employee who received both emails would reasonably construe the emails as communicating not only a violation of policy but a threat of future action. Moreover, the emails were on their face calculated through the enforcement of the "Values Based Behavior and Ethics & Standards of Conduct" to directly interfere with the employees Section 7 activities. [1]These threats in response to clear and obvious Section 7 activity violated Section 8(a) (1) of the Act.

3) **The meetings with DEI Council Members conducted by Robin Martin and Tighe Brown.**

Whether the questioning of an employee constitutes an unlawful interrogation is governed by the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), In analyzing alleged interrogations under the *Rossmore House* test, the Board looks to 5 factors s "the *Bourne* factors," set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors include:

> (1) The background, i.e., is there a history of employer hostility and discrimination?
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
> (3) The identity of the questioner, i.e., how high was he in the company hierarchy?
> (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
> (5) Truthfulness of the reply.

[1] The second amended consolidated complaint alleged separately a violation of the Act through the maintenance and enforcement of the "Values Based Behavior and Ethics & Standards of Conduct" policy. (See complaint par. (6)(a).) It is undisputed that Respondent both maintained and enforced the policy. It is also undisputed that Respondent repeatedly corelated engagement of concerted and protected activities with a violation of the policy it sought to enforce. Assuming the "Values Based Behavior and Ethics & Standards of Conduct" policy was otherwise lawful, applying a lawful rule to restrict the exercise of Section 7 rights violates the Act. *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 8 (2021). Accordingly, the enforcement of the policy separately violated the Act.

It is important to note that these factors "are not to be mechanically applied in each case." *Rossmore House*, 269 NLRB at 1178 fn. 20. Determining whether employee questioning violates the Act does not require "strict evaluation of each factor; instead, 'the flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'" *Perdue Farms Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998), quoting *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987). See also *Westwood Health Care Ctr.*, 330 NLRB 935, 939–940 (2000).

The analysis of the totality of the circumstances must begin with the backdrop under which the interviews were conducted. The interviews came directly on the heels of emails from Martin which alleged direct violation of policy and the assertion that people need to be held accountable and the direct threat to "hold the entire council responsible and respond accordingly." (GC Exh. 6). The meetings themselves were conducted by high-level officials which included the President and were not voluntary. The employees were advised that the interviews were confidential. During the meetings, the employees were advised that they in fact had violated the employer's policies (GC Exh. 9 App. A GC Exh. 16, App. A, 17 App. A). During the meetings, the employees were directly asked about the discussions during the DEI council meeting and how the decision was made to send the "Statement of Advocacy." (GC Exh. 9 App A, GC Exh. 16 App. A p. 3).

Applying the *Bourne* factors to these facts, and considering the totality of the evidence, including the mandatory nature of the meetings, the threats from Martin, the high level officials who conducted the meetings , the allegations of policy violations, and the inquiry into the substance of discussions of the group all point to interrogations that would reasonably tend to restrain, coerce or interfere with rights protected under the Act and thus were unlawful and violated Section 8(a)(1) of the Act.

4) **The Confidentiality Directive Given During the "Investigation" of the Statement of Advocacy**

Questions about confidentiality requirements are analyzed under the principles set forth in *Stericycle Inc.*, 372 NLRB No. 113 (2023). Under *Stericycle,* the General Counsel has the burden of proving that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. In *Stericycle*, the Board, noted that it "will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity. Consistent with this perspective, the employer's intent in maintaining a rule is immaterial. Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain." *Id*.

The oral admonitions during the investigation regarding confidentiality did not have any durational limitations. During the interview of Kelsey Gray (after Gray asked for clarification of the confidentiality requirement) Martin was direct in her admonition stating:

> I'm telling you not to talk about this, what we've talked about here, um, with anyone but us. So after, after today's conversation, we don't expect you to share your, to compare notes of your conversation that you had with us today with anyone else on the DEI Council or anyone else in Big Green. (GC Exh. 9 App. A P. 2.)

An employee receiving this directive would have reasonably understood it to be not limited in duration. Given the unlimited duration of the confidentiality instruction a reasonable employee would view this directive as having a coercive meaning and would reasonably tend to chill Section 7 activity.

It is readily apparent that the confidentiality instruction of unlimited duration in this case directly implicates employees Section 7 rights. It prohibits activities that are at the very heart of Section 7. Namely, the ability to seek out coworkers to discuss workplace issues such as potential discipline. A cornerstone of the Act is that it gives employees the ability to speak with each other to seek each other's help and advice and through these interactions protect each other at work. The nondurational confidentiality instruction deprives them of that. I therefore find that General Counsel has met her burden under *Stericycle.*

The question under *Stericycle* thus becomes whether Respondent has proven that the rule advances legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. In as much as Respondent has offered no legitimate business justification for the non-durational confidentiality instruction the directive was unlawful and violated Section 8(a)(1) of the Act.

D. The Media Inquiry Policy

Paragraph 6(b) of the complaint alleged that Respondent's Media Inquiry policy restricted protected activities and violated the Act. The provision in question provided as follows:

> [E]mployees, visitors, partners and representatives should refrain from speaking to reporters or other members of the media without explicit permission from the president. (GC Exh. 26.)

In as much as it is readily apparent that the media contact rule contains no limiting language regarding confidentiality or speaking on the employer's behalf and contained no limitations regarding what topics required pre-approval thus any topic relating to terms and conditions of employment or working conditions are swept under the broad prohibition. As such, the rule can be reasonably construed to directly impact established Section 7 rights. See for example, *Valley Hosp. Med. Ctr., Inc.* , 351 NLRB 1250, 1252 (2007) (holding that Section 7 protects employee communications to the public including communications about labor disputes to newspaper reporters). See, also, *Hacienda de Salud-Espanola,* 317 NLRB 962, 966 (1995) Moreover, as noted in *Trump Marina* Associates, LLC 354 NLRB 1027 (2009), "to the extent that an employee is required to obtain permission before engaging in protected activity, that

requirement is an impediment to the full exercise of an employee's Sec. 7 rights." *Id.* at fn. 3. Under longstanding Board law employees do not need the Respondent's "explicit" permission, written or otherwise, to engage in protected activities. *Brunswick Corp.*, 282 NLRB 794, 798 (1987); and *Baldor Electric Co.*, 245 NLRB 614 (1979). See also See *Lowes Home Cntrs.*, LLC v. NLRB 850 Fed. Appx 886 (5th Cir. 2021).

An employee who was subject to the rule and economically dependent on the employer would find that it chilled the exercise of their rights and was coercive. Thus, the rule is presumptively unlawful. See *Stericycle* supra.

In as much as Respondent failed to establish that legitimate business interests could not be advanced with a more narrowly tailored rule it was unlawful and violated Section 8(a)(1) of the Act.

1. The Flubbin Show Podcast

On or about July 26, 2021, Program Coordinator Coleen Donohoe called into a podcast approximately 1 month after the unionization effort had gone public. The podcast aired live on the website Street Fight Radio and streamed live on "the Flubbin Show." (Tr. 498–499). The on-air conversation began with some introductory back and forth with Donohoe giving general background about Respondent's activities and its history. The interviewer then directly asked "so what kind of challenges are you running into trying to unionize Big Green." (GC Exh. 25 App A p. 2) She responded,"

> Well, initially we are just asking to be recognized. We don't really negotiate any contract details until the Union is official, so we can't really ask them for anything until they will negotiate with the Union and for that they have to recognize that we are a Union, so the first step is just to get them to recognize that we are a Union, and the next, you know, since they have declined to do that voluntarily, we go this hearing on August 5 and these expensive attorneys on their side will make their case that none of us are eligible for the Union, and our attorney is going to refute that, and so we will have witnesses saying, no that's not true, that's not what we do, that's not part of our job. Umm, and so that is up to the person in the National Labor Relations Board who is going to hear our case on August 5, whether or not we are eligible, and if we are, then we will have an election, and we are confident we have the numbers to win the election if we can get to that point, but you know, attorneys are paid a lot of money for a reason so we will see how it goes." (GC Exh. 25 App A. P. 5.)

The interview continued and when queried how others could support their efforts, she encouraged members of the public to show their support via social media postings. She went on to express her frustrations with the lack of voluntary recognition stating: "I mean, I am extremely disappointed that with a nonprofit who raises money from philanthropists and donors across the country, it would choose to use, presumably use Big Green money to fight, you know, their own workers rather than use those funds to improve our programing or to maintain our gardens or to build new gardens, that just blows my mind." (GC Exh. 25 App. A. p. 7.)

Subsequently on July 29, 2021, Dianna Zeegers, over a video chat contacted her regarding her call in to the podcast. In the conversation, she reprimanded Donohoe advising her that she violated the media policy and that if she, "continued to speak publicly in that way about the organization," her employment "could be in jeopardy." (Tr. 503.) She then advised Donohoe that she would follow up the conversation with a written email.

As promised, Zeegers sent an email out on July 29, 2021, With Media Policy as the subject line. The email was to the point. It advised Donohoe in part, "Big Green has a media policy and your participation in the podcast was a direct violation of that policy. All media inquiries are to be run through the President's office for discussion and approval." (GC Exh. 26 p.1.) She reiterated her position that in her view Donohoe violated policy indicating that, "[w]hile I understand that you are welcome to speak about the Big Green Union outside of work hours, speaking about Big Green with a media outlet, without the approval of the President is a violation of the policy. Had you adhered to the policy, some of your comments would not have been approved given your role as a Big Green employee." (GC Exh. 26 p. 1.) She ended the email with the following language, "[t]his violation of our policy has been noted in your file and if it occurs again will be evaluated for dismissal from the organization. Please respond to this note with acknowledgment of receiving." (GC Exh. 26 p. 2.)

2. Donohoe's Call in to the Podcast Was Protected Concerted Activity and Union Activity

It is clear from a review of the transcript of the interview that Donohoe was calling in not only to inform the public of her and her coworkers' efforts to form a union but also to elicit public support from others. As noted in *NLRB v. ME. Coast Regional Health Facilities*, *NLRB v. Me. Coast Reg'l Health Facilities*, 999 F.3d 1, 10 (1st Cir. 2021), "concerted activity may also arise where employees use "channels outside the immediate employee-employer relationship" to air shared grievances. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978). Employee outreach to media outlets and governmental bodies has thus been found to be concerted activity. See *Five Star Transp.*, 522 F.3d at 48–52 (affirming finding of concerted activity where bus drivers, following meeting with union, individually sent letters to school district raising group concerns); *Allstate Ins. Co.*, 332 NLRB 759, 759, 765 (2000) (finding concerted activity where a group of employees criticized employer in magazine interview); *see also Mount Desert Island Hospital*, 259 NLRB 589, 592 (1981) (finding concerted activity pre-Meyers where nurse wrote letter to editor after discussions with other staff and subsequently circulated a petition that was published by the newspaper). See also *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (2011) (quoting *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000), "'employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute[2]

[2] The Act defines "labor dispute" broadly to include "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.". 29 U.S.C. § 152(9). Donohoe's activities fall squarely within this definition.

between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.'"

Just as in the above cited case, Donohoe's call in to the podcast was an obvious attempt to reach out to the media. This was acknowledged by Respondent's own characterization of her action as a media policy violation and the threatened discipline was for alleged violation of that policy. The Board has long held that "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are a logical outgrowth of the concerns expressed by the group." *Mike Yurosek & Son, Inc*., 306 NLRB 1037 (1992), enfd. 53 F.3d 261 (9th Cir. 1995), See also *Int'l Bhd. of Teamsters, Loc.* 70, 372 NLRB No. 19 (2022). It is readily apparent that the concerns expressed by Donohoe were the logical outgrowth of the Respondent's failure to voluntary recognize the union and the concerns of the group and thus concerted.

The expressed goals of Donohoe render her activities protected. She openly expressed that the impetus of unionization was an effort to improve the groups "lot as employees." She stated, "we took a very positive route, and wanted to stay extremely positive about the work that we do, and why we are forming a Union, and not drag the company, not try and like sling mud or anything, um, but just say, we do this because we love what we are doing and we just want to make it better, we just want to have, we really want to have long-term sustainable careers with the organization, and part of that is this, you know, having this protection of the Union. (GC Exh. 25 p. 6.)[3] She then asked for the help of listeners to support the union's efforts. In essence, Donohoe was simply utilizing channels outside of the immediate employee-employer relationship to achieve the expressed group goal to improve working conditions through union activity and her actions were thus protected.

In addition to being protected and concerted activity, Donohoe's call-in was union activity protected by Section 8(a)(3) of the Act. See *Me. Coast Mem'l Health*, 369 NLRB No. 51, slip op at. 13 (2020), noting specifically that, "it is clear that an employee engages in protected union activity when he or she supports the efforts of a union." There is no question that Donohoe was explicitly supporting the efforts of the union in her request for public assistance.

I also find that at no time during the call did Donohoe lose protection under the Act. *NLRB v. Electrical workers Local 1229*, 346 U.S. 1953 (1963) (Jefferson Standard) applies to public statements of disparagement and created a standard under which mere disloyalty may lose protection under the Act. The other applicable standard is derived from *Linn Plant Guards,* 114, 383 U.S. 53 (1966), which held that statements made with "knowledge of its falsity, or with reckless disregard of whether it was true or false would result in the loss of protection under the Act.

The record is devoid of evidence which would support loss of protection under the Act under either standard. Nothing in Donohoe's responses to the interviewer were in any way disloyal or disparaging. In fact, she never in any way made any disparaging remarks regarding

[3] It is important to note when referencing the goals that she repeatedly refers not to herself singularly but to the group repeatedly using the term "we."

the services Respondent provided. On the contrary, she spoke positively about her work and that of her colleagues and Big Green.

During one portion of her interview, she explained what motivated her and her co-workers stating,

> [w]e do this because we love what we are doing and we just want to make it better, we just want to have, we really want to have long-term sustainable careers with the organization, and part of that is this, you know, having this protection of the Union.
>
> We are, we are not trying to harass or troll anyone, yet.[4] [laughing]. It may get to that point, but I can say with 100% confidence that I truly am, love the job that I have, I love working in schools, directly with schools and teachers teaching about food literacy and food apartheid in food systems so there is more awareness and understanding about how these disparities have come to be in what kind of food people have available to them. It's really, really important work and highlighting the importance of that work on the ground, which is what the program coordinators and our project managers who design and build the gardens do, umm and you know that we value this work, we value place in the community, and we'd love to see Big Green recognize our Union (GC Exh. 25 p. 6–7 App. A).

There is not a hint of disloyalty or disparagement of Big Green's work in schools and or the community rather the comments are focused on the desire to have Big Green recognize the Union.

During one portion of the interview, she expressed her frustrations with the fact that Respondent wouldn't voluntarily recognize the union stating,

> I mean, I am extremely disappointed that with a nonprofit who raises money from philanthropists and donors across the country, it would choose to use, presumably use Big Green money to fight, you know, their own workers rather than use those funds to improve our programing or to maintain our gardens or to build new gardens, that just blows my mind. But, you know, that's the world we live in and, you know, I am not surprised with, uh, our founder being who he is and that history of the Musk family, that they wouldn't be initially receptive to a Union, but they could always change their minds and they could choose to do the right thing and to recognize our Union. (GC Exh. 25 App. A.)

Donohoe's stated disappointment does not equate to disloyalty or disparagement when read in context with her other statements referenced above. Similarly, any supposition regarding use of "Big Green money" to "fight their own workers" was merely her logical conclusion and opinion drawn from facts that she knew to be true, (and about which there is no dispute) the

[4] Zeegers in her July 29, 2021, email asserted that this statement was a threat "to troll Big Green accounts." Listening to the interview the only reasonable conclusion to be drawn from the statement is that it wasn't a threat but merely a lighthearted comment which was followed up by her laughter. It was simply a joke which Zeegers mischaracterized in her email as a threat.

organization is a non-profit, it raised money from donors, and Big Green on July 1, 2021, refused to recognize the union. Zeegers alleged that Donohoe was "claiming misuse of donor dollars." (GC Exh. 26.) Donohoe however never mentioned "misuse" of donor funds. Alleging that an organization "misused funds" is entirely different from lamenting the fact that an organization is expending resources to counter unionization which is exactly what Donohoe was communicating. The fact that her suppositions may have been inaccurate nevertheless would not render them unprotected. See *Valley Hospital*, 351 NLRB 1250, 1252 (2007), enfd. 358 Fed. Appx. 783 (9th Cir. 2009).

Respondent has the burden to establish that the comments were maliciously untrue, i.e., were made with knowledge of their falsity or with reckless disregard for their truth or falsity. *Springfield Library & Museum*, 238 NLRB 1673, 1673 (1979). Respondent failed to meet this burden; there is no basis for finding that Donohoe's statements were maliciously untrue. An objective review of the entirety of the interview reveals the one thing that is absent from her comments during the podcast is any hint of malice.

3. The Interrogation of Donohoe by Zeegers on July 29, 2021, Violated the Act

Applying the previously referenced *Bourne* factors, it is undisputed that Zeegers met with Donohoe virtually to advise her that she violated the unlawful media inquiry policy. Zeegers was a high ranking official in the organization, she directly asked Donohoe about her concerted and protected/union activities, i.e., her call in to the Flubbin Show podcast, the interview was coercive in nature and included threats of termination and she was specifically directed to refrain from engaging in concerted and protected/union activity without first receiving the President's permission. Under all the circumstances, the interrogation reasonably tended "to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB at 1178 fn. 20. Therefore, I find that the interrogation was violative of Section 8(a) (1) of the Act.

4. Zeegers threats of Termination

In it undisputed that during the video call and in the follow up email Zeegers threatened Donohoe with discipline and termination noting specifically that she would be "evaluated for dismissal from the organization" if she engaged in protected and concerted and/or union activity. (GC Exh. 26.) Considering the totality of the circumstances, I find that the statement when viewed objectively would tend to coerce a reasonable employee and can reasonably be interpreted by the employee as a threat. *Smithers Tire and Automotive Testing of Texas, Inc.*, 308 NLRB 72 (1992). Accordingly, the threat to terminate violated Section 8(a)(1) of the Act.

5. Zeegers Prohibited Donohoe from engaging in Section 7 Activity

It is undisputed as discussed above that Zeegers placed specific restrictions on the Section 7 activity of Donohoe and in particular the restriction imposed by the unlawful media policy that Donohoe seek approval from the president before engaging in Section 7 activity.

Maintaining the record of the alleged violation of the unlawful media policy in Donohoe's file to be used for discipline in the future if Donohoe exercised her Section 7 rights was also a stand-alone violation of the Act.

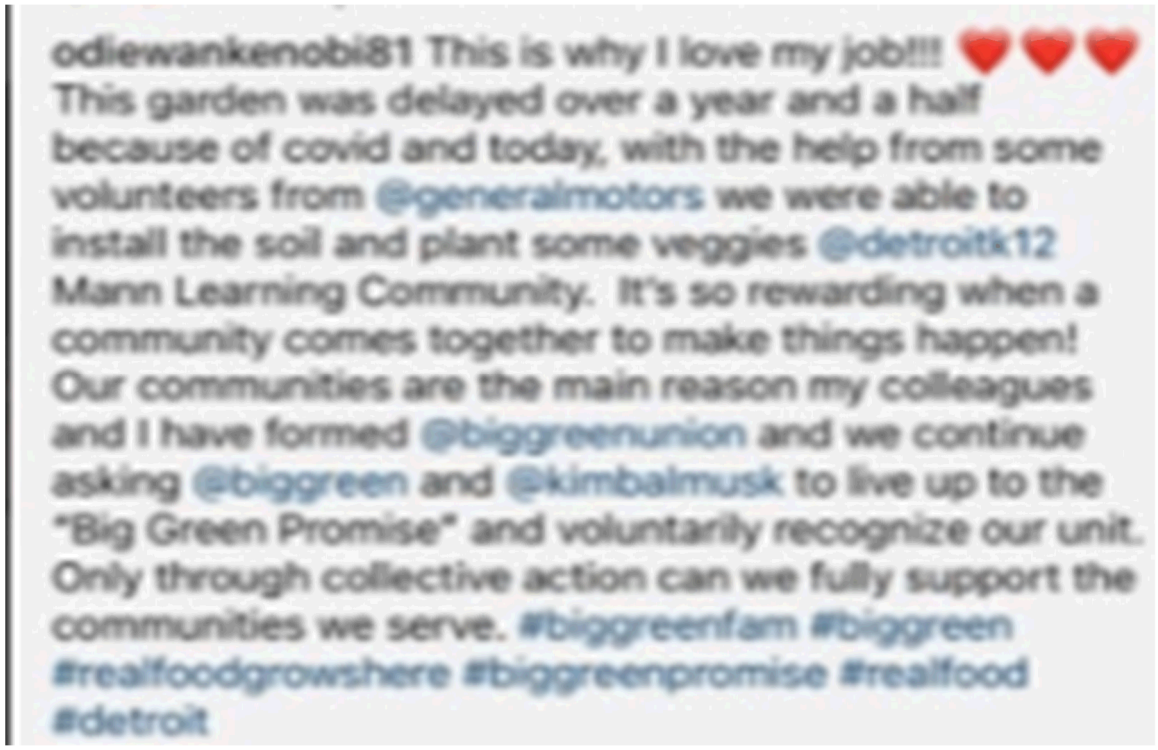
Since the causal connection between the protected/and or union activity and the maintenance of the record are established, the only issue to determine is whether the activity lost protection under the Act. Since, as discussed above, it did not, the inquiry ends and a finding of a violation of Section (8)(a)(1) is warranted. See *Phoenix Transit System*, 337 NLRB 510 (2002). Given the clear and obvious nature of the (8)(a)(1) violation it is unnecessary to determine whether Respondent's actions also violated Section 8(a)(3). See *Mast Adver. & Publ'g, Inc.* , 304 N.L.R.B. 819, at 820 fn. 7 (1991), *Dougherty Lumber Co.* , 299 NLRB 295 (1990), *U.S. Postal Service*, 250 NLRB 4 (1980).

Nevertheless, in as much as Donohoe was currently involved in Board processes and directly mentioned the upcoming hearing stating, "we go (sic) this hearing on August 5." (GC Exh. 25 app. A p. 5.) Section 8(a) 4 is also implicated. It is clear that Donohoe engaged in protected concerted and union activity, that she received discipline in the form of the negative entry into her employment record, Zeegers (from Donohoe's own statements) knew of her intended participation in upcoming Board proceedings (and her protected, concerted and union activity), and her discipline was premised on a policy that was unlawful and violated Section 8(a)(1), thus establishing the requisite causal connection and animus. *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982); *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 113 LRRM 2857 (1983). Respondent failed to show that it would have given Donohoe the same discipline in the absence of the application of the unlawful policy thus a finding that Respondent violated Section 8(a) (1), (3), and (4) is also warranted.

E. The Odie Avery Instagram Posts

On or about July 29, 2021, Odie Avery posted photos from his personal Instagram account of a community event at one of the elementary schools in Detroit. (Tr. 704.) The event was part of a community cleanup day organized by a group called Rouge Cody. The purpose of the event was to clean up the school prior to reopening for the school year. There were approximately 25 to 30 volunteers including those of from Rogue Cody, Big Green, General Motors, and school staff. (Tr. 708.)

The first picture posted was of the Detroit staff cleaning up the garden which included Johnathan Pavley, program coordinator, Emma Detrich, program coordinator, and Ava Jackson, program manager. (GC Exh. 31.) The second photo was of the herb starts that were planted in the garden. The third, fourth and fifth photos were of clean up and included Johnathan Pavely and Emma Detrich. (GC Exh. 31.) Each of the posted photos contained the following text:



The Instagram post tagged General Motors, Big Green's social media account, the Detroit Public School system, Kimbal Musk, and the Big Green union group. That very evening, Avery received an invite for a Zoom Meeting with Robin Martin scheduled for 9:30 a.m. the next day. The meeting was held which included Robin Martin and Dianna Zeegers who at that time held the title of National Director of Program (Tr. 718). During the meeting only Martin spoke and Zeegers took notes. At the start of the meeting, Martin advised that she was there to talk to about his posting to social media during work time. Avery became uncomfortable and asked for a representative. The request was denied, and the meeting continued. Martin began by alleging that he violated company policy because he didn't request Flexible Time Off to post on Instagram to which he responded he was on his personal time as he posted the photos on his lunch break. (Tr. 721). Martin then accused him of sharing "proprietary information" which she characterized as a violation of the Ethics and Standards of Conduct Policy. (See GC Exh. 5 at 9-10). When he questioned what she considered "proprietary" she responded, "posting about GM when that is not public information that is proprietary." (GC Exh. 32.) When he tried to explain that he didn't share any "proprietary" information but instead merely was acknowledging the volunteers who participated in the community event, she accused him of being argumentative. (GC Exh. 32 p. 2.) She inquired about why he tagged other entities including the union group and he replied that it was a "community effort," and a "very positive experience" and was sharing what they do in their work. (Tr. 722.) She then advised him that he posted on a union website during work hours. He attempted to explain that he didn't post on any union website, but that he merely "tagged" them. She advised that other coworkers had complained about their pictures appearing in his post without him receiving their permission. He indicated that it was his personal Instagram account and that, "everyone does that, everyone takes photos and posts on their personal accounts on social media of BG events all the time" (GC Exh. 32). She finished the meeting by advising him that, "[s]o, we are not permitting you to go to any school where you have to go on site because we need to gather additional information about 1). your use of work time to participate in personal activities, 2). your use of proprietary information, and 3). your use

of photos of BG employees without their permission." (GC Exh. 32 p. 4.) She clarified the restriction stating, "[i]f you need to go to a school for maintenance, you need to talk about that activity with me prior to you going to make sure that it is a necessary visit. To be clear, your work is not being put on hold. Your presence on a school site at BG events is what is being restricted." (GC Exh. 32 p. 4.)

The meeting ended and Martin followed up with an email on July 30, 2021, which included a short summary of the conversation. (GC Exh. 33 p. 2.) Avery, on July 30, 2021, sent his team members a text advising of the reprimand and the site visit restriction imposed by Martin. (GC Exh. 34.) On August 2, 2021, Avery sent an email responding to Martin's summary email. In it, he denied that the post occurred on work time, denied he violated the Ethics and Standards of Conduct Policy, denied he exposed proprietary information, and denied violating any policy regarding taking or posting of photos. (GC Exh. 33.)

1. The Denial of the Request for Assistance Before the Interview

Paragraph 10 (a)(c) of the second amended consolidated complaint alleged a violation of Section 8(a)(1) however General Counsel concedes that under current law, *IBM Corp*., 341 NLRB 1288 (2004), unrepresented workers are not entitled to *Weingarten* rights. Accordingly, Respondent's denial of Avery's request to have a union or other representative present was not unlawful and this complaint allegation is dismissed. (See GC Br. At 130–131).

2. The Interrogation of Avery by Martin

Applying the previously referenced *Bourne* factors to the interrogation and considering the totality of the evidence, including the mandatory nature of the meeting, the general accusatory nature of the meeting, the allegations of numerous policy violations, the restriction of his ability to go on site to any school at Big Green events all point to an interrogation that would reasonably tend to restrain, coerce or interfere with rights protected under the Act and thus were unlawful. The interrogation was directly aimed at restricting his ability to engage in Section 7 activity which might occur in relation to attendance at Big Green events, I therefore find that the interrogation violated Section 8(a)(1).

3. The Suspension of Avery

As an initial matter, it is important to note that Avery's post was protected, concerted and union activity. In his post, he was without question advocating on behalf of not only himself but his fellow employees for the voluntary recognition of the union. Thus, was concerted with the goal of mutual aid. In view of this finding, the next question becomes whether despite the protections afforded under the Act whether he lost protection under the Act. The analysis is like that set forth above in relation to Donohoe. The Board has in fact utilized the same *Jefferson Standard* and *Linn* analysis specifically in relation to off duty social media posts. See *Triple Play Sports Bar & Grille* , 361 NLRB 308, 308 (2014), holding, "under Section 7, employees have a statutory right to act together "to improve terms and conditions of employment or otherwise improve their lot as employees" including by using social media to communicate with each other and with the public for that purpose."

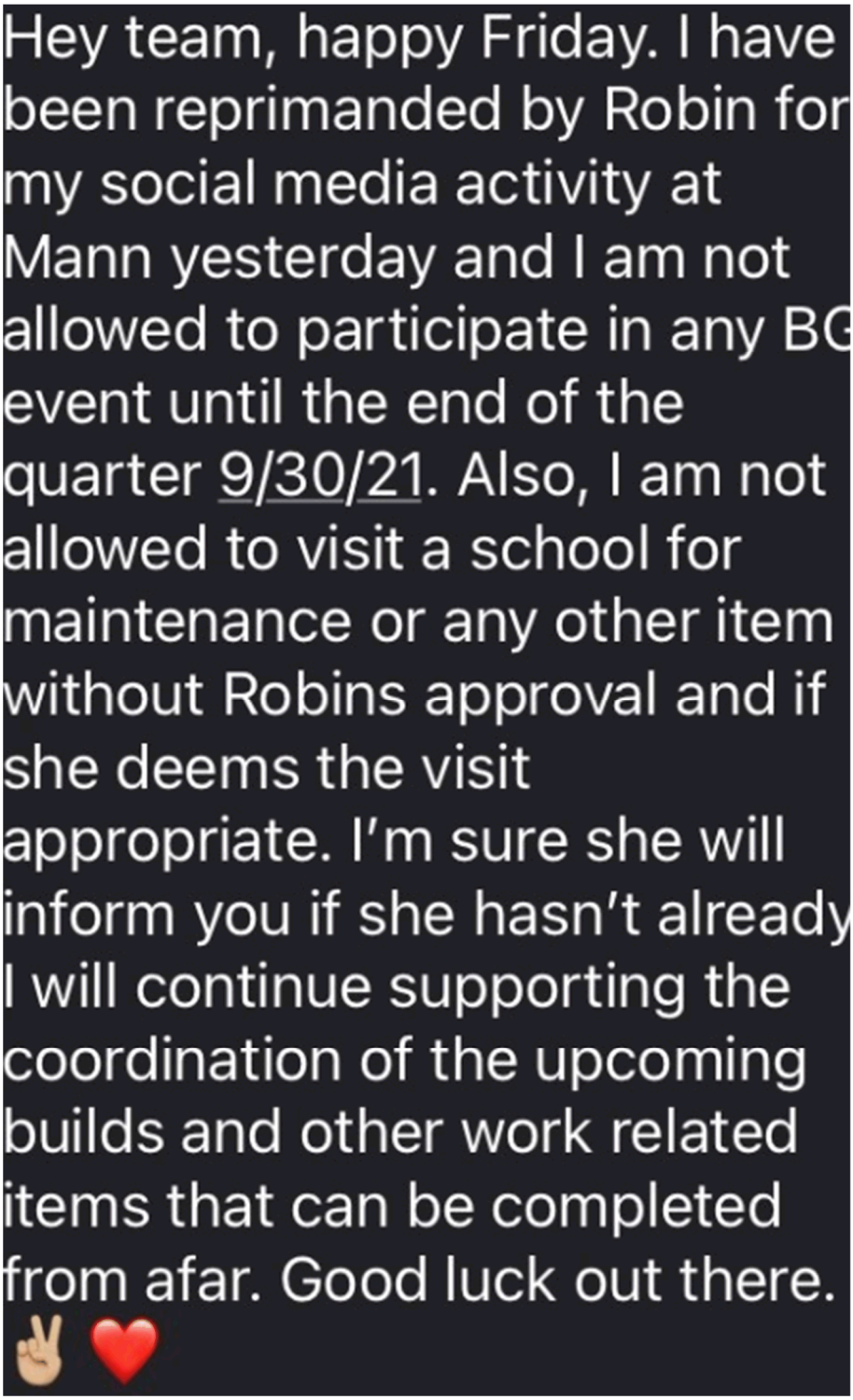
Applying these standards to the facts it is plainly obvious that Avery's social media posts are not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.'" *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (2011) (quoting *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000). On their face, the posts show no disloyalty. Avery in fact says, "I love my job," and posts multiple heart emoji's. He further comments that the event was "rewarding." Nor is there any hint of anything reckless or maliciously untrue about the posts. Asking Respondent to live up to the Big Green promise simply does not rise to the level of actual malice. Therefore, I find that Respondent violated Section 8(a)(1) of the Act.

It is also evident that applying *Wright Line,* a violation of 8(a)(3) and (1) is established. Without question, Avery was involved in union activity, which Respondent was aware of, he was suspended the day after the activity within a time frame that unlawful retaliatory motives can be inferred. Thus, establishing a prima face case *under Wright Line*. Respondent and Martin specifically alleged that Avery violated policies however a reasonable inference to be drawn from the evidence is that the alleged violations were merely pretext concocted to punish him for making his union support public and tagging others. Respondent's allegation that he disclosed "proprietary information" appears to be a violation manufactured to come up with a reason to discipline him. By merely tagging General Motors when he was off duty, he didn't expose any "proprietary information." Secondly, the policy itself defines "proprietary information" as non-public. Merely "tagging" General Motors and others who participated in a public community event with pictures or information about that public event falls squarely outside Respondent's own policy definition. So too, the notion that he violated policy by including pictures of his co-workers falls flat when individuals routinely posted pictures of coworkers at Big Green events on their social media pages. Although the coworkers may have objected to being included, they were free to directly express their objections by responding to his post. As noted above, workers need not ask their supervisors for permission to engage in Section 7 activity and the same holds true for coworkers. Moreover, requiring an employee to seek co-worker approval is simply a methodology calculated to chill legitimate union solicitations. As noted in *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998), legitimate solicitations "do not lose their protection simply because a solicited employee rejects them and feels "bothered" or "harassed" or "abused" when fellow workers seek to persuade him or her about the benefits of unionization.

Respondent has failed to demonstrate that it would have taken the same action against Avery in the absence of his engaging in union activities. I therefore find that Respondent violated Section 8(a) (3) and (1) of the Act.

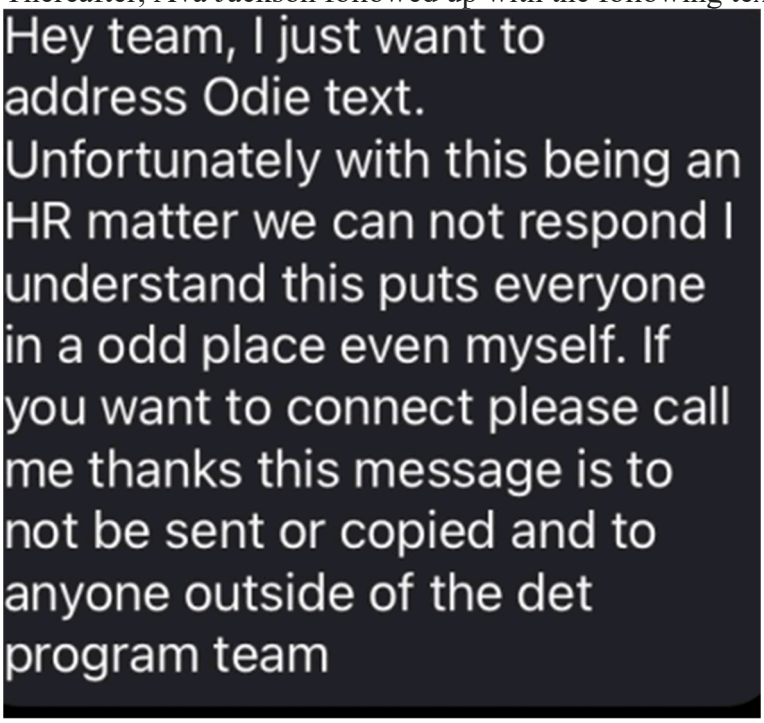
4. Ava Jackson's Instruction to Employees

On July 30, 2021, Odie Avery sent the following text to Program Mangers Emma Dietrich and Johnathan Pavley and the Program Manager Ava Jackson:



Emma Dietrich replied, "thanks for the heads up." (Tr. 993.) Later during a phone call, Ava Jackson advised her that she wasn't "allowed to reply to his message because it's an HR matter and we're not allowed to discuss HR matters." (Tr. 994.) To which Dietrich responded, "oh really, I didn't know that….okay, I guess I won't discuss it anymore with him." (Tr. 996.)

Thereafter, Ava Jackson followed up with the following text:



(GC Ex. 53 p. 2).

The Board has specifically held that, "employees not involved in a disciplinary investigation are free to discuss discipline or incidents that could result in discipline without a confidentiality limitation, and employees who are involved may also discuss them, provided they do not disclose information that they either learned or provided in the course of the investigation." See *Apogee Retail LLC d/b/a/ Unique Thrift Store*, 368 NLRB No. 144, slip op. at 8 (2019). Emma Dietrich was in no way involved in the discipline or investigation and thus the restriction imposed by Jackson was a direct restraint on her Section 7 rights. The restriction wasn't limited to any investigation but instead was a blanket prohibition without any limitations durational or otherwise. In view of this direct interference with Section 7 rights the rule had a reasonable tendency to chill employees from exercising their rights. See *Stericycle* supra. I find no employer justification sufficient to meet its burden of showing it could not have advanced its interests with a more narrowly tailored rule. Accordingly, I find that Ava Jackson's actions violated Section 8(a)(1) of the Act.

F. The Reorganization and Termination of Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa Bastides, and Sarah Burns.

On September 13, 2021, Respondent restructured its operations resulting in the elimination of the work of program managers, and program coordinators and the termination of Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa Bastides and Sarah Burns. General Counsel alleged that the actions of Respondent violated Sections 8(a)(1), (3), (4), and (5) of the Act.

Under *Wright Line*, General Counsel must make a showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 NLRB at 1089. The Board may infer a discriminatory motive from direct or circumstantial evidence. *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997). After the General Counsel makes this showing, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct." *Healthcare Emps. Union*, 463 F.3d at 919 (quoting *Wright Line*, 251 NLRB at 1089). An employer cannot prove this affirmative defense where its "asserted reasons …are found to be pretextual." *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 637 (2011).

The Board has consistently held that a broad range of circumstantial evidence can support a finding of unlawful employer motivation. This includes the employer's knowledge of the employee's union activities, the employer's hostility toward the union, the timing of the employer's action, and other unlawful acts. Timing alone may be sufficient to establish that antiunion animus was a motivating factor in a discharge decision." *Sawyer of NAPA,* 300 NLRB 131, 150 (1990). See *Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909 (9th Cir. 206), holding that "courts have consistently treated an employer's adverse employment action occurring between the filing of a petition for a representation election with the Board and the ensuing election as raising a powerful inference of anti-union animus. *See*, *e.g.*, *E.C. Waste, Inc.*, 359 F.3d at 43 ("[T]he probative value of the timing of the Company's action - firing [an employee] in the critical interval between the time that the Union filed its petition for recognition and the planned representation election—is obvious."); *Joy Recovery Tech. Corp.*, 134 F.3d at 1314 (concluding that "[i]n this case, timing is everything," where "[t]he closing of the department comes on the heels of the union's organizational activity," including filing a petition for a representation election); *Power, Inc.*, 40 F.3d at 418 ("The timing of the layoff, just two weeks before the scheduled union election, gives further credence to the charge of anti-union animus."); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (concluding that "[t]he timing of the layoffs and warehouse closing provides the strongest support for connecting anti-union sentiment with the layoffs," where the layoffs and warehouse closing closely followed a demand for union recognition)."

All the above indicia of discriminatory motive are present in this case. There is no dispute that employees engaged in union activities, that the employer was aware of those activities and that the actions in question occurred thereafter. [5] The employees were notified of the elimination of their positions within days of the participation of union supporters in a Board pre-election hearing. The timing alone raises a strong inference of anti-union animus. This case presents much more evidence of animus than just timing. As discussed above, there is established evidence of unlawful hostility toward union activity that took the form of

[5] The employer was first informed on June 29, 2021, when Coleen Donahoe sent the email requesting voluntary recognition. Odie Avery sent a follow up email on July 1, 2021, requesting a response by July 1, 2021. The request for voluntary recognition was acknowledged by the President Tighe Brown the president on July 1, 2021, in an email in which she informed that Big Green will not be voluntarily recognizing the union. (GC. Exh. 56.). The emails advising the employees of the elimination of their positions were emailed and sent via Federal Express on September 13, 2021, and advised that, "effective Monday, September 13, 2021, your position has been eliminated. Your last day of employment with Big Green is Monday, September 13, 2021." (See GC Exh. 39).

interrogations, discipline, and confidentiality orders. The totality of all this evidence is sufficient to meet General Counsel's burden under *Wright Line*.

Respondent's stated reason for its action was set forth directly in its letters to the employees advising them that their jobs had been eliminated. The letter stated the following: "As you are aware Big Green has been undergoing an organizational restructure for the past several months. After a critical review of our operating model and the ongoing impacts of COVID-19 we've decided to revamp our engagement with schools. Delivery of our impact and mission will now take the form of providing grants and other opportunities to schools and enable them to create healthy places for kids." (GC Exh. 39).

A discussion of whether Respondent has met its burden cannot occur without first addressing the critical issue presented by General Counsel's Motion for Evidentiary Sanctions as it directly implicates any resolution of the question of whether Respondent has, as a matter of law, met its burden. General Counsel filed a motion for evidentiary sanctions arguing *inter alia* that Respondent failed to comply with Subpoenas Duces Tecum B-1-FXZQFL and B-1-1GP2YWV. In its motion, General Counsel asserted that evidentiary sanctions were appropriate given Respondent's non-compliance with the subpoenas. Respondent responded to General Counsel's Motion denying that sanctions were appropriate.[6] After considering the matter fully, I find that evidentiary sanctions are warranted. This finding is supported by the testimony of Respondent's custodian of records who was called to testify and who testified that documents sought under the subpoena were either not collected or were collected and never turned over to General Counsel. Some of the information sought and which was not produced goes directly to the heart of the issues presented in the case. Respondent failed to produce, "emails or other communications associated with board meeting minutes between January 1, 2020, and January 1, 2022." and some question remains regarding whether the meeting minutes that were produced were in fact the complete record of all minutes including executive session minutes. (Tr. 1307–1308.) General Counsel also sought information related to job postings and employee personnel files. The custodian of records testified the information was collected but the information was not produced.[7] (Tr. 1354–1357). This information was directly related to Respondent's defenses and critical to determine whether its assertions could withstand scrutiny against the documentary record. The failure to produce this evidence was prejudicial to the General Counsel depriving it, this administrative law judge, the Board, and any applicable Federal Court of information which goes to the heart of the legal viability of Respondent's defenses.

The Board has repeatedly recognized the authority of the administrative law judge to impose sanctions in the appropriate cases. See for example, *McAllister Towing & Transportation*, 341 NLRB 394, 396–397 (2004) (upholding judge's imposition of evidentiary sanctions against the respondent for failing to substantially comply with the subpoenas upon issuance of the judge's order partially denying its petition to revoke on the first day of hearing), enfd. 156 Fed. Appx. 386, 388 (2d Cir. 2005). See also *San Luis Trucking*, 352 NLRB 211, 212 (2008), reaffd. 356 NLRB 168 (2010), enfd. 479 Fed. Appx. 743 (9th Cir. 2012). *Shamrock Foods Co*., 366 NLRB No. 117, slip op. at 1 fn. 1, 15, and 29 (2018) (respondent's contumacious

[6] The entire procedural history of the issue is set forth accurately in General Counsel's motion.

[7] A more comprehensive description of other items that were not produced and the "slow walking" production is chronicled in General Counsel's brief. (See for example Tr. 1308).

failure to produce subpoenaed records warranted adverse inference that they would have corroborated the testimony of employees), enfd. per curiam 779 Fed. Appx. 752 (D.C. Cir. July 12, 2019); *Sparks Restaurant*, 366 NLRB No. 97, slip op. at 9–10 (2018) (respondent's failure to produce subpoenaed records warranted adverse inference that the records would not have supported respondent's position), enfd. 805 Fed. Appx. 2 (D.C. Cir. 2019); *Chipotle Services, LLC*, above, slip op. at 1 fn. 1, and 8 (failure to produce warranted adverse inference that would have revealed disparate treatment and supported the allegation that the named discriminatee was unlawfully terminated); *Metro-West Ambulance Service*, 360 NLRB 1029, 1030 and fn. 13 (2014) (respondent's unexplained failure to produce warranted an adverse inference that they would not have supported respondent's position); and *Essex Valley Visiting Nurses Assn*., 352 NLRB 427, 441–444 (2008), reaffd. 356 NLRB 146 (2010), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012) (respondent's failure to produce subpoenaed documents warranted an adverse inference).

Given this unfortunate chapter in the history of these proceedings, even assuming that the narrowest of inferences are drawn against Respondent, considering the importance of the information withheld and prejudice occasioned by such failure to produce, the only conclusion to be drawn is that had the information been provided it would not have supported Respondent's position that it would have made the same decision absent discriminatory motives and/or that its stated reason for termination was not pretext for unlawful discrimination. In making this finding it is important to note that the imposition of sanctions is committed to the discretion of the judge. See *NLRB v. American Art Industries,* 415 F.2d 1223, 1229–1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970). The exercise of that discretion in this case was considered fully and predicated upon the totality of Respondent's custodian of records testimony which on more than one occasion strongly suggests that the failure to produce was in fact purposeful.

Assuming for the sake of argument that evidentiary sanctions were not imposed and instead the willfully limited record was relied upon, Respondent still would not meet its burden. This is because 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*, 350 NLRB 1064, 1066 (2007). In cases such as this 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). Of critical importance in analyzing the strength of General counsel's case is the timing of Respondent's actions. Although Respondent had operated under full Covid-19 restrictions since the start of the pandemic it abruptly changed direction and terminated employees within two weeks after the close of the pre-election hearing. The difference between respondent's prior COVID-19 operations and those that preceded the terminations was the threat of unionization. The abrupt nature of the terminations is further emphasized by the fact that employees had scheduled meetings during this time frame, ordered perishable supplies including seedlings when suddenly seemingly out of nowhere with no meaningful notice they were advised of their terminations.[8] It is also significant, as noted by

[8] Respondent repeatedly argued that the terminations had been in the works for many months prior however the abrupt nature of the changes, the lack of employee notice, the divergence from public announcements, the scheduling of appoints by employees all suggest that this assertion is not credible and unworthy of credence.

General Counsel, that a mere 2 months prior to the terminations, Respondent publicly announced the continuation of its work without any reference to any changes including the return to in person work. The entire chain of events when analyzed in their totality support a finding that Respondent seized upon the Covid-19 epidemic as a pretext to mask its desire to eliminate its exposure to unionization. As such, Respondent cannot meet its burden. See *Stevens Creek Chrysler Jeep Dodge, Inc*., 357 NLRB 633, 637 (2011).

Furthermore, as noted above, Respondent cannot meet its burden by simply advancing a legitimate reason. Because Respondent terminated employees, but also retained others, meeting its burden would require Respondent to establish, by a preponderance, that it would have retained those employees instead of the terminated employees even in the absence of discrimination. In this regard, there is a failure of any substantive proof in the record to meet this aspect of the burden imposed upon it. Accordingly, I find that Respondent violated Sections 8(a)(3) and (1) of the Act.

Because the terminations involved employees who had testified at Board proceedings, and in view of the above findings consistent with *Wright Line* that Respondent's efforts were pretext to mask an effort to thwart unionization attempts currently underway and directly utilizing the Boards processes, I find that Respondent's action also violated Section 8(a)(4) of the Act. See *NLRB v. Scrivener*, 405 U.S. 117 (1972).

G. The Separation Agreements

It is undisputed that upon termination of employees and prior to the Board issuing a decision in the preelection hearing, Respondent offered employees separation agreements. (R. Exhs. 35, 36, 41, 41(a), 42(a), 43(a), 44). Some employees signed the agreements and others including Bahloul, Tokheim, and Deitrich did not. The severance documents contained both a confidentiality provision and a non-disparagement provision.

The analysis of whether the severance agreement violated the Act is governed by the Board's decision in *McLaren McComb*, 372 NLRB No. 58 (2023). In *Mclaren McComb* the Board noted,

It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity." *St. Margaret Mercy Healthcare Center*s, 350 NLRB 203, 205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008). Section 7 rights are not limited to discussions with coworkers, as they do not depend on the existence of an employment relationship between the employee and the employer, and the Board has repeatedly affirmed that such rights extend to former employees. It is further long-established that Section 7 protections extend to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee employer relationship. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). These channels include administrative, judicial, legislative, and political forums, newspapers, the media, social media, and been deemed invalid and unenforceable, including '[a]ny promise by a statutory employee to refrain from union activity.' *Barrow Utilities & Electric*, 308 NLRB 4, 11 fn. 5 (1992)."). 21 See, e.g., *Shamrock Foods Co*., supra, 366 NLRB No. 117, slip op. at 2–3 & fn. 12; Ishikawa Gasket America, 337 NLRB 175, 175–176 (2001), affd. 354 F.3d 534 (6th Cir. –2004); *Clark*

Distribution Systems, supra, 336 NLRB at 748–749; *Metro Networks*, supra, 336 NLRB at 64-67; *Mandel Security Bureau*, 202 NLRB 117, 119 (1973), *Mandel Security Bureau*, supra, at 119. See Robinson Freight Lines, 117 NLRB 1483, 1485 (1957) (the Board's power to prevent unfair labor practices "is to be performed in the public interest and not in vindication of private rights"). The Act confers Sec. 7 rights on statutory employees. Sec. 2(3) of the Act provides in relevant part that "[t]he term 'employee' shall include any employee and shall not be limited to the employees of a particular employer." See *Waco, Inc*., 273 NLRB 746, 747 fn. 8 (1984); *Little Rock Crate & Basket Co*., 227 NLRB 1406, 1406 (1977); *Briggs Manufacturing Co*., 75 NLRB 569, 570 (1947). See, e.g., Cedars-*Sinai Medical Center*, 368 NLRB No. 83, slip op. at 8 fn. 7 (2019). See *Eastex, Inc. v. NLRB*, 437 U.S. at 565 ("Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context."). See *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995). See *Tesla, Inc.,* 370 NLRB No. 101, slip op. at 4 (2021). communications to the public that are part of and related to an ongoing labor dispute. Accordingly, Section 7 affords protection for employees who engage in communications with a wide range of third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection. See *NLRB v. Electrical Workers Local 1229* (*Jefferson Standard Broadcasting Co*.), 346 U.S. 464, 477 (1953). The Board is tasked with safeguarding the integrity of its processes for employees exercising their Section 7 rights. "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967). "This complete freedom is necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972), quoting *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (1951).

The Board further noted that,

"Where an agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates the Act, because it has a reasonable tendency to interfere with or restrain the prospective exercise of Section 7 rights, both by the separating employee and those who remain employed." Id.

Applying *McLaren McComb* to the severance documents in this case, I find that the non-disparagement and confidentiality provisions violate the Act because they interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Because the receipt of benefits is conditioned on the acceptance of unlawful terms, Respondent's proffer of the severance agreement violated Section 8 (a) (1) of the Act.

The non-disparagement provision like that in *McLaren McComb* on its face substantially interferes with Section 7 rights. The broad provision which prohibits the employee from "publicly disparaging or casting aspersion" is limitless in its scope and duration. Nor does it provide any definition of disparagement or casting aspersions. The Broad language sweeps under its prohibition any conduct regarding any labor issue, dispute or term and condition of employment and any statement or allegation that Respondent violated the Act. This provision

standing alone has a chilling tendency on the exercise of Section 7 rights. It places broad restrictions of employees protected Section 7 rights and violates Section 8(a)(1) of the Act.

A similar result is reached when the confidentiality provisions are scrutinized under the applicable legal standards. The provision prohibits the disclosure of confidential information which it deems as information the employer considers to be confidential and proprietary whether or not labeled as such." (See for example R. Exh. 36.) The broad nature of the provision would allow Respondent to characterize almost any communications as confidential and would prohibit a wide range of Section 7 activity including discussing terms and conditions of employment with former co-workers, impairing both the rights of the former employee and the co-worker. The provision also impairs the former employee's ability to discuss the matter with the union. As in *McLaren McComb*, I find conditioning the severance with the forfeiture of statutory rights has a reasonable tendency to interfere with, restrain or coerce the exercise of those rights, I therefore find that the proffer of the confidentiality provision violates section 8(a)(1) of the Act.

H. The Subpoena served on July 20, 2022, violated the Act.

During the hearing in this matter, Respondent sought authorization from the administrative law judge to serve a subpoena duces tecum on the union. (Tr. 833–834.) Pursuant to Section 102.31 of the Board's Rules and Regulations, the request was granted. Respondent thereafter on July 20, 2022, served upon the union a subpoena duces tecum. The subpoena in general sought, "all Signal Documents and/or Communications, and Documents and/or Communications that show all of the Signal messages, whether sent one-to one or through group(s) message" from counsel for the General Counsel and the union, party representatives, current and former Big Green and union employees, and current and former NLRB employees, alleged discriminatees, and or former supervisors. (GC Exh. 66.) The Union and the General Counsel filed timely petitions to revoke which were granted. (GC Exh. 66.)

General Counsel on August 29, 2022, issued a complaint alleging that the service of the subpoena on the union violated Section 8(a)(1) of the Act. The subpoena, as drafted, on its face was broad enough to sweep under its call for production of employees confidential and protected Section 7 union activities. Despite Respondent's assertions that other potentially relevant information might have been obtained by the subpoena it neglects the breadth and unlimited scope of the subpoena and the direct infringement on Section 7 rights that the subpoena as drafted presented.

In *Tracy Auto, L.P. d/b/a Tracy Toyota & Machinists & Mechanics Lodge No. 2182, Dist. Lodge 190, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 372 NLRB No. 101 (2023), the Board held that an attempt to subpoena communications with General Counsel violated Section 8(a)(1) of the Act. The Board reasoned that, "the Board has long held that employees have a Section 7 right to assist in the General Counsel's investigation or litigation of an unfair labor practice charge. Further, outside the discovery context, the Board has held that interrogating employees about statements provided to the Board or communications with Board agents is "inherently coercive." The Board has also held that a party acts with an illegal purpose if it subpoenas employees for their Board affidavits despite knowing that provision of such documents contravenes Board policy. The Boad further explained its reasoning noting that, "employees have the right to assist the Board in its investigation and prosecution of alleged

unfair labor practices. Further, employees would be reluctant to cooperate with Board investigations if parties to a case were able to learn the extent and content of their cooperation with the General Counsel's investigation or preparation for litigation. Any suggestion that the adverse impact of such questioning on employees' "complete freedom" to provide information to the Board is outweighed by legitimate justifications "must be rejected as contrary to the judgment and intent of Congress." *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 6 (2019). Moreover, it is likely that communications between employees and the General Counsel will contain copies of any Board affidavits that they may have provided … the Board has long held that Board affidavits may not be subpoenaed. See *Santa Barbara News-Press*, 358 NLRB 1539, 1541–1542 (2012). The Board also specifically noted that, "the harm is in the very request itself, which would have a chilling effect on employees' willingness to" assist in the General Counsel's investigation and litigation of unfair labor practice allegations. *Chino Valley Medical Center*, 362 NLRB 283, 283 fn. 1 (2015), enfd. in relevant part sub nom. *United Nurses Associations of California v. NLRB*, 871 F.3d 767 (9th Cir. 2017). *Tracy Auto* fn. 32. Accordingly, I find that the attempt to subpoena communications with General Counsel violated Section 8(a)(1) of the Act.

Relying on the reasoning and rationale of *Tracy Auto*, and *Chino Valley Medical Center, supra,* I further find that the subpoena requests seeking communications between the union and employees for the illegal purpose of inquiring into union and or protected and concerted activities and confidential communications between the employees themselves and with the union is in and of itself sufficient to separately establish a violation of Section 8(a)(1) of the Act.

I. The bargaining order and Section 8(a)(5) violation

In *Cemex Construction*, 372 NLRB No. 130 (2023), the Board announced a new framework, which it directed be applied retroactively to all pending cases, when an employer unlawfully refuses to recognize and bargain with the designated majority representative. In *Cemex* the Board held, "an employer violates Section 8(a)(5) and (1) of the act 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 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)" of the Act. Id. slip op. at 25. It is undisputed, as noted by Respondent, that the union filed an RC petition pursuant to Section 9(c)(1)(A) of the Act on July 7, 2023. Thus, under *Cemex*, the union's filing of its RC petition precludes any finding under the first portion of the *Cemex* standards that Respondent acted unlawfully regarding its failure to recognize and bargain with the union. The inquiry however does not end with the union's request for recognition. The Board noted that, "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." *Id*. at 26

General Counsel argues that Respondent Employer's unfair labor practices as found above are so serious and substantial that the possibility of erasing their effects and conducting a fair representation election by use of traditional remedies is slight and, consequently, a bargaining order should issue here in accordance with the principles stated by the United States Supreme Court in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). For the reasons stated below, I agree.

I find and conclude that the following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Program Coordinators and Project Managers employed by Respondent at its facilities in Chicago, IL, Denver, CO, Detroit, MI, Indianapolis, IN, Los Angeles, CA, and Memphis, TN.

Although the unit sought is multi region, the different facilities and job functions share a community of interest sufficient to meet the Board's established standards. See *AT&T Mobility Services, LLC*, 371 NLRB No. 14, slip op. at 2 (2021). Despite the geographic dispersion, the general terms and conditions of employment were virtually identical, the skills required of each category of employees was nearly identical, although the category of Program Managers and Program Managers performed different job functions, the work was functionally integrated into the employer's business model, the employees interacted virtually, and the management was centralized with the same president and HR officials enforcing policy.

The Union's efforts to represent the above unit employees came to fruition on June 28, 2021, when all program managers and a majority of program coordinators[9] signed cards which affirmed that they were 1) employees of Big Green, 2) they requested and accepted membership in the News Guild- Communication Workers of America Union and 3) they authorized the union to be their representative in collective bargaining with the employer. (GC Exh. 13.) The evidence of their actions in this regard are clear and unambiguous and sufficient to establish employees presumptive support for representation. *Cumberland Shoe*, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1965).

Respondent's unlawful conduct warrants the imposition of a bargaining order to protect the employees' majority selection of a bargaining representative based on authorization cards because, given the swiftness, severity, and extensiveness of Respondent's unfair labor practices, it is highly unlikely that its employees would be willing or able to freely express their choice in a Board-conducted representation election.

> As found above, the Employer, in prompt response to the employees' attempt to obtain Union representation, resorted to coercive interrogations, discriminatorily disciplined, and suspended a union supporter for voicing support for the union's request for voluntary recognition; and, discriminatorily eliminated jobs discharging the unit employees.

The above are clearly "hallmark" violations of the Act designed to defeat the employees' attempt to obtain union representation. Upper management participated in this coercive conduct. The unit employees, under the circumstances, would not be able to readily forget the results of

[9] In total 11 signed cards were collected in June of 2028. (GC Exh. 15, Jt. Exh. 2.)

their attempt to obtain union representation. Given the small size of the bargaining unit and the fact that the unfair labor practices affected each of the unit employees, Respondent's misconduct involves the type of severe and pervasive coercion and open threat to the employees livelihood on literally a day's notice that has lingering effects and that is not readily dispelled by time. *T&J Container Sys., Inc*., 316 NLRB 771, 773 (1995).

I therefore find and conclude that a bargaining order is warranted and June 29, 2021, is the appropriate date to use for the remedial order because that date is the date the Union obtained a clear majority status of an appropriate unit. See *Trading Port. Inc*., 219 NLRB 298, 301 (1975) noting that, "an employer, as the Supreme Court has held, has a right to an election so long as he does not fatally impede the election process. Once he has so impeded the process, he has forfeited his right to a Board election and must bargain with the union on the basis of other clear indications of employees' desires. It is at that point, we believe, the employer's unlawful refusal to bargain has taken place." As noted by the Board in *Cemex*, "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." *Supra* at 26.

It is undisputed that on July 1, 2021, the president of Big Green via email specifically notified both Avery and Donohoe that, "after careful consideration Big Green will not be voluntarily recognizing the union. (GC Exh. 56.) Thereafter as more fully discussed above Respondent engaged in conduct which undermined the union's status, therefore a finding that Respondent violated Section 8(a)(5) and (1) of the Act is warranted. (GC Exh. 56.) See *Greenbrier Rail Services, LLC d/b/a Greenbrier Rail Services*, 364 NLRB 279, 322 (2016), finding Respondent violated Section (8)(a)(5) of the Act by "refusing the Union's demand for recognition."

It is undisputed that after June 29, 2021, Respondent did not bargain and acted unilaterally regarding all actions it took in the workplace after the date the union requested recognition. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. " Section 8(d) of the Act explains that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. "

General Counsel in paragraph 17 of the complaint alleged violations of sections (8)(a)(5) and (1) of the Act occasioned by Respondent's failure and refusal to bargain collectively with the exclusive bargaining representative of its employees as it related specifically to paragraphs 11(a), 11(b), 11(c), 11(f), and 11(g):

11(a) Refers to the disciplinary warning that was issued to Coleen Donohoe;

11(b) Refers to the Suspension of Odie Avery;

11(c) Refers to the termination of all unit employees.

> 11(f) Alleges that all items in 11(a)-(c) are mandatory subjects for the purposes of bargaining; and
>
> 11(g) Alleges that the union was not given prior notice regarding 11(a)-(c) and did not bargain with the Charging Party to an overall good faith impasse for a collective bargaining agreement.

The Union was not given prior notice or afforded any opportunity to bargain over any of the items referenced above which were mandatory subjects of bargaining and each represent separate violations as the Act mandates collective bargaining of mandatory subjects of bargaining. *NLRB v. Borg- Warner Corp*., 356 U.S. 342 (1958). See *Sorrento Hotel,* 266 NLRB 350 (1983) (mass terminations of unit employees to avoid having to recognize or bargain with the union and failing to bargain over terminations without giving the union the opportunity to bargain over the decision or effects violated the Act), see also *Total Security Management Illinois 1, LLC*, 364, NLRB 1532 (2016), (employer has a statutory duty to bargain before imposing discretionary discipline). I also find any subsequent request by the Union to bargain over any of these items would have been an exercise in futility. The Union instead promptly filed unfair labor practice charges protesting the Employer's conduct.

Accordingly, I find and conclude that Respondent Employer also violated Section 8(5) and (1) of the Act by its conduct as alleged in paragraph 17.[10]

III. RESPONDENT'S AFFIRMATIVE DEFENSES

A. The Assertion that Program Coordinators and Project Managers were Statutory Supervisors or Managerial Employees

Respondent asserts that both the program coordinators and the project managers were statutory supervisors or managerial employees and thus excluded from the Acts protection.

The Act defines a "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment 29 U.S.C.A. § 152(11).

[10] General counsel alleged that Respondent violated Sec. 8(a)(1) by denying Odie Avery *Weingarten* rights. In as much as the issue presented i.e., whether after a *Cemex* bargaining order issues, a violation for an employer's prior refusal to afford an employee requested representation is warranted has not previously been ruled upon by the Board, the only appropriate course of action is in this circumstance is to defer ruling on the issue and afford the Board the opportunity to address what appears to be a matter of first impression.

Section 2(11) of the Act involves a three-part test for determining supervisory status. "Employees are statutory supervisors if: (1) they hold the authority to engage in any one of the twelve listed supervisory functions; (2) their "exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer.

In *NCRNC, LLC, 372* NLRB No. 35 (2022), the Board noted Section 2(11) of the Act defines a "supervisor" as an individual holding the authority to engage in or effectively recommend any of the 12 listed supervisory functions, provided the individual exercises independent judgment in doing so. "It is well established that the 'burden of proving supervisory status rests on the party asserting that such status exists."' *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (quoting *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. Id. To "exercise 'independent judgment' an individual must at minimum act . . . free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 692–693. A judgment is not independent if "it is dictated or controlled by detailed instructions" or if there is "only one obvious and self-evident choice." Id. at 693. Nor is an assignment based on independent judgment if it is made based on nothing more than known skills that make the assigned employee capable of doing the job. See *G4S Government Solutions, Inc. d/b/a WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3 (2016).

In assessing whether Respondent has met its burden of proving supervisory status, the first issue is whether the employees have the authority to engage in the supervisory functions listed in the Act. The authority to act is delineated in Respondent's position descriptions. (R. Exhs. 2, 3). The position descriptions presumably accurately reflect the duties of the positions and include the supervisory functions which are attributable to each position. A review of the program coordinator position description reveals none of the listed 12 supervisory functions as duties of the positions. If program coordinators were supervisors or if they had supervisory responsibilities the position description would clearly delineate those responsibilities. It does not. Respondent cannot meet its burden under the first element when its own position description does not confer supervisory duties or functions upon its employees. Assuming for the sake of argument that the lack of supervisory authority in the position description could be ignored, Respondent has otherwise failed to establish supervisory status. Respondent's reliance on program coordinator "responsibly directing" the work of interns, community liaisons, part time employees or program assistants" is misplaced. As noted in *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 26 (2000),

> To be responsible is to be answerable for the discharge of a duty or obligation. In determining whether "direction" in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs.

There is no evidence in the record that program coordinators were fully accountable for the work of interns, community liaisons, part-time employees, or program assistants. In fact, in the organizational structure it was program managers who were fully accountable for the work of these individuals. See (Jt. Exh. 3). The evidence is undisputed that that no program coordinator

had authority to make any final decision regarding any of those actions. (Jt. Exhs. 3, 4, 41, 94, 126, 153, 164, 238, 248, 296).

` There is insufficient evidence in the record to sustain Respondent's burden that program coordinators could "effectively recommend" any of the 12 listed functions. In the first instance the position description does not grant them authority to do so. Secondly, I am not persuaded by Respondent's assertion that it can meet its burden by suggesting that offering "input" into hiring, promoting, rewarding, disciplining, or discharging decisions somehow renders program coordinators supervisors. If providing "input" was equivalent to "effectively recommending" then an employer could "deny its employees the benefits of collective bargaining on important issues of wages, hours, and other conditions of employment merely by consulting with them on a host of less significant matters and accepting their advice when it is consistent with management's own objectives*."* See *NLRB v. Yeshiva Univ.,* 444 U.S. 672, 701, 100 S. Ct. 856, 872, 63 L. Ed. 2d 115 (1980). More to the point, the crux of Respondent's contention is that because program coordinators participated in interviews they automatically ought to be converted into supervisory status by virtue of their participation in the interviews.

The evidence is undisputed that program managers participated in interviews and held ultimate authority and could reject any recommendations of the program coordinators. Program managers in fact authored the interview questions and the program coordinators merely asked questions which were not even their own questions. The program coordinator participation in the interviews lacked the critical element of independent judgment. They did not independently interview candidates but participated in a process wherein they merely served as the conduit for the program manager's prepared questioning. (See for example Tr. 1124).

The Board has flatly rejected Respondent's contentions regarding both hiring and discipline. In *Republican Co*., 361 NLRB 93, 97 (2014), the Board held, "absent additional evidence, an individual does not effectively recommend hiring where acknowledged supervisors also interview the candidates. *See J. C. Penney Corp.,* 347 NLRB 127, 128-129 (2006) (training supervisor did not effectively recommend hiring where all applicants "recommended" by the training supervisor were subsequently interviewed by other managers, who were the only individuals vested with hiring authority); *Ryder Truck Rental*, *Inc*., 326 NLRB 1386, 1387 fn. 9, 1388 (1998) (technicians-in-charge who interviewed candidates and offered "opinions or recommendations" that were given """"significant" weight did not have authority to effectively recommend hiring where a higher-level official also participated in the interview and hiring process); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989) (LPNs did not effectively recommend hiring where no contention or finding that the director of nursing relied solely on the LPNs' recommendations without further inquiries), enfd. 933 F.2d 626 (8th Cir. 1991).

In as much as program managers interviewed candidates and retained undisputed final hiring authority, the program coordinators lacked the critical element of independent judgment, and offered only recommendations, they did not have authority to "effectively recommend." Id. Similar rationale is applicable to the notion that program coordinators could effectively recommend discipline.

In *Republican*, the Board held, that, to confer supervisory status based on authority to discipline, "the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. See *Sheraton Universal Hotel,* 350 NLRB 1114, 1116 (2007) ("Contrary to the judge's speculation, nothing in the record suggests that upper management conducted an independent investigation before deciding to impose discipline . . ."); *Beverly Health & Rehabilitation Services*, *Inc*., 335 NLRB 635, 669 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003). Warnings that simply bring the employer's attention to substandard performance without recommendations for future discipline serve a limited *reporting* function, and do not establish that the disputed individual is exercising disciplinary authority. See *Willamette Industries,* 336 NLRB 743, 744 (2001). Similarly, authority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989)."

There is nothing in the record to suggest that program coordinators could do nothing more than report disciplinary, poor performance, and/or attendance issues.

What is entirely missing in the record is that program coordinators could, exercise of disciplinary authority (as set forth by the Board in *Republican)*, that leads to "personnel action without independent investigation by upper management." Id. Simply having the authority to report problems in the workplace is insufficient to confer supervisory status. See *Veolia Transportation Services, Inc*., 363 NLRB 902 (2016).

I am similarly not persuaded by Respondent's assertions that program coordinators are "managerial employees." In *Nat'l Lab. Rels. Bd. v. Wolf Creek Nuclear Operating Corp.*, 762 F. App'x 461, 468 (10th Cir. 2019). In that case the court held,

> Managerial employees are not expressly excluded from coverage under the Act. *See NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980). But there is a "judicially implied exclusion for 'managerial employees' who are involved in developing and enforcing employer policy*."* Id. This exclusion grew out of the concern "[t]hat an employer is entitled to the undivided loyalty of its representatives." Id. In recognizing the exclusion, the Supreme Court noted the Act's legislative history, which "strongly suggests that there also were other employees, much higher in the managerial structure, who were ... regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 283, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974).
>
> > "[T]he question whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority, and relationship to *468 management." Id. at 290 n.19, 94 S.Ct. 1757. Managerial employees include "'those who formulate, determine, and effectuate an employer's policies,' and those who have discretion in performance of their jobs, but not if th[at] discretion must conform to an employer's established policy." *Bell Aerospace*, 416 U.S. at 288 n.16, 94 S.Ct. 1757 (citation omitted) (quoting *Retail Clerks Int'l Ass'n v. NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966)).

Respondent's assertion fails because the evidence did not establish that program coordinators could act upon their own discretion outside of established policy. In fact, the contrary was true. Program coordinators were bound by Respondent's policies formulated at the national level in what respondent itself identified as the "Standard Program Model". (Tr. 66, 134, 1474, Jt. Exh. 217, 272, Jt. Exh. 4 at 20). Any discretion utilized by program coordinators to tailor learning to specific schools was in fact done in conformance with the standard program model. (Jt. Exh. 222, 281, 569, 578). The conclusion that program coordinators were neither supervisors or managerial employees is inescapable.

B. Project Managers were neither Supervisory nor Managerial Employees

Respondent admitted that Project Managers were not supervisors. (Jt. Exh. 3 at 136). Nevertheless, Respondent contended they were managerial employees. Although the project manager had the title "manager" in their job description it was a more akin to a professional designation much like that of an architect and not substantive proof that they "formulate and effectuate management policies by expressing and making operative the decisions of their employer, and …who have discretion in the performance of their jobs independent of their employer's established policy." *Gen. Dynamics Corp.*, 213 NLRB 851, 857 (1974).

In fact, the evidence failed to establish that the project managers had the ability to perform their jobs independent of their employer's established policy. While project managers had some discretion in the performance of their duties, they worked not independently but in accordance with established policy. For example, the contractors utilized by the project managers were selected by the employer, any proposed designs had to be approved by Respondent's Director of Project Management, budgets were set by Respondent, proposals that were developed by project managers were forwarded to Respondent's executives to make policy determinations. (Tr. 1580, 1628, Jt. Exh. 3 at 122, Jt. Exh. 4 at 88). All this evidence points conclusively to the finding that the performance of the job was not done independent of the employers established policy and therefore they were simply not managerial employees.

C. Respondent's Darlington Defense

Respondent argues vehemently that it was completely within its rights to terminate the employees citing the Supreme Court's decision in *Textile Workers v. Darlington*, 380 U.S. 263 (1965). Respondent's contentions when closely scrutinized fall short. Respondent overlooks a central tenet of the Court's holding in *Darlington*. In *Darlington* the court held,

> The closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place. On the other hand, a discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of s 7 rights among remaining employees of much the same kind as that found to exist in the 'runaway shop' and 'temporary closing' cases. See supra, p. 1001. Moreover, a possible remedy open to the Board in such a case,

> like the remedies available in the 'runaway shop' and 'temporary closing' cases, is to order reinstatement of the discharged employees in the other parts of the business. No such remedy is available when an entire business has been terminated. By analogy to those cases involving a continuing enterprise we are constrained to hold, in disagreement with the Court of Appeals, that a partial closing is an unfair labor practice under s 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.

It is undisputed in this record that Big Green did not completely close but instead continued its operations. In doing so it singled out employees who it retained to perform functions for its continued operations. Respondent's assertions of complete closure are misplaced. Given the fact that it is undisputed that many employees were retained, and Respondent continued its operations, it is clear that Respondent's actions cannot be characterized as a "complete closure." A reasonable view of the facts presented is that instead of a "closure" Respondent merely reorganized its operating structure. Assuming for the sake of argument that Respondent's actions could be characterized as a "partial closure" under *Darlington,* a violation would still be found as there is ample evidence in the record to establish motivation to "chill unionism" and that the employer could have reasonably foreseen the results. See *NLRB v. Joy Recovery Technology C*orp., 134 F. 3d 1307 (7th Cir. 1998), (finding the timing of closure, discipline of union supporter, and continued operations all support finding of a violation). The timing of the reorganization is significant as it occurred abruptly after the union petitioned for election. So too, union supporters were disciplined and others who were aware of the ongoing efforts of unionization were retained. It is therefore reasonably foreseeable that the reorganization and termination of employees actively pursuing unionization would have a chilling effect. Respondent's reliance on *Darlington* instead of providing sought after immunity misfires and instead establishes a separate basis from which to conclude that the reorganization violated Section 8(a)(1), (3), and (4) of the Act.

D. Covid -19 Defense

To the extent that Respondent suggests that the occurrence of COVID-19 amounts to an affirmative defense to the performance of its statutory obligations, I am not persuaded. Any analysis of a putative COVID-19 "affirmative defense" must be examined against the backdrop of the fundamental public policy underpinnings of the Act. The NLRA provides that it is "the policy of the United States," to "encourag[e] the practice and procedure of collective bargaining." Section 1, 29 U.S.C. Section 151. The occurrence of COVID-19 does not negate the stated policy of the Act. Nor has the Board issued any decision which stands for the proposition that the occurrence of COVID-19 relieves an employer of any of its duties under the Act. To so hold would directly interfere with Act's protections at a time when those very protections and policy considerations are most relevant and needed.

CONCLUSIONS OF LAW

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

2. The union, the Denver Newspaper Guild-Communications Workers of America, Local 37074 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent committed numerous unfair labor practices in violation of Section 8(a)(1), (3), (4), and (5) of the Act as more fully described above.

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

5. All other complaint allegations are dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

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 Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa-Bastidas, and Sarah Burns, I shall order Respondent to reinstate them and make them whole for any loss of earnings and other benefits suffered because of the discrimination against them. Respondent shall pay them 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 them 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). Additionally, in accordance with *Thryv, Inc*., 372 NLRB No. 22 (2022), the Respondent shall also compensate each affected employee identified above for any other direct or foreseeable pecuniary harms incurred because of the unlawful discharge.

In accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016), Respondent shall also file with the Regional Director for Region 27, within 21 days of the date

[11] 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.

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 27, 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 their corresponding W-2 forms reflecting the backpay award.

The Respondent shall also be required to expunge from its files any adverse references to their unlawful discharges and notify each and the Regional Director of Region 27, 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 facilities 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.

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 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. Respondent is ordered to bargain with the Union retroactively to June 29, 2021, when the employees requested voluntary recognition.

This section should be read together with the following:

Order

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

1. Cease and desist from

   a) Applying the Values Based Behavior and Ethics and Standards of Conduct policies to restrict employees in the exercise of their Section 7 rights.

   b) Maintaining and enforcing work policy that prohibit communications with the media protected by the NLRA or that requires employees receive authorization before engaging in such communications.

   c) Threatening employees with discipline, discharge, or other reprisals because they engage in union or other protected and concerted activities.

   d) Instructing Employees to keep management interrogations about protected

concerted activities confidential.

e) Instructing employees to not discuss employee discipline with coworkers.

f) Discipline, layoff, or otherwise discriminate against employees for engaging in protected concerted activities and/or activities supporting the Denver Newspaper Guild-Communications Workers of America, Local 37074 (the Union), or any other labor organization, and for attending and/or testifying in proceedings before the National Labor Relations Board in connection with the union representation of employees.

g) Reorganizing operations and eliminate work and or terminate employees because employees engage in protected concerted activities and/or activities supporting the union, or any other labor organization, and because the employee attended and/or testified in proceedings before the National Labor Relations Board in connection with the Union representation of employees.

h) Failing and refusing to recognize and bargain with the union as the exclusive collective-bargaining representative of employees in the bargaining unit.

i) Unilaterally changing terms and conditions of employment without providing notice to and an opportunity to bargain with the Union.

j) Issuing subpoenas duces tecum requiring the production of information and/or documents about union and/or protected concerted activities of the union and/or protected concerted activities of other employees, including information about employee's participation in Board processes, including information about employees, their participation in Board processes, and/or communications of, by, through, or with Board Agents or other NLRB officials.

k) Offering employees and entering into "Confidential Settlement Agreement, Waiver, and Release of Claims" that prohibits employees from "recovering any individual monetary relief or individual remedies" in connection with charges filed and pending before the National Labor Relations Board, and that also prohibits employees from engaging in protected union and other concerted activities following termination of employment.

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 Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa-Bastidas, and Sarah Burns full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, as those occupied by other employees who were not terminated and were absorbed into the newly reorganized structure without

prejudice to their seniority or any other rights or privileges previously enjoyed including full union representational rights.[12]

b) Make Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa-Bastidas, and Sarah Burns whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest, and also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of their layoffs, including reasonable search-for-work and interim employment expenses, plus interest. Compensate employees entitled to backpay for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for 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 awards to the appropriate calendar year for each employee. Compensate each affected employee identified above for any other direct or foreseeable pecuniary harms incurred because of the unlawful discharge.

c) Within 14 days from the date of the Board's order, file with the Regional Director for Region 27 or such additional time as the Regional Director may allow for good cause shown, a copy of Odie Avery's, Emma Dietrich's, Colleen Donahoe's, Jenny Tokheim's, Amina Bahloul's, Erika Hansen's, J.P. Miller's, Laura Guzman's, Margarita Bossa-Bastidas,' and Sarah Burns' W-2 forms reflecting their backpay payments.

d) Within 14 days from the date of the Board's Order, remove from Respondent's files any reference to the unlawful layoffs of Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa-Bastidas, and Sarah Burns, and within 3 days thereafter, notify them in writing that this has been done and that their layoffs will not be used against them in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

e) Rescind Respondent's Values Based Behavior and Ethics and Standards of Conduct policies and effectively notify employees of the rescission and that the rule will no longer be enforced without a disclaimer that these policies will not be applied to restrict Section 7 activity.

f) Rescind or revise Respondent's media-inquiries policy that prohibits employees from communicating with the media without authorization.

As noted by the court in *Pan American Grain Co., Inc. v. NLRB* 558 F. 3rd 22 ,29 (1st Cir. 2009), the employer bears the burden of showing that the Board's [remedial] order would require a substantial outlay of new capital or otherwise cause undue financial hardship." The appropriate procedural avenue to make such a showing would be at the compliance proceeding. See Compu–Net Commc'n, Inc., 315 NLRB 216, fn. 3 (1994), ("[T]he Respondents may introduce previously unavailable evidence, if any, at the compliance stage of this proceeding to demonstrate that the reinstitution of those operations is unduly burdensome.") (citing *Lear Siegler, Inc.,* 295 NLRB 857 (1989)); *E.I. Du Pont de Nemours & Co. v. N.L.R.B.,* 489 F.3d 1310, 1317 (D.C. Cir. 2007) (discussing the appropriate procedure for developing an objection to the remedial order); *West Penn Power Co. v. N.L.R.B.,* 394 F.3d 233, 246 (4th Cir.2005).

g) Notify employees that the media-inquiries policy has been rescinded or, if it has been revised, provide employees with a copy of the revised media-inquiries policy and a disclaimer that the policy will not be applied to restrict Section 7 activity.

h) Within 14 days from the Board's order, rescind the "Confidential Settlement Agreement, Waiver, and Release of Claims" offered to and/or entered into with Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa-Bastidas, and/or Sarah Burns that prohibits the recovery of "any individual monetary relief or individual remedies," and the disclosure of "confidential information," including "Employee lists and personnel information, policies and procedures, and all other information that the Employer disclosed to [the] Employee or information that [the] Employee otherwise obtains which the Employer considers to be confidential and proprietary, whether or not labeled as such," and the making of remarks or taking actions that "publicly disparage or cast aspersion" following termination of employment.

i) 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 program coordinators and project managers employed by Big Green at its facilities in Chicago, IL, Denver, CO, Detroit, MI, Indianapolis, IN, Los Angeles, CA, and Memphis, TN.

j) On request, rescind any or all changes to terms and conditions of employment that were made without first notifying the Union and giving it an opportunity to bargain, including all mandatory subjects and those subjects concerning discipline, reorganization of operations and any attendant layoffs and their effects on unit employees.

k) Respondent shall read the attached notice aloud to employees at its facilities. This is an "'effective but moderate way to let in a warming wind of information and, more important, reassurance' to the bargaining unit employees that their rights under the Act will not be violated in the future." *International Shipping*, 369 NLRB No. 79, slip op. at 8 (2020) (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)). Respondent shall hold a meeting or meetings during working hours at its facilities, scheduled to ensure the widest possible attendance of employees, at which the remedial notice is to be read to employees by a high-ranking manager in the presence of a Board agent and a union representative if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of management and, if the Union so desires, a union representative. A union representative shall be afforded the opportunity to make an audio-visual recording of the notice reading. See, e.g., *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 (2018), affd. in relevant part 803 Fed.Appx. 876 (6th Cir. 2020).

l) Respondent shall post at all of its facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms 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 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 September 13, 2021.

m) Within 21 days after service by the Region, file with the Regional Director for Region 27 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.

Dated, Washington, D.C. December 20, 2023

Dickie Montemayor
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT apply our Values Based Behavior and Ethics and Standards of Conduct policies to restrict you in the exercise of your rights listed above.

WE WILL NOT maintain or enforce any work policy that prohibits your communications with the media protected by the National Labor Relations Act (NLRA) or that requires you to receive authorization from us before engaging in such communications.

WE WILL NOT coercively interrogate you about your union and other protected concerted activities.

WE WILL NOT threaten you with discipline, discharge, or other reprisals because you engaged in union and other protected concerted activities.

WE WILL NOT instruct you to keep management's interrogations about your protected concerted activities confidential.

WE WILL NOT instruct you to not discuss employee discipline with your co-workers.

WE WILL NOT discipline, layoff, or otherwise discriminate against you for engaging in protected concerted activities and/or activities supporting the Denver Newspaper Guild-Communications Workers of America, Local 37074 (Union), or any other labor organization, and for attending and/or testifying in proceedings before the National Labor Relations Board in connection with the Union representation of our employees.

WE WILL NOT reorganize our operations and eliminate your work because you engage in protected concerted activities and/or activities supporting the Union, or any other labor organization, and because you attended and/or testified in proceedings before the National Labor Relations Board in connection with the union representation of our employees.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT unilaterally change your terms and conditions of employment without providing notice to and an opportunity to bargain with the Union, including subjects concerning discipline, reorganization of operations and any attendant layoffs and their effects on unit employees.

WE WILL NOT issue subpoena duces tecum to you, requiring you to produce information and/or documents about your union and/or protected concerted activities or the union and/or protected concerted activities of other employees, including information about you and/or other employees' participation in Board processes and/or communications of, by, though, or with Board Agents.

WE WILL NOT offer you and enter into a "Confidential Settlement Agreement, Waiver, and Release of Claims" that prohibits you from "recovering any individual monetary relief or individual remedies" in connection with charges filed and pending before the National Labor Relations Board, and that also prohibits you from engaging in protected union and other concerted activities following termination of your employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our Values Based Behavior and Ethics and Standards of Conduct policies and effectively notify you of the rescission and that the rule will no longer be enforced, and, if we wish to reinstate these policies,

WE WILL reinstate them with a disclaimer that these policies will not be applied to restrict Section 7 activity.

WE WILL rescind or revise our media-inquiries policy that prohibits you from communicating with the media without our authorization.

WE WILL notify you that the media-inquiries policy has been rescinded or, if it has been revised, provide you with a copy of the revised media-inquiries policy and a disclaimer that the policy will not be applied to restrict Section 7 activity.

WE WILL, within 14 days from the Board's order, rescind the "Confidential Settlement Agreement, Waiver, and Release of Claims" we offered to and/or entered into with Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa-Bastidas, and/or Sarah Burns that prohibits the recovery of "any individual monetary relief or individual remedies," and the disclosure of "confidential information," including "Employee lists and personnel information, policies and procedures, and all other information that the Employer disclosed to [the] Employee or information that [the] Employee otherwise obtains which the Employer considers to be confidential and proprietary, whether or not labeled as such," and the making of remarks or taking actions that "publicly disparage or cast aspersion" on us following termination of employment.

WE WILL, 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 program coordinators and project managers employed by Big Green at its facilities in Chicago, Illinois, Denver, Colorado, Detroit, Michigan, Indianapolis, Indiana, Los Angeles, California, and Memphis, Tennessee.

WE WILL, on request, rescind any or all changes to your terms and conditions of employment that we made without first notifying the Union and giving it an opportunity to bargain, including subjects concerning discipline, reorganization of operations and any attendant layoffs and their effects on unit employees.

WE WILL, within 14 days from the date of the Board's Order, offer Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa-Bastidas, and Sarah Burns full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa-Bastidas, and Sarah Burns whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest, and **WE WILL** also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of their layoffs, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate employees entitled to backpay for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for 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 awards to the appropriate calendar year for each employee.
WE WILL, within 14 days from the date of the Board's order, file with the Regional Director for Region 27 or such additional time as the Regional Director may allow for good cause shown, a copy of Odie Avery's, Emma Dietrich's, Colleen Donahoe's, Jenny Tokheim's, Amina Bahloul's, Erika Hansen's, J.P. Miller's, Laura Guzman's, Margarita Bossa-Bastidas,' and Sarah Burns' W-2 forms reflecting their backpay payments.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Odie Avery, Emma Dietrich, Colleen Donahoe, Jenny Tokheim, Amina Bahloul, Erika Hansen, J.P. Miller, Laura Guzman, Margarita Bossa-Bastidas, and Sarah Burns, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that their layoffs will not be used against them in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

BIG GREEN

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov
Bryon Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294-5433
(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/ 27-CA-276068 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

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

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