Starbucks Corporation *and* Workers United. Cases 03–CA–296757, 03–CA–299016, and 03–CA–302451

December 16, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS PROUTY AND WILCOX

On August 25, 2023, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated it authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

As explained below, we find, contrary to the judge, that the Respondent violated Section 8(a)(1) of the Act by creating an impression of surveillance of Latham store employees' union and protected concerted activities during a disciplinary interview with employee James Schenk on June 16th, 2022.[3] We also find, again contrary to the judge, that the Respondent violated Section 8(a)(3) and (1) by: (1) issuing a final written warning to Schenk on June 27; (2) issuing a memorialized coaching to Schenk on July 18; and (3) discharging Schenk on August 31.

I. BACKGROUND

The Respondent operates a chain of coffee shops including the two Albany, New York, stores at issue in this case. Latham store shift supervisor[4] Schenk contacted the Union in November 2021 about representing employees at the Latham store. On March 29, 2022, Schenk and ten other Latham store employees signed a public letter to the Respondent's then Chairman and CEO Howard Schultz announcing the Union's campaign at the Latham store and describing grievances including inadequate staffing. During the Union's campaign, Schenk wore a union pin at work and collected authorization cards for the Union. On May 17, a majority of Latham employees voted for the Union in a Board-conducted representation election, and the Board certified the Union as their representative for collective bargaining on May 26.

On June 8, 16, and 22, Schenk sent emails to the Respondent requesting bargaining over the effects of a plan to renovate the Latham store. District Manager Beate Kuhnle-Hambster[5] recommended discharging Schenk for sending the June 16 email during working time, but the Respondent could not establish that the email had not been sent during break time, and no discipline ultimately issued.

Schenk and four other shift supervisors regularly discussed work-related issues, including union activity, in a Snapchat group message. Snapchat is an instant messaging and social media platform that features settings designed to enhance privacy. Specifically, messages in this group were not publicly accessible and were set to delete after 24 hours and to notify participants if any participant took a screenshot.

On May 24, Latham Store Manager Nick Cain scheduled Schenk for a closing shift that included a weekly deep cleaning of the store. The shift was understaffed, and one of the employees scheduled had a medical condition that prevented her from using cleaning products required for the cleaning assignment. Schenk sent a series of angry messages to the Snapchat group complaining about Cain's

[1] The General Counsel, the Charging Party, and the Respondent have excepted or implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's credibility findings.

[2] We affirm the judge's conclusion, for the reasons given in his decision, that the Respondent violated Sec. 8(a)(1) of the Act by creating an impression that it had placed employees' union activities under surveillance when District Manager Beate Kuhnle-Hambster dramatically increased her presence at the Stuyvesant store between the onset of the Union's public campaign there in April 2022 and the June 7, 2022 election. We also affirm the judge's conclusions, for the reasons given in his decision, that the Respondent did not violate Sec. 8(a)(1) by threatening Stuyvesant employees with the loss of benefits if they selected the Union or by denying a request by Latham store employee James Schenk for union representation during an investigatory interview on June 16, 2022.

We have amended the judge's conclusions of law and remedy consistent with our findings herein, and we shall modify the judge's recommended Order to conform to our findings and substitute a new notice to conform to the violations found and to the Board's standard remedial language.

[3] Dates below are in 2022 unless otherwise specified.

[4] No party contends that the Respondent's shift supervisors are statutory supervisors within the meaning of Sec. 2(11) of the Act.

[5] Kuhnle-Hambster oversaw 10 stores, including the two involved in this case.

decisions to keep the store open and require deep cleaning despite inadequate staff. The messages included pervasive profanity, several vulgar sexual references to Cain, and several derogatory references to the other employee, including a gender slur.[6] Another employee who was in the message group photographed a cellphone screen displaying the messages and sent the images to Cain and Kuhnle-Hambster.

On June 16, Kuhnle-Hambster confronted Schenk with some of the message images, and Schenk confirmed that he had written them. Schenk asked how the Respondent had obtained the images, but Kuhnle-Hambster did not tell him. The Respondent's human resources department considered either discharging Schenk or issuing a final written warning, noting that a final written warning rather than discharge would be warranted "if behavior is common in store by other partners." Kuhnle-Hambster recommended discharging Schenk, and the Respondent's HR representative Althea Williams and Regional Director Mallori Coulombe concurred, but the Respondent ultimately decided to issue only a final written warning.[7] On June 27, Kuhnle-Hambster issued the warning to Schenk. The warning states that it is "for unprofessional behavior, including use of profanity and name calling which is in violation of Starbucks Code of Conduct & How We Communicate," by sending "a work-related text message to another SSV [shift supervisor], with comments such as [quoting selected messages]."

The Respondent had previously disciplined Schenk with a memorialized coaching in April 2018 for failing, as a shift supervisor, to stop other employees from submitting cards to a nomination system for a "partner of the quarter" program that included "obscene phrases" with Schenk's name on them. No other employee was disciplined for that incident. The 2022 final written warning does not refer to the 2018 coaching or any other prior discipline.

On July 18, the Respondent issued a memorialized coaching to Schenk for failing, on June 30, to ensure that four store-closing tasks had been completed. The coaching also cites the June 27 final written warning.

On August 1, Cain and Schenk had a conversation which Schenk recorded. In the course of that conversation, Cain told Schenk: "That memorialized coaching . . . I fought against that. I did not think—I thought those things were one-offs and I was like, why?" The conversation continued:

> Schenk: I feel extremely targeted by [Kuhnle-Hambster]. I am basically waiting at any point to receive my termination. . . . I know that she's targeting me and other people who are heavily involved with the Union campaign because I'm in communication with those people. And so I don't really know how to respond to that because I know her ultimate goal is to fire me as well as several other people that I'm aware of. And . . . [these are] almost impossible conditions to work under.
>
> Cain: Trust me, I know. Between you and I, as of this is an open, honest, transparent conversation, I've had the same thing since February . . . . I've been on all the write-ups and corrective actions all the way down through . . . .

On August 12, towards the end of Schenk's shift when no store manager was present, the United States Postal Service delivered a letter from the National Labor Relations Board marked "official business" and addressed to "Starbucks Corporation" at the Latham store address. Schenk opened the letter—which contained the Board's May 26 certification of the Union as representative at the Latham store—shared the contents with other employees, put the letter back in the envelope, and left it on Cain's desk. The next day, Cain and Schenk had a conversation, which Schenk again recorded, including the following exchange:

> Cain: One last question. So I saw there was the mail and I saw it was open. Could you in the future not open—was it you who opened them?
>
> Schenk: Well, I opened the NLRB one because it was just addressed to the store.
>
> Cain: Yeah. That one I was the one that – I would ask you not to just in case there's anything legal or anything like that, that I may have to take care of. And I'm unsure and unaware. I know it seemed confusing when it just says the store, but that's something that I would like to be able to open and look at first.

[6] Specifically, Schenk referred to Cain as a "fucking cocksucker," "fucking chicken shit," and "fucking [p]ussy," referred to Cain's decision to keep the store open as "lizard brain fucking stupidity," and stated, "[Cain] can suck my dick," and "[Cain] can suck my fucking dick." Schenk also referred to the employee who could not participate in the cleaning project as "useless fucking [name]," and "[t]he dumb fuc[k]ing bitch who can't even use cleaners."

[7] The record does not reflect how or why this decision was reached. A relevant email chain includes secs. marked "A/C privilege" and "REDACTED: Privileged." At the hearing, the General Counsel asserted that the privilege log accompanying documents produced by the Respondent pursuant to the General Counsel's subpoena was insufficient and requested that the judge direct the Respondent to produce assertedly privileged documents for in camera inspection. The judge so directed, but the Respondent refused to permit the judge to inspect the documents at issue.

On August 31, Kuhnle-Hambster discharged Schenk for opening the letter. The notice of separation states that Schenk "opened a letter that was not addressed to him, despite the fact that he was not an individual who is authorized to open Company mail," which "could have constituted a felony under federal law," in violation of the Respondent's Standards of Business Conduct provision requiring employees to "comply with all applicable laws." The notice of separation also cites the prior final written warning and memorialized coaching discussed above.

II. DISCUSSION

A. June 16 Impression of Surveillance

The General Counsel alleges that the Respondent violated Section 8(a)(1) by creating the impression that the Respondent was surveilling employees' union and protected concerted activity on June 16 when Kuhnle-Hambster confronted Schenk with photographs of his messages in the Snapchat group and refused, upon Schenk's request, to disclose how she had obtained the images.

An employer unlawfully creates the impression of surveillance by statements or other conduct which, under all of the relevant circumstances, would lead reasonable employees to assume that their union or other protected activities have been placed under surveillance.[8] Specifically, the Board has held, with court approval, that an employer unlawfully creates the impression of surveillance when it tells employees that it is aware of their union or other protected activities but fails to tell them the source of its information, because "'the employees are left to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring.'"[9]

The administrative law judge acknowledged this precedent, but nevertheless found that, under all of the relevant circumstances here, a reasonable employee would not assume that the employer had placed their union or protected activities under surveillance. The judge reasoned that the images at issue did not involve union activity and that an obvious explanation for Kuhnle-Hambster's possession of them was that a participant in the group had felt obliged to voluntarily bring the offensive comments to management's attention.[10]

We disagree. First, while the images at issue did not involve union activity, employees also used the message group to discuss union activity. The Respondent's unexplained access to some messages implies the possibility of access to others, reasonably supporting a conclusion that the Respondent was monitoring employees' union discussions in the message group as well. Moreover, the judge found, and the Respondent does not contest, that Schenk's discussion of inadequate staffing in the messages at issue was itself protected concerted activity because employees had previously concertedly raised the issue of inadequate staffing to the Respondent. The record does not reflect the motives of the employee who reported the messages to the Respondent, and we do not agree with the judge that it would be obvious to a reasonable employee that those motives did not involve employer monitoring. Finally, shift supervisor Siena Phelps, a member of the message group, testified without contradiction that employees stopped using the group entirely after Schenk was disciplined out of concern that their own messages might similarly lead to discipline.

For these reasons, we find, contrary to the judge, that Kuhnle-Hambster's failure to disclose the source of the images would lead a reasonable employee to conclude that the Respondent was monitoring employees' union and other protected concerted discussions in the message group. We accordingly conclude that this conduct created an impression of surveillance in violation of Section 8(a)(1).

B. June 27 Final Written Warning

The General Counsel alleges that the Respondent's June 27 final written warning to Schenk violated Section 8(a)(3) and (1)[11] because the Respondent's true motive for issuing the discipline was in retaliation for Schenk's union activity.[12]

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[8] See, e.g., *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1183 (2011) (citing *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005), enfd. mem. 181 Fed. Appx. 85 (2d Cir. 2006)).

[9] *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 6 (2018) (quoting *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009) (emphasis in original omitted), adopted and incorporated by reference 357 NLRB 633 (2011), enfd. mem. per curiam sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012)), enfd. on point 939 F.3d 798, 811-812, 814 (6th Cir. 2019); see also *Ozburn-Hessey Logistics, LLC*, 359 NLRB 1025, 1025 & fn. 7, 1036 (2013), adopted and incorporated by reference 361 NLRB 921 (2014), enfd. 833 F.3d 210 (D.C. Cir. 2016).

[10] The judge found further support for this conclusion in the presence of a hand holding a cellphone in some of the images. The record contains two sets of images, only one set of which shows a hand. Schenk testified that the images which Kuhnle-Hambster showed to him on June 16 were not complete, and the record does not reflect that they included any images showing a hand. In any case, we do not think that the presence or absence of the hand in the images affects whether a reasonable employee would conclude that the Respondent obtained the images through its own monitoring of the message group because the hand, in and of itself, gives no information about who photographed the messages or for what purpose.

[11] A violation of Sec. 8(a)(3) constitutes a derivative violation of Sec. 8(a)(1). See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 fn. 4 (1983).

[12] The General Counsel separately alleges that the June 27 final written warning independently violated Sec. 8(a)(1) because it was issued for conduct that took place in the course of protected concerted activity and did not lose the protection of the Act. As explained below, the resolution

Where, as here, an employer defends against an allegation that it has disciplined an employee because of their union activity by asserting that it issued the discipline for legitimate reasons, the Board applies the dual-motive analysis set forth in *Wright Line*.[13] Under this framework, the General Counsel must first make an initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision.[14] The elements required to sustain the General Counsel's initial burden are a showing of (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) animus against union or other protected activity on the part of the employer.[15] Once the General Counsel has established that the employee's protected conduct was a motivating factor in the employer's decision, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.[16] If the employer fails to meet its burden, the Board will conclude that a causal relationship exists between the protected activity and the adverse action, and a violation will be found.[17] Motivation is a question of fact that may be inferred from both direct and circumstantial evidence on the record as a whole.[18] Once an unlawful motive has been established, the employer cannot meet its burden merely by showing that it had a legitimate reason for the action; rather, it has the burden of persuasion to establish that it would have taken the same action even in the absence of the protected conduct.[19] The Board has explained that "the relative contribution of an employer's lawful and unlawful motives for the action against the employee is not decisive."[20]

Here, we agree with the judge, and the Respondent does not dispute, that the General Counsel easily met her initial burden. As the judge found, Schenk was a very active union proponent, and the Respondent undisputedly had knowledge of some of his union activities at the time it issued the discipline. He initiated the Union's campaign at the Latham store by contacting the Union in November 2021, signed the public letter announcing the Union's campaign in March 2022, and actively and openly participated in that campaign before the May 17 election. After the election, he emailed the Respondent on three occasions on June 8, 16, and 22 requesting bargaining about the effects of a plan to renovate the Latham store. Direct evidence establishes that Kuhnle-Hambster, who issued the June 27 discipline, was aware of at least some of this protected union activity. Direct evidence also establishes the Respondent's animus towards Schenk's union activity. As the judge found, Store Manager Cain, an agent of the Respondent, confirmed to Schenk on August 1 Schenk's observation that Kuhnle-Hambster was targeting Schenk and other union supporters for discipline and discharge.[21] Schenk and Cain's impression of the situation is supported by record evidence that Kuhnle-Hambster recommended discharging Schenk for his union activity of requesting bargaining by email on June 16. We accordingly find that the General Counsel's initial *Wright Line* showing is unusually well-supported by this record.[22]

Contrary to the judge, we find that the Respondent has not established that it would have issued the June 27 final written warning absent Schenk's union activity. Assuming, without deciding, that the content of Schenk's messages provided a legitimate basis for discipline, it is well established that an employer cannot meet its burden merely by showing that it had a legitimate reason for the action, but must persuade, rather, that it would have taken the same action even in the absence of the employee's protected conduct.[23] Finally, the Board has held that "an

of the independent Sec. 8(a)(1) allegation is not dispositive of the analysis of the Sec. 8(a)(3) allegation.

[13] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

[14] See, e.g., *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 6 (2023), enfd. 2024 WL 2764160 (6th Cir. 2024).

[15] Id.

[16] Id.

[17] Id.

[18] Id.; see also, e.g., *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995), enfg. 312 NLRB 155 (1993).

[19] *Intertape Polymer*, above, 372 NLRB No. 133, slip op. at 7.

[20] Id., slip op. at 6 fn. 24 ("'[W]here, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.'") (quoting *Wright Line*, above, 251 NLRB at 1089 fn. 14); see also, e.g., *Igramo Enterprise, Inc.*, 351 NLRB 1337, 1341 & fn. 18 (2007), enfd. 310 Fed. Appx. 452 (2d. Cir. 2009)

[21] The Respondent does not contest the judge's findings in this regard.

[22] See *Wright Line*, above, 251 NLRB at 1083 ("In modern day labor relations, an employer will rarely" admit "that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities.").

[23] See, e.g., *Intertape Polymer*, above, 372 NLRB No. 133, slip op. at 6; *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011), enfd. in relevant part 795 F.3d 18, 22-23 (D.C. Cir. 2015); *Igramo Enterprise*, above, 351 NLRB at 1340–1341; see also, e.g., *Renew Home Health v. NLRB*, 95 F.4th 231, 245 (5th Cir. 2024) ("Where the record does permit a competing, perhaps even equal, inference of a legitimate basis for discipline, the Board could reasonably infer an improper motivation.") (internal quotation, modification, and citation omitted), enfg. in relevant part 371 NLRB No. 165 (2022); *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998) ("[I]t is a subsidiary aspect of [employer's] overall burden to prove, as an affirmative defense, that despite any anti-union animus, [employer] *would* have fired [employee] *because of* his insubordination, not that it *could* have done so.") (emphasis in original), enfg. 324 NLRB 1213 (1997).

employer fails to meet its burden where the evidence affirmatively shows a lack of consistency in the employer's application of its disciplinary rules[.]"[24]

Here, Schenk's profanity in the group messages clearly violated the Respondent's "How We Communicate" policy. However, substantial record evidence establishes that Latham employees and managers commonly used profanity without being subject to discipline under that policy. First, Schenk testified that employees at the Latham store used profanity daily, and that every manager he had worked for, including Cain, used profanity. Schenk also testified that the specific expressions he used in the May 24 messages were commonly used by employees at the Latham store. Latham shift supervisor Phelps, a member of the message group, testified that "pretty much everyone under 30 uses profanity" at the Latham store, and "everyone in the group chat . . . occasionally used profanity." Phelps also testified that she "didn't even bat an eye" when she read Schenk's messages about Cain, because she "saw this as [Schenk] just venting . . . . [and] kind of letting off some steam." Phelps relatedly testified, as mentioned above, that employees stopped using the message group entirely after Schenk was disciplined because "people were nervous about maybe venting or wanting to say something and didn't want to be disciplined for it." Finally, as the judge acknowledged, Cain had previously, albeit jokingly, expressly excluded Schenk from an admonition to other employees to watch their language.[25]

Phelps' and Schenk's testimony in this regard is not directly controverted by any other evidence in the record and substantially supports finding, as we do, that language comparable to that used in Schenk's messages was common and had previously been tolerated by the Respondent at the Latham store.

Moreover, Cain did not testify, despite being currently employed by the Respondent at the time of the hearing. The General Counsel asks the Board to infer from the Respondent's failure to present testimony from Cain that his testimony would not have supported the Respondent's case. The Board has long accepted "the familiar rule . . . that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge."[26] Cain, as a manager currently employed by the Respondent, may reasonably be assumed to be favorably disposed to the Respondent.[27] Cain would clearly have been best positioned to confirm or deny Schenk's testimony that Cain had previously condoned Schenk's use of profanity or otherwise to contradict Phelps and Schenk if their testimony was inaccurate. The Respondent's decision not to present testimony from Cain on this matter accordingly warrants an inference, which we draw, that, had Cain testified, his testimony would have supported finding that the Respondent had previously tolerated comparable profanity by Schenk and others at the Latham store.[28]

Finally, documentary evidence suggests that the Respondent investigated whether comparable profanity was common or had been previously tolerated by the Respondent at the Latham store, but the Respondent refused the judge's direction to produce for *in camera* inspection relevant, assertedly privileged, documents that the General Counsel had subpoenaed. The General Counsel requests that the Board infer that relevant documents would have shown that comparable profanity was common and tolerated. The Respondent contends that the judge, and by extension the Board, does not have the authority to impose sanctions for subpoena noncompliance. However, Board law, with clear support from some Courts of Appeals,

[24] *Publix Supermarkets*, 347 NLRB 1434, 1438–1439 (2006).

[25] Specifically, Schenk testified: "[Cain] has made a joke in the past about, you know, people watching their mouths. Except for [Schenk], he's going to, you know, he's going to say what he wants." The judge appears to have credited this testimony, but he specifically discredited other aspects of Schenk's testimony. The judge's decision does not otherwise refer to Schenk's testimony about the use of profanity at the Latham store. Given the absence of a specific credibility resolution by the judge with respect to that testimony, we rely upon it only to the extent it is consistent with other credited testimony or record evidence.

[26] *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988).

[27] Id. ("[W]hile we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted . . . where the missing witness is a member of management[.]"). We accordingly reject the Respondent's argument that no adverse inference is warranted from its failure to call Cain because the General Counsel could have subpoenaed Cain to testify.

[28] See *Auto Workers v. NLRB*, 459 F.2d 1329, 1343 (D.C. Cir. 1972) ("[A]bsent a valid reason for bypassing the [adverse inference] rule, the inference should actually be drawn and its impact evaluated."), revg. and remanding with instructions on point *Gyrodyne Co. of America*, 185 NLRB 934 (1970). We reject the Respondent's argument that no adverse inference is warranted because the General Counsel has the ultimate burden of proof. Cain's testimony in this respect would have born on the Respondent's affirmative defense under *Wright Line*, and requiring the Respondent to make out its defense does not shift the General Counsel's ultimate burden to establish an unfair labor practice by the preponderance of the evidence. *Wright Line*, above, 251 NLRB at 1088 fn. 11. We also reject the Respondent's contention that drawing an adverse inference here conflicts with *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 3–4 (2019), in which the Board held that a judge abused his discretion by "filling a hole in the General Counsel's case" by drawing an adverse inference from the respondent's failure to call an employee discriminatee who the Board concluded could not be reasonably inferred to be disposed to testify in support of the respondent. Here, unlike in *Quicken Loans*, substantial record evidence independent of any inference supports the General Counsel's case, and Cain is a member of management.

supports drawing an adverse inference from the Respondent's failure to produce relevant evidence within its control in this context.[29] We accordingly infer from the Respondent's failure to introduce documents reflecting the results of its investigation into the use of profanity in the Latham store that those documents would not have contradicted Phelps and Schenk's testimony about the type and frequency of profanity previously tolerated by the Respondent there.[30]

The judge found that the Respondent met its *Wright Line* defense burden because: (1) in the judge's view, the content of Schenk's messages was egregious and the discipline imposed was not disproportionate to the offense; (2) while the record established that other Latham employees had commonly used profanity without being disciplined, the record did not show that the Respondent had previously tolerated language comparable to that appearing in Schenk's messages; and (3) the Respondent had previously disciplined Schenk for reasons related to obscene language, and Cain had previously told other employees to be careful with their language.

We disagree. First, the Board has repeatedly emphasized that a judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken is not a substitute for evidence that the employer would have relied on this reason alone.[31] Given the strong record evidence that the Respondent disciplined Schenk because of his union activity, we neither condone nor minimize the seriousness of Schenk's use of profanity by requiring the Respondent to meet its legal burden to affirmatively establish that it would have disciplined him for that profanity absent its unlawful ulterior motive.

Next, as explained above, we have found, contrary to the judge, that the Respondent had previously tolerated comparable profanity at the Latham store. Given the General Counsel's production of affirmative record evidence supporting this finding, any contention that Schenk's profanity was relevantly distinct from other profanity previously tolerated at the Latham store would be part of the Respondent's defense. The Respondent would accordingly have the burden to establish such a distinction, but it has not done so. In this respect, the Respondent produced no witness testimony or other evidence bearing on the use of profanity by Latham employees, and the record contains no support for the judge's suggestion that the language at issue was an outlier. Because the Respondent has the burden of establishing that it would have disciplined Schenk absent his union activity, to whatever extent the record might be read as inconclusive in this respect, such ambiguity undermines, rather than supports, the Respondent's position.

Finally, the Respondent's 2018 discipline to Schenk and Cain's admonition to other employees to be careful with their language fall far short of establishing that the Respondent disciplined Schenk pursuant to a consistently applied policy. The 2018 discipline rested on Schenk's failure to prevent other employees from submitting written obscenities to the Respondent's employee recognition system, and the record reveals no context for Cain's admonition to other employees beyond that it was essentially jocular. Neither of these instances is relevantly similar to the June 27 discipline. In any case, the Board has held that evidence that an employer took disciplinary action in reliance on a rule in some instances does not meet its defense burden where, as here, the record shows that it did not take such disciplinary action in a significant number of other instances.[32] Given the record evidence and the judge's uncontested factual finding that use of profanity was

[29] See, e.g., *Metro-West Ambulance Service*, 360 NLRB 1029, 1030 & fn. 13 (2014) (inferring that unproduced subpoenaed accident reports would have been adverse to the respondent's position); see also *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004) ("The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including . . . drawing adverse inferences against the noncomplying party."), enfd. 156 Fed. Appx. 386, 388 (2d Cir. 2005); *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1086-1087 (D.C. Cir. 2003) (affirming ALJ's adverse inference that unproduced subpoenaed documents would have been unfavorable to the employer; observing "ALJ would have been justified in drawing the adverse inference, however, even if no subpoena had been issued"), enfg. 335 NLRB 1318 (2001); *Auto Workers v. NLRB*, above, 459 F.2d at 1338–1339 ("[W]hile the adverse inference rule in no way depends upon the existence of a subpoena . . . the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the preexisting inference . . . . [T]he rule does not deprive the suppressing party of [its] constitutional right to an enforcement hearing on the subpoena, since [it] is not required to produce the evidence in question. Rather, the tribunal simply utilizes the commonsense inference that if the evidence would do the suppressing party any good, [it] would readily produce it."); *NLRB v. C. H. Sprague & Son Co.*, 428 F.2d 938, 942 (1st Cir. 1970) (affirming prohibition of cross-examination of witness with reference to matters relating to unproduced subpoenaed documents); *NLRB v. American Art Industries, Inc.*, 415 F.2d 1223, 1229-30 (5th Cir. 1969) (affirming exclusion of secondary evidence to prove point that would have been conclusively established by unproduced subpoenaed documents); but see *NLRB v. Interbake Foods, LLC*, 637 F.3d 492 (4th Cir. 2011); *NLRB v. Detroit Newspapers Agency*, 185 F.3d 602 (6th Cir. 1999); *NLRB v. International Medication Systems*, 640 F.2d 1110 (9th Cir. 1981).

[30] We emphasize that the weight of the affirmative record evidence supports our factual finding that language comparable to that used in Schenk's messages was common and had previously been tolerated by the Respondent at the Latham store even absent the inferences we draw from the Respondent's failure to elicit testimony from Cain or produce relevant documentary evidence.

[31] See, e.g., *Igramo Enterprise*, above, 351 NLRB at 1338 fn. 10 (citing cases).

[32] *Avondale Industries, Inc.*, 329 NLRB 1064, 1066-1067 (1999) (holding respondent failed to meet its defense burden by proffering evidence that "would prove at most that, in many instances, it took

common at the Latham store, the Respondent's failure to produce *any* evidence that it had ever previously disciplined any Latham employee for their own use of profanity precludes finding that it carried its *Wright Line* defense burden under well-established Board law.[33]

Because the General Counsel established that the Respondent issued the June 27 final written warning because of Schenk's union activity, and the Respondent has not established that it would have issued the warning absent that activity, we conclude that the warning violated Section 8(a)(3) and (1) of the Act.[34]

C. July 18 Memorialized Coaching

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) by issuing a memorialized coaching to Schenk on July 18 because of his union activity. As with the final written warning discussed above, the Respondent's contention that it issued this discipline for legitimate reasons not related to Schenk's union activity—here, for Schenk's failure, on June 30, to ensure that four store-closing tasks had been completed—requires analysis under the Wright Line dual-motive framework.

The judge found that the Respondent met its Wright Line defense burden because the record does not show that any other shift supervisor had left as many as four closing tasks undone on a single shift, and, in the judge's view, the coaching was a very mild form of discipline.[35]

Again, we disagree. First, as noted above, the judge's belief that Schenk's infractions warranted the discipline issued does not substitute for the Respondent's production of evidence that it would have issued this discipline for those infractions absent its unlawful motive.[36]

Next, as the judge found, credible evidence establishes that the types of shortcomings mentioned in the memorialized coaching were not uncommon at the Latham store, and the record does not show that the Respondent had ever previously disciplined any Latham shift supervisor for such failures. Given the General Counsel's initial showing and the substantial record evidence that other shift supervisors had made similar mistakes, any contention that Schenk's four mistakes were sufficiently extraordinary to establish that they would have resulted in discipline absent Schenk's union activity would be the Respondent's burden to establish as part of its affirmative defense. But the Respondent has produced no evidence tending to show that Schenk's mistakes went beyond those ordinarily tolerated when made by other employees, and a lack of record evidence on this point does not support the Respondent's burden. Moreover, Cain's comments to Schenk on August 1 reflect that Cain himself judged the June 30

disciplinary action in reliance on its rules," in light of evidence that "in many other instances [it] did not take such disciplinary action").

[33] See, e.g., *Publix Supermarkets*, above, 347 NLRB at 1438-1439; *Starbucks Corp.*, 372 NLRB No. 122, slip op. at 4 (2023) (employer failed to meet defense burden absent evidence it had ever previously discharged any other employee for misconduct upon which employer relied) (citing *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5 (2019)); *Renew Home Health*, above, 371 NLRB No. 165, slip op. at 1–2 fn. 2 (employer failed to meet its defense burden based solely on insufficiency of employer's comparator evidence); *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006) (employer failed to meet defense burden where affirmative record evidence established lack of consistent application of disciplinary rule: "In our view, the issue is not whether some conduct is "worse," in some moral sense, than other conduct. Rather, the issue is whether the [r]espondent has met its burden of showing that it would have discharged [employee] in the absence of [employee's] union activity. That burden has not been met.").

[34] As noted above, the General Counsel alleges in the alternative that the warning independently violated Sec. 8(a)(1) because it was issued for conduct that took place in the course of protected concerted activity and did not lose the protection of the Act. The judge concluded, the Respondent does not dispute, and we agree that Schenk's discussion of inadequate staffing was protected concerted activity because it related to employees' ongoing concerted discussions of this issue with the Respondent. The judge further concluded, however, that the warning did not violate Sec. 8(a)(1) because Schenk's use of profanity in the messages lost the protection of the Act under *Atlantic Steel*, 245 NLRB 814 (1979). The General Counsel argues that the judge erred in applying *Atlantic Steel* and should have instead found that Schenk's messages retained the protection of the Act under the totality of circumstances.

We agree with the General Counsel that the judge erred in applying *Atlantic Steel*. See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB 308, 310 (2014) ("[A]s a general matter, the *Atlantic Steel* framework is not well suited to address issues . . . involving employees' off-duty, offsite use of social media to communicate with other employees or with third parties."), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015); *Desert Springs Hospital Medical Center*, 363 NLRB 1824, 1824 fn. 3 (2016) ("In determining whether there is a loss of the Act's protection in a conversation among employees, the weight of the Board's decisions suggests that the appropriate standard is one that considers all the circumstances surrounding the conduct at issue.").

However, as discussed above, we have concluded that, even assuming that Schenk's profanity provided a legitimate basis for discipline, i.e., that the profanity was unprotected by the Act, the warning nevertheless violated Sec. 8(a)(3) and (1) because it was unlawfully motivated to retaliate against Schenk's union activity. Stated differently, the Respondent's authority to proscribe workplace profanity does not permit it to discipline employees for engaging in union activity. Accordingly, the question of whether or not Schenk's profanity lost the protection of the Act under the totality of circumstances has no bearing on the analysis of the 8(a)(3) allegation under *Wright Line*. Because concluding that the warning independently violated Sec. 8(a)(1) would not affect the remedy, we find it unnecessary to pass on the General Counsel's alternative allegation. Cf. e.g., *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324, 1324 fn. 1 (2016).

Chairman McFerran agrees with her colleagues that the warning violated Sec. 8(a)(3) and (1) because it was issued in retaliation for Schenk's union activity. However, under the totality of circumstances, she would affirm the judge's finding that Schenk's use of profanity lost the protection of the Act. She would accordingly affirm the judge's dismissal of the independent 8(a)(1) allegation.

[35] For the reasons discussed above, we agree with the judge's implicit finding that the General Counsel made her initial *Wright Line* showing with respect to the memorialized coaching.

[36] See, e.g., *Igramo Enterprise*, above, 351 NLRB at 1338 fn. 10.

closing errors unworthy of discipline.[37] On this record, the Respondent's failure to produce a single prior comparable discipline precludes a finding that it has carried its defense burden under controlling Board law.[38]

Finally, the July 18 memorialized coaching expressly relied in part upon the prior June 27 final written warning, which we have found unlawful. The Respondent does not contend that it would have issued the coaching absent the prior unlawful warning. The coaching's reliance on the warning accordingly additionally precludes finding that the Respondent has carried its defense burden with respect to the coaching as a matter of law.[39]

Because the General Counsel established that the Respondent issued the July 18 memorialized coaching because of Schenk's union activity, and the Respondent has not established that it would have issued the coaching absent that activity, we conclude that the coaching violated Section 8(a)(3) and (1) of the Act.

D. August 31 Discharge

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) by discharging Schenk on August 31 because of his union activity. The Respondent contends that it lawfully discharged Schenk for violating its policy requiring employees to "comply with all applicable laws" when Schenk opened a letter that was not addressed to him. As with the final written warning and memorialized coaching discussed above, the Respondent's contention that it discharged Schenk for legitimate reasons not related to Schenk's union activity requires analysis under *Wright Line*.

The judge found that the Respondent met its *Wright Line* defense burden based on his sense that Schenk's opening of a letter from a federal government agency addressed to Starbucks Corporation and designated on the envelope as "official business" was "a brazen intrusion into management's prerogatives."[40] The judge also found that the record did not establish that shift supervisors were generally authorized to open mail or specifically authorized to open official business mail sent by government entities. Finally, the judge found that the Respondent's *Wright Line* defense was additionally supported by its reliance, in discharging Schenk, on the June 27 final written warning, which the judge had previously found lawful.[41]

We disagree with the judge's finding that the Respondent met its defense burden. First, as noted above, the judge's sense of the seriousness of Schenk's conduct does not substitute for evidence that the Respondent would have discharged him for that conduct absent its unlawful motive to retaliate against him for his union activity.[42]

More fundamentally, record evidence supports finding that Latham store shift supervisors *were* generally authorized to open mail arriving at the store, and no record evidence supports finding that that authorization was limited to exclude certain kinds of mail. Specifically, Schenk testified that opening mail was a consistent part of closing shift, that he had seen some shift supervisors opening mail and been told by others that opening mail was a regular part of their closing procedures, and that he had opened mail while working as a shift supervisor under four different store managers. Phelps testified that she had seen shift supervisors open mail "only a handful of times," and "a few times," but also testified that two shift supervisors when she had first started working "would open mail regularly." Finally, the day after the August 12 incident, Schenk recorded a conversation with Cain in which Cain granted that the situation "seemed confusing," but asked Schenk not to open mail of this kind *in the future*.[43]

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[37] Specifically, Cain told Schenk: "That memorialized coaching . . . I fought against that. I did not think—I thought those things were one-offs and I was like, why?" We reject the Respondent's contention that this statement by Cain should be given no weight because it is from a surreptitious recording. As noted above, the judge correctly found that Cain is an admitted agent of the Respondent. Cain's opinion, as Latham store manager, that discipline was not warranted is clearly relevant to the question of whether the Respondent would have imposed discipline absent its unlawful motive. Finally, it is well established that surreptitious recordings are admissible in Board proceedings. See, e.g., *Cadillac of Naperville, Inc.*, 368 NLRB No. 3, slip op. at 1, fn. 1 (2019), enfd. on point 14 F.4th 703, 713 (D.C. Cir. 2021); *McAllister Bros.*, 278 NLRB 601, 601 fn. 2 (1986), enfd. 819 F.2d 439 (4th Cir. 1987).

[38] See, e.g., *Publix Supermarkets*, above, 347 NLRB at 1439 ("[A]n employer fails to meet its burden where the evidence affirmatively shows a lack of consistency in the employer's application of its disciplinary rules, and where the case for unlawful motive is substantial.").

[39] See, e.g., *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 20 (2018) ("'It is well settled that, where a respondent disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful.'") (quoting *Hays Corp.*, 334 NLRB 48, 50 (2001)), enfd. 2019 WL 12276113 (D.C. Cir. 2019); *NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764, 787 (8th Cir. 2013) ("An adverse employment decision is unlawful if it relies upon and results from a previous unlawful action.").

[40] For the reasons discussed above, we agree with the judge's implicit finding that the General Counsel made her initial *Wright Line* showing with respect to the discharge.

[41] The judge additionally emphasized Schenk's claim that his position with the Union permitted him to open the letter. Because no party argues that opening the letter was protected union conduct, Schenk's claim is not relevant to the *Wright Line* analysis.

[42] See, e.g., *Igramo Enterprise, Inc.*, 351 NLRB at 1338 fn. 10.

[43] The August 13 conversation included the following exchange:

> Cain: One last question. So I saw there was the mail and I saw it was open. Could you in the future not open—was it you who opened them?
>
> Schenk: Well, I opened the NLRB one because it was just addressed to the store.

The Respondent has no written policy governing opening mail and introduced no evidence bearing on the practice at the Latham store. In finding that Latham store shift supervisors were *not* authorized to open official business mail sent by government entities, the judge relied upon testimony from Phelps and from former shift supervisor and present Stuyvesant store manager Jacob Barkman. Specifically, Phelps testified on cross-examination that, while she had seen some shift supervisors open a variety of packages and mail "all the time," she could not say "with certainty" whether she had ever seen anyone open "a letter that was sent through the United States Postal Service from a government agency addressed to the Starbucks Corporation." Contrary to the judge, Phelps's uncertainty in this respect does not support an affirmative finding that Latham shift supervisors' authority was relevantly limited. Stuyvesant store manager Barkman testified that his prior duties as a shift supervisor had included opening packages containing product or inventory that arrived at the store by FedEx or UPS, but not mail, and that shift supervisors at the Stuyvesant store were currently responsible for opening packages, but not mail. However, Barkman also testified that he had never worked at the Latham store and did not know what they did there. Given the lack of any generally applicable policy governing mail and Barkman's unfamiliarity with the practice at the Latham store, Barkman's testimony about the practice at the Stuyvesant store has no bearing on the limits of the authority of Latham shift supervisors.

We accordingly find that, prior to August 12, Latham shift supervisors had generally been authorized to open mail arriving in the absence of a store manager, and that authority had not been limited to exclude certain kinds of mail.[44]

Moreover, as noted above, Cain did not testify. The General Counsel requests that the Board infer from the Respondent's failure to elicit testimony from Cain that Schenk had previously been authorized to open mail at the Latham store. Because Cain could reasonably be assumed to be favorably disposed to the Respondent's position and would clearly have been best positioned to testify if there were limits on Latham shift supervisors' authority to open mail, the Respondent's failure to call him as a witness supports an inference, which we draw, that Cain's testimony would not have contradicted other record evidence that Latham shift supervisors had generally been authorized to open mail prior to Schenk's discipline and that that authorization had not excluded certain kinds of mail.[45]

Absent production by the Respondent of any evidence that Schenk's conduct on August 12 exceeded his authority, we find that the Respondent has not carried its *Wright Line* defense burden to establish that it would have disciplined him for that conduct absent his union activity.

Finally, the August 31 notice of separation expressly relies upon both the June 27 final written warning and the July 14 memorialized coaching, both of which we have found unlawful. Because the Respondent does not contend that it would have discharged Schenk absent reliance on either or both of those earlier unlawful disciplines, the Respondent's reliance on those disciplines additionally precludes finding that it carried its *Wright Line* defense burden as a matter of law.[46]

Because the General Counsel established that the Respondent discharged Schenk on August 31 because of his union activity, and the Respondent has not established that it would have discharged him absent that activity, we conclude that the discharge violated Section 8(a)(3) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

1. Starbucks Corporation (the Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Workers United (the Union) is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by creating the impression that it was engaged in surveillance of its employees' union and protected concerted activities.
4. The Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Issuing a final written warning to James Schenk because of his support for and activities on behalf of the Union.

(b) Issuing a disciplinary memorialized coaching to Schenk because of his support for and activities on behalf of the Union.

> Cain: Yeah. That one I was the one that—I would ask you not to just in case there's anything legal or anything like that, that I may have to take care of. And I'm unsure and unaware. I know it seemed confusing when it just says the store, but that's something that I would like to be able to open and look at first.

[44] Because the record does not support the Respondent's contention that Schenk was not authorized to open the letter in question, we reject the Respondent's stated grounds for discharging Schenk for violation of its policy requiring compliance with applicable law.

[45] See, e.g., *International Automated Machines*, above, 285 NLRB at 1123. We emphasize that the weight of the affirmative record evidence supports our factual findings with respect to Latham shift supervisors' authority to open mail even absent the inference we draw from the Respondent's failure to elicit testimony from Cain on this matter.

[46] See, e.g., *Kitsap Tenant Support Services, Inc.*, above, 366 NLRB No. 98, slip op. at 20.

(c) Discharging Schenk because of his support for and activities on behalf of the Union.

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

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we amend the judge's remedy in the following respects. Having found that the Respondent unlawfully discharged James Schenk, we shall order it to offer him full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. We shall also order the Respondent to make Schenk whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The make-whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024), the Respondent shall also compensate Schenk for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings.[47] Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

We shall also order the Respondent to compensate Schenk for the adverse tax consequences, if any, of receiving a lump sum backpay award. The Respondent shall file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating backpay to the appropriate calendar year, and, within the same period or such additional time as the Regional Director may allow for good cause shown, a copy of Schenk's corresponding W-2 form(s) reflecting the backpay award. *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

Finally, we shall order the Respondent, within 14 days from the date of this order, to remove from its files any reference to the unlawful disciplines and discharge, and within 3 days thereafter, notify Schenk in writing that this has been done and that the disciplines and discharge will not be used against him in any way.

ORDER

The Respondent, Starbucks Corporation, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(b) Issuing disciplinary warnings to employees because of their support for and activities on behalf of Workers United (the Union).

(c) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

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

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

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

(b) Make Schenk whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Schenk for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) File with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Schenk's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplines and discharge, and within 3 days thereafter, notify Schenk in

[47] For the reasons set forth in *Airgas USA, LLC*, 373 NLRB No. 102, slip op. at 1 fn. 2 (2024), the Board's decision in *Thryv* remains valid precedent.

writing that this has been done and that the disciplines and discharge will not be used against him in any way.

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

(g) Post at its 1210 Troy Schenectady Road, Latham, New York, facility, copies of the attached notice marked "Appendix A" and post at its 1475 Western Avenue, Albany, New York, facility, copies of the attached notice marked "Appendix B."[48] Copies of the notices, on forms provided by the Regional Director for Region 3, 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 facilities 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 April 2022.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 3 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 16, 2024

_____
Lauren McFerran, Chairman

_____
David M. Prouty, Member

_____
Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT issue disciplinary warnings to you because of your support for and activities on behalf of Workers United (the Union).

[48] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If either facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice at that facility must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with employees by electronic means, the notices must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before the physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discharge or otherwise discriminate against you for supporting the Union or any other labor organization.

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, within 14 days from the date of the Board's Order, offer James Schenk full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James Schenk whole for any loss of earnings and other benefits resulting from our unlawful discharge of him, less any net interim earnings, plus interest, and WE WILL also make him whole for any other direct or foreseeable pecuniary harms suffered as a result of our unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate James Schenk for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of James Schenk's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful disciplines issued to James Schenk and to his unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use the disciplines or discharge against him in any way.

STARBUCKS CORPORATION

The Board's decision can be found at https://www.nlrb.gov/case/03-CA-296757 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.

APPENDIX B

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 create the impression that we are engaged in surveillance of your union or other protected concerted activities.

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

STARBUCKS CORPORATION

The Board's decision can be found at https://www.nlrb.gov/case/03-CA-296757 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

Desmond D. Metzger, Esq. and *Greg Lehmann, Esq.*, for the General Counsel.

Alex Frondorf, Esq. (Littler Mendelson, P.C.), of Cleveland,

Ohio*, Laura Spector, Esq. (Littler Mendelson, P.C.),* of Washington, D.C.*,* and *Samuel P. Wiles, Esq. (Littler Mendelson, P.C.),* of Fairport, New York, for the Respondent.

Michael Dolce, Esq. (Hayes Dolce), of Buffalo, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case in Albany, New York, on April 24 and 25, 2023. Workers United (the Union or the Charging Party) filed the charge: in Case 03–CA–296757 on June 1, 2022; in Case 03–CA–299016 on July 11, 2022 (amended July 28, 2022); and in Case 03–CA–302451 on August 31, 2022. The Director of Region 3 of the National Labor Relations Board (the Board) issued the Amended consolidated complaint and notice of hearing (the complaint) on February 8, 2023. The complaint alleges that Starbucks Corporation (the Respondent, the Employer, the Company, or Starbucks) discriminated on the basis of protected concerted activity and union activity in violation Section 8(a)(1) and Section 8(a)(3) and (1) of the Act: on June 27, 2022, when it issued a final written warning to James Schenk; on July 18, 2022, when it issued a memorialized coaching to Schenk; and on August 31, 2022, when it discharged Schenk. The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by imposing this discipline without providing notice and an opportunity to bargain to the Union. In addition, the complaint alleges that the Respondent violated Section 8(a)(3) and (1) by more strictly enforcing its communication policy against Schenk. The complaint also alleges that the Respondent violated Section 8(a)(1) by more closely supervising employees, creating the impression that union activities were under surveillance, holding captive audience meetings, threatening employees with loss of benefits if they selected the Union as their bargaining representative, and denying Schenk's request to be represented by the Union during an interview that he reasonably believed could lead to discipline. The Respondent filed a timely answer in which it denied committing any of the violations alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT[1]

I. JURISDICTION

The Respondent is a corporation with an office and place of business in Seattle, Washington, and is engaged the retail operation of stores offering coffee and quick-service foods at locations throughout the United States, including one at 1210 Troy Schenectady Road, Latham, New York (the Latham store or the Latham location) and one at 1475 Western Avenue, Albany, New York (the Stuyvesant store or the Stuyvesant location). The Respondent annually derives gross revenues in excess of $500,000, and, at each store referenced above, annually receives products, goods and materials valued in excess of $5000 directly from points outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent operates over 25,000 retail coffee stores worldwide.[2] The alleged violations in this case involve conduct at the Respondent's Latham store and Stuyvesant store. Both of those locations are among the 10 stores in the Albany, New York, district that is overseen by district manager Beate Kuhnle-Hambster. At the time of the trial in this matter, employees at eight of those stores, including at the Latham and Stuyvesant locations, had voted to unionize.

Employees at the Latham store were the first in the district to announce a union campaign. Schenk, a shift supervisor[3] at the Latham store, contacted the Union in November 2021 about representing employees there. In March 2022, a group of eleven

[1] At trial the Respondent asserted that a significant number of documents responsive to the General Counsel's subpoena duces tecum were privileged. The General Counsel stated that the privilege log submitted by the Respondent contained insufficient information to show that the documents were privileged, and asked that I inspect the documents in camera. I directed the Respondent to produce those documents to me for in camera inspection, but the Respondent refused to do so even after I repeated the direction and advised that I would consider imposing sanctions for such refusal. See *Pioneer Hotel & Gambling Hall*, 324 NLRB 918, 920, 927 (1999) (drawing adverse inference where party refused to provide withheld documents to administrative law judge for in camera inspection to evaluate the claim of privilege), enfd. in relevant part 182 F.3d 939 (D.C. Cir. 1999). The General Counsel sought all sanctions that might be appropriate pursuant to *Bannon Mills*, 146 NLRB 611, 614 fn. 4, 633–634 (1964), but did not make any specific requests that I sanction the Respondent by, for example, drawing an adverse inference regarding a particular subject, precluding the Respondent from offering evidence on any subject, or permitting the General Counsel to prove any matter using secondary evidence. In its brief, the General Counsel asks that I draw a "general adverse inference." Brief of General Counsel at Page 18. The Respondent's refusal to comply with my direction to submit the allegedly privileged material to me for in camera review is sanctionable conduct. However, I find that in this case the General Counsel's request for a "general adverse inference" is unworkably vague. The General Counsel declined my invitation to identify specific matters about which an adverse inference should be drawn and has not pointed to evidence or secondary evidence providing guidance regarding appropriate inferences about the contents of the withheld documents.

[2] This figure is set forth in the Board's decision in *Starbucks Corp. d/b/a Starbucks Coffee Co.*, 372 NLRB No. 50, slip op. at 1 (2023). In its brief, the Respondent states that in the United States it operates over 9000 stores. Brief of the Respondent at pg. 4. The Respondent cites no record evidence for that figure, but it is consistent with the Wikipedia entry about the company, which states that the Respondent has over 8900 company-operated stores in the United States. Starbucks—Wikipedia (retrieved 08/15/2023).

[3] Although Schenk's job title is "shift supervisor," no party has asserted that Schenk, or any other employee referenced by that title in this decision, is a statutory supervisor for purposes of Section 2(11) of the Act. See Brief of Respondent at pg. 3 fn. 2; see also *Oakwood Healthcare*, 348 NLRB 686, 687 (2006) (a party asserting supervisory status carries the burden of proving it). The certification of representative that the Board issued for the Latham store expressly includes shift supervisors among the bargaining unit employees.

Latham store employees, including Schenk, identified themselves as members of the union organizing committee in a letter addressed to the Respondent's chief executive officer (CEO) and posted to social media. General Counsel Exhibit Number (GC Exh. 3; Transcript at Page (Tr.) 83–84.)[4] Among the complaints that the organizing committee set forth in the letter were "inadequate staffing" and employees being required to "work harder to accommodate the lack of sufficient coverage or training." On May 17, 2022, employees at the Latham store voted in a representation election and on May 26 the Board certified the Union as their collective bargaining representative. Employees at the Stuyvesant store announced their union campaign on April 20 or 21, 2022, and, on June 7, 2022, voted to be represented by the Union.

III. KUHNLE-HAMBSTER'S INCREASED PRESENCE AT STUYVESANT LOCATION

Kuhnle-Hambster has been a district manager since August 2021 when she first started working for the Respondent. During the time period of the alleged violations, the persons who reported to Kuhnle-Hambster included Nick Cain, the store manager for the Latham store, and Jacob Barkman, the store manager for the Stuyvesant store. Prior to Barkman, the store manager for the Stuyvesant store was G. Hedge. Kuhnle-Hambster testified that she generally visited each of the stores in her district from once every other week to twice a week, but that she visited the Stuyvesant store more often during Hedge's tenure because he was having performance problems. (Tr. 356–359.) On May 2, 2022, Hedge resigned his employment effective May 15, 2022. Barkman, a current employee who had not previously been a store manager, was promoted to replace Hedge at the Stuyvesant location on May 16. (Tr. 324–325.) Barkman and Kuhnle-Hambster both testified that Barkman asked that Kuhnle-Hambster be "involved in" his "development" and "success," and Kuhnle-Hambster addressed that request by visiting the store more often. (Tr. 326–327, 364.) Within weeks after becoming store manager, Barkman took a previously scheduled vacation from May 30 to June 5, 2022. (Tr. 327–328.) When store managers are on vacation they reach out "around the district" to find a "proxy store manager" to handle administrative responsibilities during their absence. Ibid.

Precious Melendez, an employee at the Stuyvesant store who has been with the Respondent since January 2021, testified that prior to the union campaign she saw Kuhnle-Hambster at the store only about once every 2 months and never saw her having one-on-one conversations with employees.[5] (Tr. 51.) According to Melendez' testimony, after employees announced the union campaign, she witnessed Kuhnle-Hambster at the store 4 to 5 times a week. (Tr. 51–52.) Melendez testified that during every shift leading up to the union election, she witnessed Kuhnle-Hambster having one-on-one conversations with the employees at the Stuyvesant store. (Tr. 52–53.)During this period, Kuhnle-Hambster would sometimes test employees' drink preparation proficiency and point out shortcomings. (Tr. 52.)

Another Stuyvesant store employee, Jacob Evans, testified that, over a 2-month period prior to the union campaign, he saw Kuhnle-Hambster at the store a total of one or two times. Tr. 268.[6] He stated that on those occasions he never saw her have one-on-on conversations with employees. Evans testified that immediately after the employees announced the union campaign, he witnessed Kuhnle-Hambster in the store "multiple times a week," and saw her engage in one-on-one conversations with employees on a weekly basis. (Tr. 269–270, 275–276.) He stated that, during her visits, Kuhnle-Hambster would sometimes sit in the customer seating area—a vantage point from which she was able to observe most of the employee workstations. (Tr. 269.) Melendez and Evans both testified that Kuhnle-Hambster's presence at the store made them feel uncomfortable about discussing the Union with coworkers. (Tr. 53, 270.)

As discussed earlier, Kuhnle-Hambster herself testified that she increased her presence at the store during Hedge's tenure, and then further increased it when Barkman took over as store manager, but Melendez and Evans testified that the increase was more substantial that what Kuhnle-Hambster described, and that the timing of that increase coincided with announcement of the Union campaign rather than with the tenure of particular store managers. Based on the record as a whole, I found Melendez and Evans's accounts on this subject more credible than Kuhnle-Hambster's. Kuhnle-Hambster's claim that she was there simply to provide guidance to Barkman is undercut by the fact that during some of her time in the store she was not interacting with Barkman, but simply sitting in the customer seating area where she was able to observe the employees. In addition, Kuhnle-Hambster's testimony was vague with respect to when she increased her presence. She said that it had increased when Hedge was store manager, but she did not specify whether she was present more frequently throughout his time in that position or whether the more frequent visits were triggered at a specific point during that time. In addition, I note that she did not claim that she continued visiting the store so frequently during the period *after* the representation election, despite the fact that Barkman was still a new store manager at that time. In addition, the increase immediately after the April 20 or 21 announcement of the campaign is unsatisfactorily explained by the arrival of Barkman because he did not start at the store until May 16. Tr. 323–325; Brief of Respondent at Page 10.

[4] Schenk characterized Siena Phelps and himself as co-authors of the letter. Tr. 84. Phelps, however, stated that she was the author of the letter, and that while she had input from "everybody at the store," Schenk was not a primary author Tr. 298. I find that Phelps' testimony about Schenk's degree of involvement with the letter was more credible that Schenk's testimony on the subject. Phelps, a public union supporter and witness for the General Counsel, had nothing to gain by that testimony and testified in a calm and certain manner. On the other hand, Schenk has a financial interest in the outcome of this litigation and his sometimes melodramatic demeanor as a witness detracted to a degree from his credibility.

[5] Both before and after the announcement of the union campaign, Melendez worked at the store five or six shifts a week, for 5 hours each shift. Tr. 51. Melendez was active in the union campaign at the store. Tr. 50.

[6] Evans worked at the store four or five days a week for a total of about 20 hours weekly. Tr. 268. He was working during Kuhnle-Hambster's tenure in November and December 2021, but he was on leave with an injury from January 21 to April 11, 2022. Tr. 267.

IV. KUHNLE-HAMBSTER'S PRE-ELECTION ONE-ON-ONE MEETINGS WITH EMPLOYEES OF THE STUYVESANT STORE

Between the announcement of the union campaign at the Stuyvesant store and the union vote there, Kuhnle-Hambster initiated numerous one-on-one meetings about the Union with employees at the Stuyvesant store. According to both Kuhnle-Hambster and Melendez, Kuhnle-Hambster would ask employees if they had 5 or 10 minutes to talk. (Tr. 52–53, 365–366.) Kuhnle-Hambster testified that she would tell employees what the topic was and then speak to them about the Union. Tr. 366, 398. She testified that before starting the meeting she would ask the employee "are you okay speaking with me?," and that every single employee she asked to meet with had "consented" to the conversation. (Tr. 366.)

Melendez and Evans were among those who Kuhnle-Hambster met with during the lead-up to the union vote. Kuhnle-Hambster approached Melendez at work on May 11 and asked if Melendez had 5 minutes to talk. Melendez testified that she told Kuhnle-Hambster that she wanted to wait until her break so that the meeting would not prevent her from continuing to assist coworkers complete team tasks. (Tr. 54, 70–71.) According to Melendez, Kuhnle-Hambster did not honor that request, but rather continued the meeting. Ibid. Kuhnle-Hambster testified that since employees' breaks were their "own time" she did not conduct the anti-union meetings during the employees' breaks. (Tr. 366.)

I credit Melendez' testimony that when Kuhnle-Hambster asked her to meet on May 11, Melendez responded that she wished to wait until she was on a break, but that Kuhnle-Hambster proceeded with the meeting without waiting. That testimony was specific and confident. Kuhnle-Hambster's contrary testimony that she did not start any of the anti-union meetings without first obtaining the employee's consent was very general, and she did not assert that she had a specific recollection of her May 11 meeting with Melendez. In addition, Melendez' testimony that Kuhnle-Hambster declined her request to postpone the meeting until a break is lent credence by Kuhnle-Hambster's own testimony that she intentionally refrained from holding the meetings during employees' breaks.

There is no dispute that, during her meetings with Stuyvesant employees, Kuhnle-Hambster made statements to employees regarding the relationship between unionizing and benefits, and in particular regarding unionizing and the college tuition reimbursement benefit.[7] (Tr. 54–55, 70, 277–278, 369.) There was, however, conflicting testimony about what precisely Kuhnle-Hambster told employees, and in particular Melendez, on that subject. According to Kuhnle-Hambster, what she told employees regarding the subject of unionizing and benefits was that if employees unionized "a lot of things would be up for – to bargaining." (Tr. 370.) Kuhnle-Hambster did not testify specifically about meetings with Melendez, but did deny that she told any employee that benefits would be unavailable if employees unionized. (Tr. 371.) Although Kuhnle-Hambster testified that she discussed the tuition reimbursement program during the one-on-one meetings with employees, she conceded that she did not have any specific recollection of those discussions. (Tr. 369-370.) She also stated that she had never discussed the Respondent's "coffee master" training program[8] during her anti-union meetings with employees at the Stuyvesant store. (Tr. 369.)

Melendez gave testimony that contradicted some of Kuhnle-Hambster's account. Melendez stated that Kuhnle-Hambster met with her about the union twice—on May 11 and May 23—the latter time with employee Kayla Lupi[9] present. (Tr. 56–57.) Both Melendez and Lupi were participating in the college tuition reimbursement program. According to Melendez' testimony, during the May 11 meeting Kuhnle-Hambster stated that she had noticed that Melendez was in favor of the Union, and then asked if Melendez "was in favor of potentially not having the benefits" because if employees unionized they would have to bargain for benefits. (Tr. 54, 56–57.) According to Melendez' direct testimony, during the second meeting—the one that also included employee Lupi—Kuhnle-Hambster stated that if employees unionized they "would no longer have access" to the tuition reimbursement program. (Tr. 56.)[10] In addition, Melendez testified that Kuhnle-Hambster had brought up the coffee master program in the context of discussing unionization. Specifically, Melendez testified that, on May 23, Kuhnle-Hambster told her that if employees unionized they would not have access to the coffee master program or other benefits that the Respondent was "rolling out." (Tr. 54–55, 73–74.) That testimony is called into question, however, by Melendez' own seemingly contradictory testimony during other parts of her examination. Specifically, I note the following exchange:

> Respondent's Counsel: You testified not only the coffee master program, but also that tuition reimbursement program?
>
> Melendez: Correct.
>
> Respondent's Counsel: You were never told by Beate[Kuhnle-Hambster] or any[one] else on behalf of Starbucks that you would lose those benefits if the Union, if you selected to unionize, correct?
>
> Melendez: We were told potentially for the benefits we'd have to bargain for them in a negotiation.
>
> Tr. 70. Similarly, at another point when Melendez was asked what Kuhnle-Hambster said about the coffee master program on May 23, she reported not that Kuhnle-Hambster had said the program would be unavailable, but rather that it was something employees "would bargain for." (Tr. 56-57.)

Kuhnle-Hambster initiated a one-on-one meeting with Evans

[7] Starbucks offers employees free tuition to a 2-year on-line degree program from the State University of Arizona.

[8] Employees who participate in the Respondent's coffee master program receive training to become expert "ambassadors" for coffee. The Respondent does not provide enhanced pay, benefits, or scheduling prerogatives, to employees who complete the coffee master program, but does provide them with a special work apron. The coffee master program was not active in May 2022. However, in April 2022, the Respondent's CEO had announced a plan to revive the program.

[9] This employee's name is spelled "Lupe" in the trial transcript, but in their briefs the parties spell the name "Lupi."

[10] No party called Lupi to testify.

on May 2 while he was working behind the store counter. Kuhnle-Hambster told Evans that the upcoming union election was a "big decision" and she wanted to make sure he "got all the facts" about joining a union. (Tr. 271, 276.) Evans told Kuhnle-Hambster that he hoped the union would be able to change the employees' "at-will" employment status. Kuhnle-Hambster replied that "whether employment would remain at-will" "would be uncertain." (Tr. 271.) Evans testified that Kuhnle-Hambster did not state that benefits would change if employees unionized, and did not make any promises. (Tr. 277–278.) Evans also testified that the meeting made him uncomfortable, but that he did not feel he could end the meeting given the "chain of command and authority" relationship. (Tr. 276–277.)

As indicated above, Melendez' and Kuhnle-Hambster accounts were in some respects contradictory on the subject of what was said regarding benefits. Regarding the question of whether Kuhnle-Hambster told Melendez that benefits would be unavailable to employees if they unionized (as opposed to telling Melendez that benefits would be subject to negotiation) I find that the record does not provide a basis for concluding that the statement was, or was not, made. Kuhnle-Hambster denied that she had ever made such a statement to employees, and Melendez' testimony that Kuhnle-Hambster did so was less than clear. Although Melendez' lack of clarity on that subject to some extent results from the fact that there were two separate meetings during which Kuhnle-Hambster discussed the subject with Melendez, the lack of clarity is not fully explained by that fact. Moreover, Kuhnle-Hambster's account about what she was telling employees is lent a modicum of credence by the account of Evans—a witness for the General Counsel—who testified that, when discussing the connection between unionization and benefits, Kuhnle-Hambster did not state that benefits would change if employees elected to unionize.

V. SCHENK: DISCIPLINARY MEETINGS AND DISCIPLINARY ACTIONS

Schenk was employed by the Respondent for 6 years, the last 4½ of those as a shift supervisor. His responsibilities as shift supervisor included deploying staff and delegating tasks to employees, providing "respectful coaching and feedback" to employees, and "assist[ing] with new partner training." (R. Exh. 1.)[11] Prior to the Union campaign, the Respondent disciplined Schenk on two occasions. The first discipline was a documented coaching, issued at the Latham store on April 9, 2018, which cited Schenk for failing to take appropriate action as a shift supervisor in response to employees' use of "obscene" and potentially "offensive or harassing" insults about a coworker. (R. Exh. 5.) The coaching required Schenk to read and sign the Respondent's antiharassment standards and warned that "further violations of this standard will lead to additional corrective action, up to and including separation." Schenk conceded that at that time he was made aware that it was inappropriate to use offensive and obscene language in the workplace. (Tr. 186.) The second discipline was a documented coaching, issued in 2021, which cited Schenk for failing to follow procedures for informing the Respondent when he was going to miss a scheduled shift.[12]

Schenk was active in the effort for union representation at the Latham store. He reached out to the Union in November 2021 and was one of the employees who identified themselves to the Respondent as a member of the union organizing committee in the March 2022 letter. Schenk also passed out union authorization cards and collected the signed cards from employees. After the union campaign became public, he wore a pro-union pin on his apron while at work. After the Union was certified as employees' bargaining representative on May 26, Schenk sent emails to the Respondent on June 8, June 16, and June 22, 2022, demanding that the Respondent bargain over the effects of a plan to renovate the store. (GC Exhs. 4, 5, and 6.) On June 23, 2022, the Respondent's counsel asked Schenk for "thoughts about arranging our first meeting," and also stated that the Respondent was seeking confirmation from the Union's counsel that Schenk was authorized to speak on behalf of the Union. The next day, the Union's attorney confirmed to the Respondent, by email, that Schenk was speaking on behalf of the Union.

Kuhnle-Hambster was an addressee of Schenk's bargaining requests. After receiving the June 16 bargaining request, Kuhnle-Hambster contacted the Respondent's human resources support team for a "separation consultation" based on Schenk sending the bargaining request email during working time. (GC Exh. 15.) Kuhnle-Hambster herself was "leaning separation" according to the human resources team's report.[13] Ibid. The report from human resources notes that while Schenk sent the email during his shift, it was not known when Schenk had been on break. The human resources team's "disposition" regarding Kuhnle-Hambster inquiry was to provide her with "no guidance"—declining, in other words, to concur with Kuhnle-Hambster who was "leaning" in favor of separation. Kuhnle-Hambster did not subsequently impose any discipline on Schenk based on his June 16 bargaining request email.

A. Final Written Warning: Shortly thereafter, on June 27, Kuhnle-Hambster issued a final written warning to Schenk, citing him for violating the Respondent's "How We Communicate" policy. (GC Exh. 9.) The warning cited Schenk for offensive statements made on May 24 in a group chat. The participants in the group chat were shift supervisors Gregory Ingram, Jessica Mahoney, Siena Phelps, Schenk, and Jordan Schultz. (Tr. 95, 280.) Phelps credibly testified that the chat was used by shift supervisors to communicate "store updates, things going on at the store" that were helpful for "crossover between shifts" and also "sometimes [to] just talk about like our days." (Tr. 281–282.) For example, the shift supervisors used the group chat when they needed to discuss an employee "call out" and how they were "handling backups." Ibid. The group chat topics

[11] See also, supra, fn. 3 (Schenk was not a supervisor for purposes of Sec. 2(11) of the Act).

[12] When Schenk was asked to state what discipline the Respondent had issued to him prior to the union campaign, Schenk stated that there had only been the 2021 coaching, and neglected to mention the 2018 discipline that concerned obscene, and potentially harassing, statements about coworkers. See Tr. 81–82, 185–186.

[13] At trial, prior to being confronted with the human resources report, Kuhnle-Hambster denied that she was leaning towards firing Schenk for sending the email regarding bargaining. Tr. 406, 407–408. Given the documentary evidence, and the record as a whole, I find that Kuhnle-Hambster's testimony in this regard was not credible.

sometimes included complaints about inadequate staffing levels.[14] (Tr. 284–285.) The participants would "occasionally" talk about union information in the group chat, but "not a ton." (Tr. 282.)[15]

The offensive statements that Schenk made in the group chat on May 24 came to the Respondent's attention on May 25 or 26 when Mahoney—a participant in the group chat and also a member of union organizing committee—informed store manager Cain about the remarks and shared photographs of the chat with Kuhnle-Hambster.[16] In the chat, Schenk complained that Cain had scheduled inadequate staff for a closing shift during which the Schenk was responsible for supervising "clean play"—a once-weekly deep cleaning of the store. (Tr. 98.) Schenk's comments in the shift supervisor group chat included the following:

> Nick[Cain] can suck my fucking dick. Closing with 2 people and still have to do clean play. . . .
> Leaves me with useless fucking [T]emera[17] for CLEAN PLAY
> WHAT THE FUCK CAN SHE CLEA[N] ARE YOU FUCKING SER[I]OUS
> Safe money is fucked too . . . .
> I fixed it
> I d[o]n't care
> Nick can suck my dick. . . . .
> Un fucking believable
> Especially when I told that fucking cocksucker to close at 2 when we had people
> If you're too fucking chicken shit to stand up to [Kuhnle-Hambster] when she "makes" your stay open then you can say by[e] to going above and beyond
> Fucking [p]ussy
>
> . . .
> Sick ass
> Get to do clean play solo with termera
> The dumb fuc[k]ing bitch who can't even use cleaners.
> . . .
> I d[o]n't give a fuck
> DON'T FUCKING OPEN IF YOUR ARENT FUCKING STAGED
> What kind of lizard brain fucking stupidity does it take to convince himself it's okay to ask me to come in and do 3 fucking peoples jobs.

(R. Exh. 6.)

On June 16, 2022, Schenk was called in for a meeting with Kuhnle-Hambster and Cain. Kuhnle-Hambster showed Schenk the photographs that Mahoney had provided of the chat messages referenced above, and asked if he had written them. Schenk confirmed that he wrote the messages, but stated that he considered them "personal."[18] During the meeting, Schenk asked how the Respondent had obtained the images of the group chat, but Kuhnle-Hambster did not tell him. (Tr. 101–102, 237.) The evidence shows that after this meeting, Kuhnle-Hambster once again inquired about disciplining Schenk and obtained input from other company staff, including a company regional director. (GC Exhs. 16 and 17.) The company regional director observed that, according to Kuhnle-Hambster, the store manager might not have been holding employees accountable for using offensive language, but that Kuhnle-Hambster and herself were "aligned with Sep[aration]." (GC Exh. 17 at pg. 00095.) Ultimately a decision was made to issue a final written warning to Schenk, rather than to fire him.

Kuhnle-Hambster and Cain met with Schenk at the store again on June 27 and issued a final written warning to him at that time. Prior to doing so, the Respondent did not provide the Union with pre-implementation notice or an opportunity to bargain regarding the discipline. (Tr. 37–38.) Kuhnle-Hambster presented the written warning to Schenk and stated that the action was based on the severity of the work-related "verbiage" sent to coworkers. (Tr. 104 ff.) The written warning document itself stated that it was issued "for unprofessional behavior, including use of profanity and name calling which is in violation of Starbucks Code

[14] Inadequate staffing had been raised by the Latham organizing committee as a matter of concern in its previous letter to management. GC Exh. 3. Kuhnle-Hambster stated that Latham store employees also raised staffing levels as an issue when she met with them about the union campaign. Tr. 400.

[15] I credit Phelps testimony that the group chat was used primarily as a means for shift supervisors to communicate information to help them run their shifts over Schenk's contrary testimony that it was a union organizing committee chat, Tr. 95, used primarily to discuss union activity. I note that Phelps was a union supporter and a witness for the General Counsel, and had no apparent motive to give testimony that weighed against the General Counsel's argument that the group chat communications were protected under the Act. I note, moreover, that Schenk's claim that the group chat was an instrument of the union organizing committee is undercut by the fact that the chat group only included four of the eleven persons identified as members of the organizing committee in the March 2022 letter, but did include Ingram, who was a shift supervisor but not a member of the union organizing committee. Tr. 94–95, 280.

[16] She shared them as photographs of a cell phone screen displaying the messages. In the photographs, one can clearly see the cell phone and the hand holding it. R Exh. 6.

[17] Temera was an employee who had a medical condition that prevented her from working with cleaning products used at the Latham store. Tr. 283-284, 301. Schenk was the shift supervisor on a shift to which Temera was assigned.

[18] Schenk testified that, on the way into the meeting, he told Kuhnle-Hambster that if anything disciplinary was going to be discussed he wanted to have a union representative present, but that Kuhnle-Hambster "blew past" the request and proceeded with a disciplinary interview. Tr. 92-93. Kuhnle-Hambster testified, contrary to Schenk, that it was not until the end of the interview that Schenk stated he wanted to have a union representative present during meetings of this type. Tr. 379. I do not find a basis in the record for crediting Schenk's testimony over Kuhnle-Hambster on this point. I believe that both of these witnesses strained at times to conform their testimony to their own interests in this litigation. See, supra, footnotes 4, 12, 13, 15, and infra footnote 20. Moreover, I note that Schenk did not explain why he acquiesced when Kuhnle-Hambster ignored his purported pre-interview request for representation. Nor did he explain why he would have suspected that the meeting was a disciplinary interview before any questioning started and before any of the disciplinary actions at-issue in this case.

of Conduct & How we Communicate," and recounted some of the language quoted above, which the document characterized as part of "a work-related text message to another" shift supervisor. Schenk protested that the communications were "private conversations" and that he was not asking for work-related help. (Tr. 107; GC Exh. 9.) At the hearing, Schenk opined that the messages were part of a "private group chat to a group of friends with an expectation of privacy," and also that it was "protected speech." (Tr. 111.) After the Respondent issued the final warning, the employees stopped using the group chat. (Tr. 287.)

During the period relevant to this litigation, the Respondent maintained the following rule:

> How We Communicate
>
> Partners[19] are expected to communicate with other partners and customers in a professional and respectful manner at all times. The use of vulgar or profane language is not acceptable.

(R. Exh. 3.) The rule was contained in the Respondent's "Partner Guide," which is available to employees. There was credible evidence that, despite the existence of this rule, it was common for employees at the Latham store to use profanity and vulgarity. (Tr. 282, 287.) The record evidence does not show, however, that it was common, or tolerated, for employees to use vulgar or profane language as part of insults or name calling directed at other staff members (as opposed to as exclamations or intensifiers). (Tr. 301–302.) Indeed, well before the start of the union campaign, Schenk himself had been disciplined at the Latham store for failing to act appropriately as a shift supervisor to stop employees on his shift from using obscene insults about a coworker. (R. Exh. 5.) The coaching document that the Respondent issued to Schenk at that time warned that further violations could result in separation. Nevertheless, Schenk did not feel it necessary to moderate his own use of profanities, and even bragged at trial that when Store Manager Cain asked employees to be careful with their language, Cain had added "Except for James[Schenk], he's going to, you know he's going to say what he wants." Tr. 101. The evidence also shows that, after disciplining Schenk, Kuhnle-Hambster terminated a newly hired employee for, inter alia, using vulgarity towards a coworker. R Exh. 12.

B. Memorialized Coaching: On July 18, 2022, the Respondent issued a "memorialized coaching" to Schenk, stating that during a closing shift on June 30 he had "violat[ed] the standards and procedures as outlined in the Steps to Excellence – Clean & Maintained Stores." (GC Exh. 10.) Prior to issuing this coaching, the Respondent did not provide the Union with pre-implementation notice or an opportunity to bargain. (Tr. 37–38.) The document memorializing the coaching states that Schenk had left four tasks undone: high variance count; dating of pastries; stocking the bathrooms; and filling empty cold brew coffee kegs. The "high variance count" refers to an inventory tracking task in which particular items in the store are spot checked. (Tr. 222–223.) This task takes a few minutes to complete. (Tr. 223.) Dating pastries refers to taking the pastries out of the freezer so they will be ready for sale the following day and stamping each with a sticker that shows its expiration date. (Tr. 220–221.) This task takes a few minutes. (Tr. 223.) Stocking the toilet takes about 5 to 15 minutes and is confined to making sure there are two toilet paper rolls—a roll and a backup roll—in each dispenser. (Tr. 120, 222.) Regarding the kegs, the closing shift staff is required to leave at least half of the kegs filled and ready for the staff that opens the store the following day. (Tr. 116–117.)

Schenk testified that on the shift in question, he had made sure the bathroom was properly stocked "to the best of my knowledge" but when specifically asked whether he had placed the second, back-up, roll in the dispenser he first answered, "I don't know," and when asked again conceded that he "didn't take the time to do a second [toilet paper]roll in there." (Tr. 120, 221–222, 224.)[20] Schenk did not deny that the other deficiencies described in the memorialized coaching had occurred, but he stated that such deficiencies were common and that he was not aware of anyone else being disciplined for them. When store manager Cain confronted Schenk about the shortcomings, Schenk told him that he had been unable to complete the tasks because the coin-rolling machine was malfunctioning and because the coworker scheduled to close the store with him was inexperienced. (Tr. 111–114.) The coin rolling task was not one that the closing shift completed each day, but Schenk testified that it was part of the weekly distribution of tips to employees and he had prioritized it for the sake of his coworkers. (Tr. 215.)

There was credible evidence that the types of shortcomings mentioned in the memorialized coaching were not uncommon at the Latham store (Tr. 289–290, 307–309), and the record does not show that any closing shift supervisor had previously been disciplined at the Latham store, or by Kuhnle-Hambster, for the failures that Schenk was cited for in the memorialized coaching. At the same time, there was no evidence that any shift supervisor had previously been responsible for as many as four failures of this type on a single shift. (Tr. 308–309.)

Store manager Cain was the one who informed Kuhnle-Hambster of the shortcomings of Schenk's closing shift performance on June 30. (Tr. 389–390.) Nevertheless, Cain, during an August 1 conversation with (and recorded by) Schenk,[21] stated that he had "fought against" issuing the memorialized coaching because he considered Cain's deficiencies that day to be "one-offs." During this conversation, Schenk opined that Kuhnle-Hambster's "goal is to fire me" and that he was "feeling sick" at work. Schenk stated that he just "want[ed] it to be over with" and was actually disappointed that Cain had not told him he "was getting fired." Schenk further stated, "I'm going on 10 days in a row now where I've had a nightmare that I woke up to a text saying, like, don't come in, you're fired." Schenk told Cain that "quitting feels like letting [Kuhnle-Hambster] win" and Cain responded that Schenk should not quit and that he did not want Schenk "to feel stress from me or anyone because I feel like it's

[19] The Respondent uses the term "partners" to refer to staff.

[20] Given this inconsistent testimony, I find that Schenk's testimony that the bathrooms were properly stocked at the end of the shift is not credible.

[21] Schenk's recording of this conversation was played at the hearing by the General Counsel and made part of that hearing transcript. Tr. 124 ff.

been affecting you in different ways here too." Cain stated he believed Schenk's mistakes were due to stress-related exhaustion. He warned that both Schenk and himself had to make sure "to cross our 'T's and dot our 'I's," because "that's what Beate[Kuhnle-Hambster] is going to be looking for." Later, when Schenk opined that Kuhnle-Hambster was "making it more and more miserable" for him so that he would quit, Cain responded "it sucks that then, she's winning, making it miserable to be here."

C. Termination of Employment:

Schenk was working as a shift supervisor at the Latham store on August 12, 2022. Towards the end of Schenk's shift, at a time when the store manager was not present, Schenk opened a letter that came to the store from the NLRB. The letter was delivered by United States mail, was addressed to "Starbucks Corporation," and gave the street address of the Latham store. (R. Exh. 7.) The pre-printed text on the envelope warned that the correspondence was "Official Business" and set forth the return addressee as the "United States Government National Labor Relations Board." After opening the envelope, Schenk examined its contents, shared them with other employees, and then placed the letter back in the envelope and left it on the desk of store manager Cain. (Tr. 144.) Schenk testified that he was aware that opening mail that is not addressed to you is a potential violation of the law. (Tr. 235.)

The next day, on August 13, Cain asked Schenk who had opened the letter from the National Labor Relations Board and Schenk responded that he was the one who had done so.[22] Cain told Schenk, "I would ask you not to just in case there's anything legal or anything like that . . . that's something that I would like to be able to open and look at first." Schenk responded: "Well, with respect, I am the Union liaison with the store and papers given to us by the NLRB to put up have been taken down after I've posted them. So I don't have a lot of confidence that I will receive that communication if I need it." At trial, Schenk expressed a similar view, testifying that "as the Union liaison" he viewed it as "well within my purview to read a letter from the NLRB." (Tr. 159.)

Cain called Kuhnle-Hambster and told her about the incident and that Schenk had admitted to opening the letter. (Tr. 391–392.) Kuhnle-Hambster discussed Schenk's conduct with the Respondent's human resources department and its legal department, and decided to terminate Schenk's employment. On August 31, Kuhnle-Hambster informed Schenk by phone that he was being terminated for opening the letter. Prior to taking this action, the Respondent did not provide the Union with pre-implementation notice or an opportunity to bargain over the termination. (Tr. 37–38.) Later that day, Schenk received a "notice of separation" document, dated August 31, 2022, which stated:

> This document is James Schenk's notice of separation for violation of the Standards of Business Conduct, specifically the expectations in the *Compliance with Laws and Regulations* section, which states that partners "must comply with all applicable laws, rules and regulations when performing [their] duties" and that "[a]ll Starbucks partners have a continuing obligation to familiarize themselves with applicable laws relating to their job responsibilities and all Starbucks policies. Breach of these standards, Starbucks policies or the law may give rise to disciplinary action up to, and including dismissal."
>
> On 6/27/22, James received a final written warning for sending an inappropriate text to his peers. Then on 7/14/22, James had a memorialized conversation due to not meeting the expectations of the shift supervisor role.
>
> Despite this, on 8/12/22, James opened a letter that was not addressed to him, despite the fact he was not an individual who is authorized to open Company mail or who has been designated as needing to know the information in order to perform his job duties. James admitted that he knew the letter was not intended for him and that he opened it because he wanted to know what it contained. James' conduct was not consistent with our Mission and Values and could have constituted a felony under federal law in violation of his responsibilities under the Standards of Business Conduct.[23]

(GC Exh. 13.)

The Respondent did into show that it has promulgated a policy specifically addressing which members of store staff are authorized to open mail. The record shows that on relatively rare occasions shift supervisors opened mailers and packages containing work supplies that were delivered to the store. (Tr. 288, 305–307, 336–337, 339.) The record does not support the notion that shift supervisors were generally authorized to open whatever mail came into the store or, more specifically, that they were authorized to open official business mail sent by government entities and addressed to Starbucks Corporation. Id. and Tr. 350. Schenk essentially recognized this himself, stating that he opened the NLRB letter to the Respondent in his capacity as *union liaison* and based on his distrust that the Respondent would share its contents with him. I find that it is not credible, facially or on the record here, that Schenk had, or honestly believed he had, the right as either a shift supervisor or a union liaison to open official business mail addressed to Starbucks Corporation by a government agency. This finding is buttressed by Schenk's attempts to avoid admitting that the letter was addressed to Starbucks *Corporation.* See Tr. 145 (Schenk testifies that the letter was addressed to "Starbucks 1210 Schenectady Road," and omits that it was addressed to Starbucks *Corporation*); (Tr. 151.) (when confronted by Cain, Schenk says "I opened the NLRB one because it was just addressed to the store"); Tr. 252 (when asked if any of the mail he opened "was addressed specifically for the Starbucks Corporation from [a] government entity," he answers "I do not know").

[22] Schenk recorded this conversation with Cain. The General Counsel played the recording at the hearing and it was included in the trial transcript. See Tr. 150 ff.

[23] The Respondent's written Standards of Business Conduct state that Starbucks "depends upon its partners to follow the law and make appropriate decisions." R. Exh. 3 at internal pg.36; Tr. 176

Discussion

I. SECTION 8(A)(1): ALLEGED INTERFERENCE

A. Impression of Surveillance

1. Stuyvesant Store: The General Counsel alleges that the Respondent unlawfully created the impression of surveillance at the Stuyvesant Store during the weeks prior to the union election there. An employer violates Section 8(a)(1) of the Act when, under all the relevant circumstances, reasonable employees would assume from the employer's actions that their union or other protected activities have been placed under surveillance. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 102 (2010); *Fred'k Wallace & Son*, 331 NLRB 914 (2000), quoting *Flexsteel Industries*, 311 NLRB 257 (1993). The Board has held that while "management officials may observe public union activity," those officials may unlawfully create the impression of surveillance when their observation of the union activity is "out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982) (Table); see also *Durham School Services*, 361 NLRB 407 (2014) (observation of union activities in a public area was unlawful surveillance when manager "was observing employees in way that was out of the ordinary"). To determine whether employer surveillance violates the Act, the Board considers whether the employer's conduct, under the totality of the circumstances, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Starbucks Coffee Co.*, 372 NLRB No. 50, slip op. at 23 (2023), citing *Sage Dining Services, Inc.*, 312 NLRB 845, 846 (1993) and *Brown Transportation Corp.*, 294 NLRB 969, 971–972 (1989).

Kuhnle-Hambster dramatically increased her presence at the Stuyvesant store during the time period from April 2022, when the union campaign there became public, and June 7, 2022, when employees at that location voted to be represented by the Union. During these extra visits Kuhnle-Hambster positioned herself in the customer seating area from which she could observe most of the employee workstations and also met with employees one-on-one to campaign against unionization. As discussed in the findings of fact, the increase in her presence was tied to the start of the union campaign, rather than, as Kuhnle-Hambster claimed, to the tenure of any particular store manager. The magnitude of the increase—from as little as one visit every 2 months before the union campaign to four or five visits every week during the union campaign—was far out of the ordinary and would reasonably tend to restrain employees' exercise of their Section 7 rights. Both Melendez and Evans testified that it inhibited them from talking to coworkers about the Union.

I find that the Respondent created the impression of surveillance and violated Section 8(a)(1) of the Act, from April 2022 to June 7, 2022, when district manager Kuhnle-Hambster dramatically increased her presence at the Stuyvesant store during the union campaign.

2. Latham Store: On June 16, Kuhnle-Hambster showed Schenk the photographs that Mahoney had provided to her of Schenk's statements in the May 24 group chat and did not tell Schenk how she had obtained those images. The General Counsel contends that this conduct created the impression that the group chat activities were under surveillance.

I find that under all the relevant circumstances here, a reasonable employee would not assume that the employer had placed his or her union or protected activities under surveillance. Five employees were using the chat group to communicate information between shifts. An obvious explanation for Kuhnle-Hambster's possession of the photographs of the offensive messages was that one of those employees had provided them. Although the employees had sometimes in the past communicated union information in the chat, there is no claim that the Respondent had displayed an awareness of that information; rather the only information the record shows it possessed were the offensive statements, including about an employee with a medical condition, that the chat participants would reasonably feel obliged to voluntarily bring to the attention of management. The fact, moreover, that a hand was holding a cell phone that displayed the text messages is consistent with the idea that a recipient had provided copies of the messages to the Respondent, rather than that management had somehow hacked into the group chat and obtained screenshots without the participants' knowledge. I recognize that Kuhnle-Hambster's unwillingness to reveal that the texts were volunteered to management by a concerned coworker, while not unreasonable during an active investigation, left surveillance as an open possibility.[24] However, I find that under all the circumstances here, a reasonable employee would not believe that surveillance was the source.

The allegation that the Respondent unlawfully created the impression of surveillance in violation of Section 8(a)(1) on June 16 at the Latham store must be dismissed.

B. Meetings with Employees

1. Captive Audience Meetings at Stuyvesant Store: The General Counsel argues that the Board should find that captive audience meetings are per se unlawful and that Kuhnle-Hambster violated Section 8(a)(1) when she met with employees on May 2, 11 and 23 and tried to persuade them not to support the Union. The General Counsel concedes that finding a violation on this basis would require overruling the Board's decisions in *Babcock & Wilcox Co.*,77 NLRB 577 (1948), and other cases. Brief of General Counsel at Pages 36 to 46. The decision about whether to reverse Board precedent is for the Board, not me. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied."); see also *Austin Fire Equipment, LLC*, 360 NLRB 1176 fn. 6 (2014).

Applying existing Board precedent, and without considering the merits of the General Counsel's arguments for reversing that precedent, I find the allegation that the Respondent violated Section 8(a)(1) of the Act when Kuhnle-Hambster met with

[24] See, e.g., *David Saxe Prods.*, 370 NLRB No. 103, slip op. at 38–39 (2021) ("unsourced" statement tends to cause employees "to speculate as to how the employer obtained the information, causing them reasonably to conclude that the information was obtained through employer monitoring").

employees on May 2, 11, and 23, 2022, must be dismissed.

2. T hreatened Loss of Benefits at Stuyvesant Store: The U.S. Supreme Court stated, in *NLRB v. Gissel Packing Co.*, that an employer "may communicate with his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit." 395 U.S. 575, 618 (1969). An employer's statement that union representation will mean that certain benefits will be negotiated and "could go either way", is not, without more, considered a threat of reprisal. *Jefferson Smurfit Corp.*, 325 NLRB 280 n.3 (1998); *Telex Communications*, 294 NLRB 1136, 1140 (1989); *Pilliod of Mississippi*, 275 NLRB 799, 800 (1985). However, when an employer predicts that employees will necessarily lose benefits if they elect to be represented by a union, the prediction constitutes a "threat of reprisal" absent a "lawful explanation based on objective facts as to why such a loss of benefits would occur." *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), enfd. in relevant part by 260 F.3d 465 (5th Cir. 2001); see also *Dico Tire, Inc.*, 330 NLRB 1252, 1257 (2000) (employer threatens an employee in violation of the Act when it predicts that employees will lose benefits in negotiations if they select a union).

In this case, the General Counsel alleges that Kuhnle-Hambster made an unlawful threat to Melendez by stating that employees would necessarily lose their college tuition benefits and would be denied participation in the soon-to-be-revived coffee master program if they unionized. As I discuss in the statement of facts, however, the General Counsel failed to show that Kuhnle-Hambster made such a prediction. Although Kuhnle-Hambster did discuss the connection between unionization and benefits during conversations with employees at the Stuyvesant store, the General Counsel did not show that she went beyond stating that if employees unionized the benefits would be subject to negotiation. Since such statements are not, without more, unlawful, the General Counsel has not established this violation.

I find that the complaint allegation that the Respondent violated the Act on or about May 23, 2002, by threatening employees with the loss of a benefit if they selected the Union as their bargaining representative must be dismissed.

3. Weingarten Rights and Schenk Interview: In *NLRB v. J. Weingarten, Inc.*, the United States Supreme Court held that Section 7 of the Act prohibits an employer from refusing an employee's request for union representation during an investigatory meeting that the employee reasonably believes could lead to discipline. 420 U.S. 251, 260 (1975). When an employee makes such a request the Respondent has three options: "(1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview without a union representative or having no interview at all." *Troy Grove*, 371 NLRB No. 138, slip op. at 3 (2022).

On June 16, Kuhnle-Hambster brought Schenk into an investigatory interview regarding the offensive chat group messages that the Respondent cited as the basis for issuing the final written warning to Schenk on June 27. The General Counsel alleges that the Respondent violated Schenk's rights under *Weingarten* during that interview because Schenk requested union representation on the way into the interview, but Kuhnle-Hambster proceeded with the interview without allowing Schenk to obtain such representation. As discussed in the statement of facts, however, I find that the record does not establish that Schenk, in fact, made a request for union representation before or during the questioning. In the absence of such a request, the Respondent's failure to provide union representation did not violate the Act. *Praxair Distribution, Inc.*, 358 NLRB 27 fn. 2 (2012) (no *Weingarten* violation absent a showing that employee requested representation).

The allegation violated Section 8(a)(1) of the Act during the investigatory interview by failing to honor an employee request for union representation must be dismissed.

II. DISCIPLINARY ACTIONS AGAINST SCHENK

The General Counsel alleges that the challenged disciplinary actions against Schenk were all taken in retaliation for his protected union and concerted activity. Allegations that an employer discriminated based on protected union or concerted activity in violation of Section 8(a) (1) and 8(a)(3) of the Act, and which turn on motivation, are analyzed using the framework set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983); see also *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006) ("The Board applies the *Wright Line* framework to alleged violations of Section 8(a)(1) that turn on employer motivation."). Under the *Wright Line* framework, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by employees' protected union or concerted activity. *Mondelez Glob., LLC*, 369 NLRB No. 46 (2020) (evidence must show a causal relationship between the employee's protected activity and the adverse action). The General Counsel can meet its initial *Wright Line* burden by showing that: (1) the employee engaged in union or protected concerted activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the protected union and/or concerted activity, and there was a causal connection between the discipline and the protected activity. *Camaco Lorain Mfg. Plant,* 356 NLRB 1182, 1184–1185 (2011); *ADB Utility Contractors,* 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville,* 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council,* 330 NLRB 1100, 1105 (2000). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. *Camaco Lorain*, supra; *ADB Utility*, supra*; Intermet Stevensville*, supra; *Senior Citizens*, supra.

The Board has held, however, that the *Wright Line* analysis is not appropriate when the employer defends a disciplinary action based on the employee's alleged misconduct in the course of otherwise protected union or concerted activity. In such circumstances motivation is not at issue and the question is whether, in the course of otherwise protected activity, the employee engaged in conduct egregious enough to cause him or her to forfeit the Act's protection for that activity. *Lion Elastomers LLC*, 371 NLRB No. 83 (2001), overruling *General Motors*, 369 NLRB No. 127 (2020); *Atlantic Steel*, 245 NLRB 814 (1979); see also

Gross Electric Inc., 366 NLRB No. 81, slip op. at 2 (2018) ("[W]here an employer undisputedly takes action against an employer for engaging in protected activity, a *Wright Line* analysis is not appropriate."). If it is determined that the misconduct alleged by the employer did not cause the employee to lose the protection of the Act, the causal connection between the discipline and the employee's protected activity is established and "the inquiry ends." *Nor-Cal Beverage Co.*, 330 NLRB 610, 611–612 (2000).

A. Final Written Warning

Section 7 of the Act provides that employees engage in protected activity when they, inter alia, "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." When an employee shares criticisms about working conditions with coworkers, the criticisms are protected activity, not mere griping, if the problems raised affect coworkers or coworkers are unhappy about the same issues. *Tampa Tribune*, 351 NLRB 1324, 1334–1335 (2007), enf. denied on other grounds by 560 F.3d 181 (4th Cir. 2009).

The Respondent issued the June 27 final written warning to Schenk based on his conduct in the course of otherwise protected concerted activity in the group chat on May 24. Schenk's group chat messages focused on complaints that management was not properly staffing the store and that, as a result, he was being forced to complete the work of multiple employees. These are clearly work-related criticisms and are among the precise problems that a group of employees had recently raised to the Respondent in the organizing committee letter. That group letter flagged problems with "inadequate staffing" and complained that employees "are expected to work harder to accommodate the lack of sufficient coverage or training." Employees had also raised staffing problems during conversations with Kuhnle-Hambster. The staffing and workload issues discussed by Schenk in the group chat plainly fall within the category of working conditions that affected coworkers and that coworkers were concerned about.

Even though Schenk's communications with coworkers about staffing and workload issues were protected concerted activity, those communications forfeited the Act's protection under the Board's decision in *Atlantic Steel* if, in the course of such activity, Schenk engaged in sufficiently egregious or opprobrious misconduct. 245 NLRB at 816; see also *Lion Elastomers*, 372 NLRB No. 83, slip op. at 1, 2 (Board re-affirms *Atlantic Steel* standard); see also *Stanford New York, LLC*, 344 NLRB 558, 558 (2005) ("When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act."). In *Atlantic Steel* the Board stated that whether otherwise protected activity is sufficiently egregious to lose the Act's protection depends on a balancing of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, supra; see also *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 fn. 2 (2018), enfd. 763 Fed.Appx. 5 (2nd Cir. 2019), *Postal Service*, 360 NLRB 677, 677 fn. 2 and 683 (2014).

I find that consideration of the four factors set forth in *Atlantic Steel* weigh in favor of finding that Schenk's statements in the group chat were egregious enough to cause his otherwise protected activity to forfeit the Act's protection. The only one of the four factors that weighs in favor of continued protection is "the subject matter of the discussion." As noted above, Schenk was complaining about staffing and workload problems that affected Latham employees generally and that employees had already collectively raised with the Respondent. The other three *Atlantic Steel* factors all weigh against finding continued protection. The "place" of the discussion was a group chat that shift supervisors used to communicate helpful "crossover" information between shifts. This meant that shift supervisors who wanted to benefit from the assistance provided in the group chat would have to absorb the highly offensive statements that Schenk injected into the conversation, including about the store manager and about an employee who shift supervisors were responsible for providing with respectful direction, coaching and feedback. See *Starbucks Corp.*, 354 NLRB 876, 878 (2009) ("The location of an employee's conduct weighs against protection when the employee engaged in insubordinate or profane conduct toward a supervisor in front of other employees regardless of whether those employees are on or off duty."), decision and reasoning affirmed by 355 NLRB 636 (2010), reversed in part on other grounds by 679 F.3d 70 (2d Cir. 2012). The highly offensive insults directed at an employee's medically-imposed limitations demonstrated hostility, and arguably encouraged hostility,

towards that employee and the accommodation she was receiving. One of the shift supervisors, herself a member of the union organizing committee, chose to bring Schenk's remarks to the attention of the store manager even though it was predictable that doing so might create problems for another organizing committee member.[25]

I also find that the nature of the outburst weighs in favor of finding that protection was forfeited. The statements, which are set forth fully in the statement of facts, included a torrent of unusually offensive insults, some invoking sex acts, directed at other members of the staff. These included insults referencing the medically-imposed limitations of an employee whose work Schenk was responsible for directing. In the group chat, Schenk referred to that employee as "the dumb fucking bitch who can't even use cleaners" and as "useless fucking" Termera. In addition, he referred to the store manager Cain as a "fucking pussy" and a "fucking cocksucker" who could "suck my dick" and "suck my fucking dick." Schenk used this language even though, well before the start of the union campaign, he had been disciplined

[25] I considered the fact that neither of the two individuals who were the targets of Schenk's obscene insults were participants in the group chat. Cf. *The Tampa Tribune*, 351 NLRB at 1326 (finding profane insult about a supervisor did not cause forfeiture of protection because, inter alia, it was not made "to his face"). However, the Board has not required that the employee make the insult directly to the other individual in order to forfeit protection. In *Cellco Partnership*, for example, the Board held that an employee forfeited protection when, while soliciting coworkers to support the union, he referred to a specific supervisor as a "bitch" and to others as "fucking supervisors." 349 NLRB 640, 642 (2007).

for reasons related to "obscene" and possibly "harassing" insults directed at an employee. Indeed, at trial Schenk rather proudly recounted that when Cain previously told employees to avoid using offensive language he acknowledged knowing that Schenk was "going to say what he wants." The use of profane insults directed at coworkers has contributed in other cases to the Board finding that an employee had forfeited the Act's protection. See, e.g., *Cellco Partnership*, supra, *Tus Joist MacMillian*, 341 NLRB 369, 372 (2004) ("prostitute" and "lying bastard"), *Piper Realty Co.*, 313 NLRB 1289, 1289–1290 (1994) ("fucking asshole"). Tellingly, in its brief the General Counsel avoids repeating any of Schenk's highly offensive insults, but rather refers to them simply as profanity, as if all uses of profanity in the workplace are the same. They are not, and Board precedent recognizes that they are not.

Regarding the fourth factor, Schenk's outburst was not provoked by an unfair labor practice. The record does not show that the Respondent had committed any unfair labor practices at the Latham store as of the time of Schenk's remarks.[26] The staffing and workload issues that Schenk was reacting to are not alleged to constitute unfair labor practices. I find that, on balance, consideration of the *Atlantic Steel* factors weighs decisively in favor of finding that by his conduct in the course of the otherwise protected communications, Schenk forfeited the Act's protection. As the Board has stated, the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *Stanford*, 344 NLRB at 558, quoting *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984).

The allegation that the Respondent violated Section 8(a)(1) when it issued the June 27, 2022, final written warning to Schenk for engaging in protected concerted activity must be dismissed.[27]

The General Counsel also argues that the Respondent discriminated based on Schenk's other protected union and/or concerted activity in violation of Section 8(a)(3) and (1). This allegation, although it relates to the same disciplinary action discussed above, turns on motivation and therefore is appropriately analyzed using the *Wright Line* framework. I find that the General Counsel easily establishes the elements of a prima facie case under *Wright Line*. Schenk was a very active union proponent and the Respondent indisputably had knowledge of some of his union activities at the time it issued the discipline. For example, the Respondent knew that Schenk was one of the union committee members who identified themselves in the March 2022 letter. The Respondent also knew that Schenk, on behalf of the Union, had repeatedly contacted Kuhnle-Hambster to demand bargaining over a plan to renovate the Latham store.

The General Counsel has also shown the final element of the prima facie case—that the Respondent bore animus towards Schenk's protected activity and that the animus was connected to the discipline issued against Schenk. Such animus is demonstrated by Kuhnle-Hambster unlawfully creating the impression that employees' union activities were being surveilled. Kuhnle-Hambster was the same manager who issued the challenged discipline to Schenk. Anti-union animus is also shown by Kuhnle-Hambster's demonstrated eagerness to terminate Schenk. Prior to any of the discipline at-issue in this case, Kuhnle-Hambster was already "leaning" towards firing Schenk for emailing a bargaining request to her during his June 16 shift. In that instance, however, the human resources department declined to recommend terminating Schenk. The human resources report noted that Kuhnle-Hambster did not know when Schenk took his breaks on June 16 (and, therefore, presumably would not have known whether he had sent the email during work time or break time). When Kuhnle-Hambster found out about Schenk's chat messages she again inquired about firing Schenk, but decided against doing so after consulting with a company regional director who noted that the store might not have been holding other employees accountable for using offensive language. (GC Exh. 17 at pg.00095.)[28]

Since the General Counsel has established all three elements of its initial *Wright Line* burden with respect to disciplinary actions against Schenk, the burden shifts to the Respondent to show that it would have taken the same actions against Schenk for lawful reasons even absent his protected activity. Camaco *Lorain,* supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. With respect to the final written warning, I find that the Respondent has met that burden. For the reasons discussed above, I find that the torrent of profane insults that Schenk used in reference to members of the store staff was egregious. As discussed above, this included insults he directed at an employee he was responsible for overseeing, and focused on the medically imposed limitations of that employee. Schenk's conduct was a violation of the Respondent's "How We Communicate" policy that applies to all employees, and is also at cross purposes with Schenk's duties as a shift supervisor, which included providing encouragement and "respectful coaching and feedback" to employees whose work he directed.

In addition, the record shows that in 2018, well before the union campaign, the Respondent disciplined Schenk for reasons related to obscene, and potentially offensive or harassing, comments directed at a store employee. At that time, the Respondent required Schenk to read and sign the Respondent's anti-harassment policy and advised him that it was inappropriate to use obscene and offensive language in the workplace. The level of discipline that the Respondent subsequently imposed on June 27 was not disproportionate to the offensive chat group communication. That is especially true given that it was not the first time Schenk had been disciplined for reasons relating to offensive

[26] Kuhnle-Hambster had unlawfully created the impression of surveillance at the Stuyvesant store, but not at the Latham store where Schenk and others were using the group chat. At any rate, Schenk's outburst was not about surveillance.

[27] It does not appear that the General Counsel is arguing that Schenk's communications on May 24 were protected as union activity, as opposed to as concerted activity. Any such argument would fail since even assuming that those communications were union activity, Schenk's misconduct during those communications forfeited the Act's protection based on the same *Atlantic Steel* analysis discussed above with respect to concerted activity.

[28] The evidence discussed above is sufficient to establish that Kuhnle-Hambster bore animus towards Schenk's protected activity. Nevertheless, I also think it is also worth noting that during their August 1 conversation, store manager Cain, an admitted agent of the Respondent, see GC 1(n), paragraph 5, essentially agreed that Kuhnle-Hambster was targeting Schenk.

insults.

The General Counsel contends that the Respondent enforced their "How We Communicate" rule selectively and disparately based on protected activity and, in particular, did so with respect to Schenk's May 24 group chat outburst. That is not demonstrated by the record. To the contrary, as noted immediately above, well before Schenk's union activity the Respondent disciplined him for reasons related to obscene and offensive insults. In addition, the testimony shows that Cain had previously told employees to be careful with their language. Thus, the record shows that the Respondent did not knowingly tolerate the use of obscene and offensive insults in the workplace. It is true that other employees at the Latham store used profanity without being disciplined. However, it was not shown that the Respondent had tolerated other employees using such language the way that Schenk did in this instance – i.e., when directing highly offensive insults at other members of the staff. Indeed, Schenk essentially admitted that his use of offensive language outstripped that of others – testifying that when Cain told employees to watch their language, Cain added, "Except for James[Schenk], he's going to, you know he's going to say what he wants."

For the reasons discussed above, the General Counsel has not shown either that the Respondent selectively enforced its "How We Communicate" rule or otherwise discriminated in violation of Section (a)(1) and/or Section 8(a)(3) when it issued a final written warning to Schenk on June 27, 2022. Those allegations must be dismissed.

B. Memorialized Coaching

I also find that the Respondent has met its responsive burden with respect to the July 18, 2022, memorialized coaching. The evidence shows that Schenck was the shift supervisor responsible for closing the store on June 30 and that he left four mandatory closing tasks undone. Schenk testified that this occurred largely because of the time he devoted to a task—rolling coins—that was not generally completed at the end of each closing shift. Although there was credible evidence that shift supervisors sometimes failed to complete a closing task, the evidence did not show that any other shift supervisor had ever left so many tasks undone on a single shift. Under these circumstances, I credit the evidence this very mild form of discipline—a memorialized coaching—would have been issued to Schenk for the multiple deficiencies even in the absence of his protected activities.

For the reasons discussed above, I find that the allegation that the Respondent discriminated in violation of Section 8(a)(3) and (1) when it issued a memorialized coaching to Schenk on July 18, 2022, must be dismissed.

C. Separation

Lastly, I find that the Respondent has met its responsive burden with respect to the decision to terminate Schenk. Schenk's decision to open United States mail, from a federal government agency, that was addressed to "Starbucks Corporation," and which was explicitly designated on the envelope as "official business," was a brazen intrusion into management's prerogatives. The General Counsel's suggestion that opening the confidential letter was part of Schenk's duties as an employee is wholly without merit. As discussed in the statement of facts, the record shows that while employees designated as shift supervisors sometimes opened mailers and packages containing supplies, it was understood that they were not authorized to open mail addressed to Starbucks Corporation. Indeed, Schenk himself told Cain, and testified at trial, that the reason he felt entitled to open the letter was because of his role *with the Union* and because he did not trust the Respondent to share the letter's contents with employees. Cf. *Berkshire Farm Ctr.*, 333 NLRB 367 (2001) (Board defers to compliance proceeding question of whether employee's entitlement to backpay was terminated due to the employee's misconduct in opening and reading mail addressed to management) and *Champion Parts Rebuilders, Inc.*, 260 NLRB 731 (1982) (employee engaged in protected activity when he complained about a supervisor opening union mail), enforcement granted in part and denied in part by 717 F.2d 845 (3d Cir. 1983). Moreover, when Cain specifically told Schenk not to open mail that came to the store in the future, Schenk did not agree to abide by that direction, but rather maintained that it was his right to open the Respondent's mail because he was union liaison and lacked "confidence" that the Respondent would share information with him.

My conclusion that the Respondent has met its responsive burden with respect to Schenk's discharge is based not only on the severity of Schenk's misconduct, but also on the fact that Schenk had received a final written warning only 2 months earlier. As found above, the issuance of that final written warning was not shown to be unlawful. Schenk knew, as he indicated during his August 1 conversation with Cain, that he was in danger of being terminated, and yet he engaged in further serious misconduct. That Schenk did so causes me to wonder whether he meant what he said on August 1 when he told Cain that he was hoping to get fired. It is true that Schenk had enthusiastically and effectively supported the Union and that Kuhnle-Hambster was hostile towards those activities. However, that did not afford Schenk license to engage in misconduct without appropriate repercussions.

In reaching the conclusion that the Respondent met its responsive *Wright Line* burden with respect to Schenk's termination, I considered that the Respondent was not shown to have written protocols or policies about opening mail. The Respondent points out that it does, however, have written "Standards of Business Conduct," referenced in Schenk's separation notice, and those standards state that the Respondent "depends on its partners to follow the law and to make appropriate decisions." The Respondent contends that Schenk "likely committed a federal felony" by opening a letter addressed to Starbucks Corporation. (Br. of R. at pg. 1, 34–35.) Raising the specter of a federal felony charge is an overreach in my view, but I do believe that even in the absence of a federal crime or of a mail-handling policy, Schenk violated a common sense understanding of the Respondent's Standards of Business Conduct by taking it upon himself to, based on his distrust of the Respondent, open official business correspondence addressed to the Respondent by a government agency. Indeed, even without reference to such standards of conduct, reasonable employees would know that doing that was wrong.

I also considered that there is no evidence that the Respondent had previously disciplined any other employee for opening mail.

However, there was also no record evidence that any other nonmanagerial employee had intentionally opened official business correspondence addressed to Starbucks Corporation by a government agency or any other confidential mail, much less that the Respondent was aware of such misconduct. Given the lack of prior comparable misconduct, the lack of prior comparable discipline does not show disparate treatment.

I find that the allegation that the Respondent discriminated in violation of Section 8(a)(3) and (1) when it discharged Schenk on August 31, 2022, must be dismissed.

III. RESPONDENT'S FAILURE TO BARGAIN OVER DISCIPLINE ISSUED TO SCHENK

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by exercising disciplinary discretion without bargaining with the Union when it issued the final written warning, the memorialized coaching, and the termination to Schenk. The evidence does show that the Respondent exercised discretion in the imposition of these disciplinary actions at a time after the Union became the bargaining representative of unit employees at the Latham store, and that it exercised that discretion without bargaining with the Union. The General Counsel does not contend that this, or the other facts, shows a violation under current Board precedent. Instead it argues that the Board should overrule the current controlling Board precedent, *Care One at New Milford*, which holds that "upon commencement of a collective-bargaining relationship, employers do not have obligation under . . . 8(a)(5) of the Act to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice," 369 NLRB No. 109, slip op. at 7 (2020), and should find a violation under a different standard. As noted earlier in this decision, the question of whether existing Board precedent should be reversed is for the Board to decide, not me. *Waco, Inc.*, 273 NLRB at 749 n. 14; *Austin Fire Equipment,* 360 NLRB at 1176 fn. 6.

Applying existing Board precedent, and without considering the merits of the General Counsel's arguments for reversing it, I find the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by exercising disciplinary discretion without bargaining must be dismissed.

CONCLUSIONS OF LAW

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

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent interfered with employees' exercise of their section 7 rights and violated Section 8(a)(1) of the Act when district manager Kuhnle-Hambster created the impression that union activities were under surveillance by dramatically increasing her presence at the Stuyvesant store during the period between when the union campaign there became public in April 2022 and when employees voted to be represented by the Union on June 7, 2022.

4. The above unfair labor practice affected commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent was not found to have committed the other violations alleged in the complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[29]

ORDER

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

1. Cease and desist from

(a) Creating the impression that employees' union activities are under surveillance.

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

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

(a) Within 14 days after service by the Region post at its Stuyvesant Store, located at 1475 Western Avenue, Albany, New York, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 3, 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, the notice 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 employees at the Stuyvesant Store 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. In the event that, during the pendency of these proceedings, 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 the Stuyvesant Store at any time since April 2022.

(b) Within 21 days after service by the Region, file with the Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 25, 2023

[29] 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.

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

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 interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

STARBUCKS CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-296757 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.

Desmond D. Metzger, Esq. and *Greg Lehmann, Esq.,* for the General Counsel.

Alex Frondorf, Esq. (Littler Mendelson, P.C.), of Cleveland, Ohio*, Laura Spector, Esq. (Littler Mendelson, P.C.),* of Washington, D.C.*,* and *Samuel P. Wiles, Esq. (Littler Mendelson, P.C.),* of Fairport, New York, for the Respondent.

Michael Dolce, Esq. (Hayes Dolce), of Buffalo, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case in Albany, New York, on April 24 and 25, 2023. Workers United (the Union or the Charging Party) filed the charge: in Case 03–CA–296757 on June 1, 2022; in Case 03–CA–299016 on July 11, 2022 (amended July 28, 2022); and in Case 03–CA–302451 on August 31, 2022. The Director of Region 3 of the National Labor Relations Board (the Board) issued the Amended consolidated complaint and notice of hearing (the complaint) on February 8, 2023. The complaint alleges that Starbucks Corporation (the Respondent, the Employer, the Company, or Starbucks) discriminated on the basis of protected concerted activity and union activity in violation Section 8(a)(1) and Section 8(a)(3) and (1) of the Act: on June 27, 2022, when it issued a final written warning to James Schenk; on July 18, 2022, when it issued a memorialized coaching to Schenk; and on August 31, 2022, when it discharged Schenk. The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by imposing this discipline without providing notice and an opportunity to bargain to the Union. In addition, the complaint alleges that the Respondent violated Section 8(a)(3) and (1) by more strictly enforcing its communication policy against Schenk. The complaint also alleges that the Respondent violated Section 8(a)(1) by more closely supervising employees, creating the impression that union activities were under surveillance, holding captive audience meetings, threatening employees with loss of benefits if they selected the Union as their bargaining representative, and denying Schenk's request to be represented by the Union during an interview that he reasonably believed could lead to discipline. The Respondent filed a timely answer in which it denied committing any of the violations alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT[1]

I. JURISDICTION

The Respondent is a corporation with an office and place of

[1] At trial the Respondent asserted that a significant number of documents responsive to the General Counsel's subpoena duces tecum were privileged. The General Counsel stated that the privilege log submitted by the Respondent contained insufficient information to show that the documents were privileged, and asked that I inspect the documents in camera. I directed the Respondent to produce those documents to me for in camera inspection, but the Respondent refused to do so even after I repeated the direction and advised that I would consider imposing sanctions for such refusal. See *Pioneer Hotel & Gambling Hall*, 324 NLRB 918, 920, 927 (1999) (drawing adverse inference where party refused to provide withheld documents to administrative law judge for in camera inspection to evaluate the claim of privilege), enfd. in relevant part 182 F.3d 939 (D.C. Cir. 1999). The General Counsel sought all sanctions that might be appropriate pursuant to *Bannon Mills*, 146 NLRB 611, 614 fn. 4, 633–634 (1964), but did not make any specific requests that I sanction the Respondent by, for example, drawing an adverse inference regarding a particular subject, precluding the Respondent from offering evidence on any subject, or permitting the General Counsel to prove any matter using secondary evidence. In its brief, the General Counsel asks that I draw a "general adverse inference." Brief of General Counsel at Page 18. The Respondent's refusal to comply with my direction to submit the allegedly privileged material to me for in camera review is sanctionable

business in Seattle, Washington, and is engaged the retail operation of stores offering coffee and quick-service foods at locations throughout the United States, including one at 1210 Troy Schenectady Road, Latham, New York (the Latham store or the Latham location) and one at 1475 Western Avenue, Albany, New York (the Stuyvesant store or the Stuyvesant location). The Respondent annually derives gross revenues in excess of $500,000, and, at each store referenced above, annually receives products, goods and materials valued in excess of $5000 directly from points outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent operates over 25,000 retail coffee stores worldwide.[2] The alleged violations in this case involve conduct at the Respondent's Latham store and Stuyvesant store. Both of those locations are among the 10 stores in the Albany, New York, district that is overseen by district manager Beate Kuhnle-Hambster. At the time of the trial in this matter, employees at eight of those stores, including at the Latham and Stuyvesant locations, had voted to unionize.

Employees at the Latham store were the first in the district to announce a union campaign. Schenk, a shift supervisor[3] at the Latham store, contacted the Union in November 2021 about representing employees there. In March 2022, a group of eleven Latham store employees, including Schenk, identified themselves as members of the union organizing committee in a letter addressed to the Respondent's chief executive officer (CEO) and posted to social media. General Counsel Exhibit Number (GC Exh. 3; Transcript at Page (Tr.) 83–84.)[4] Among the complaints that the organizing committee set forth in the letter were "inadequate staffing" and employees being required to "work harder to accommodate the lack of sufficient coverage or training." On May 17, 2022, employees at the Latham store voted in a representation election and on May 26 the Board certified the Union as their collective bargaining representative. Employees at the Stuyvesant store announced their union campaign on April 20 or 21, 2022, and, on June 7, 2022, voted to be represented by the Union.

III. KUHNLE-HAMBSTER'S INCREASED PRESENCE AT STUYVESANT LOCATION

Kuhnle-Hambster has been a district manager since August 2021 when she first started working for the Respondent. During the time period of the alleged violations, the persons who reported to Kuhnle-Hambster included Nick Cain, the store manager for the Latham store, and Jacob Barkman, the store manager for the Stuyvesant store. Prior to Barkman, the store manager for the Stuyvesant store was G. Hedge. Kuhnle-Hambster testified that she generally visited each of the stores in her district from once every other week to twice a week, but that she visited the Stuyvesant store more often during Hedge's tenure because he was having performance problems. (Tr. 356–359.) On May 2, 2022, Hedge resigned his employment effective May 15, 2022. Barkman, a current employee who had not previously been a store manager, was promoted to replace Hedge at the Stuyvesant location on May 16. (Tr. 324–325.) Barkman and Kuhnle-Hambster both testified that Barkman asked that Kuhnle-Hambster be "involved in" his "development" and "success," and Kuhnle-Hambster addressed that request by visiting the store more often. (Tr. 326–327, 364.) Within weeks after becoming store manager, Barkman took a previously scheduled vacation from May 30 to June 5, 2022. (Tr. 327–328.) When store managers are on vacation they reach out "around the district" to find a "proxy store manager" to handle administrative responsibilities during their absence. Ibid.

Precious Melendez, an employee at the Stuyvesant store who has been with the Respondent since January 2021, testified that prior to the union campaign she saw Kuhnle-Hambster at the store only about once every 2 months and never saw her having one-on-one conversations with employees.[5] (Tr. 51.) According to Melendez' testimony, after employees announced the union campaign, she witnessed Kuhnle-Hambster at the store 4 to 5 times a week. (Tr. 51–52.) Melendez testified that during every shift leading up to the union election, she witnessed Kuhnle-Hambster having one-on-one conversations with the employees at the Stuyvesant store. (Tr. 52–53.)During this period, Kuhnle-

conduct. However, I find that in this case the General Counsel's request for a "general adverse inference" is unworkably vague. The General Counsel declined my invitation to identify specific matters about which an adverse inference should be drawn and has not pointed to evidence or secondary evidence providing guidance regarding appropriate inferences about the contents of the withheld documents.

[2] This figure is set forth in the Board's decision in *Starbucks Corp. d/b/a Starbucks Coffee Co.*, 372 NLRB No. 50, slip op. at 1 (2023). In its brief, the Respondent states that in the United States it operates over 9000 stores. Brief of the Respondent at pg. 4. The Respondent cites no record evidence for that figure, but it is consistent with the Wikipedia entry about the company, which states that the Respondent has over 8900 company-operated stores in the United States. Starbucks—Wikipedia (retrieved 08/15/2023).

[3] Although Schenk's job title is "shift supervisor," no party has asserted that Schenk, or any other employee referenced by that title in this decision, is a statutory supervisor for purposes of Section 2(11) of the Act. See Brief of Respondent at pg. 3 fn. 2; see also *Oakwood Healthcare*, 348 NLRB 686, 687 (2006) (a party asserting supervisory status carries the burden of proving it). The certification of representative that the Board issued for the Latham store expressly includes shift supervisors among the bargaining unit employees.

[4] Schenk characterized Siena Phelps and himself as co-authors of the letter. Tr. 84. Phelps, however, stated that she was the author of the letter, and that while she had input from "everybody at the store," Schenk was not a primary author Tr. 298. I find that Phelps' testimony about Schenk's degree of involvement with the letter was more credible that Schenk's testimony on the subject. Phelps, a public union supporter and witness for the General Counsel, had nothing to gain by that testimony and testified in a calm and certain manner. On the other hand, Schenk has a financial interest in the outcome of this litigation and his sometimes melodramatic demeanor as a witness detracted to a degree from his credibility.

[5] Both before and after the announcement of the union campaign, Melendez worked at the store five or six shifts a week, for 5 hours each shift. Tr. 51. Melendez was active in the union campaign at the store. Tr. 50.

Hambster would sometimes test employees' drink preparation proficiency and point out shortcomings. (Tr. 52.)

Another Stuyvesant store employee, Jacob Evans, testified that, over a 2-month period prior to the union campaign, he saw Kuhnle-Hambster at the store a total of one or two times. Tr. 268.[6] He stated that on those occasions he never saw her have one-on-on conversations with employees. Evans testified that immediately after the employees announced the union campaign, he witnessed Kuhnle-Hambster in the store "multiple times a week," and saw her engage in one-on-one conversations with employees on a weekly basis. (Tr. 269–270, 275–276.) He stated that, during her visits, Kuhnle-Hambster would sometimes sit in the customer seating area—a vantage point from which she was able to observe most of the employee workstations. (Tr. 269.) Melendez and Evans both testified that Kuhnle-Hambster's presence at the store made them feel uncomfortable about discussing the Union with coworkers. (Tr. 53, 270.)

As discussed earlier, Kuhnle-Hambster herself testified that she increased her presence at the store during Hedge's tenure, and then further increased it when Barkman took over as store manager, but Melendez and Evans testified that the increase was more substantial that what Kuhnle-Hambster described, and that the timing of that increase coincided with announcement of the Union campaign rather than with the tenure of particular store managers. Based on the record as a whole, I found Melendez and Evans's accounts on this subject more credible than Kuhnle-Hambster's. Kuhnle-Hambster's claim that she was there simply to provide guidance to Barkman is undercut by the fact that during some of her time in the store she was not interacting with Barkman, but simply sitting in the customer seating area where she was able to observe the employees. In addition, Kuhnle-Hambster's testimony was vague with respect to when she increased her presence. She said that it had increased when Hedge was store manager, but she did not specify whether she was present more frequently throughout his time in that position or whether the more frequent visits were triggered at a specific point during that time. In addition, I note that she did not claim that she continued visiting the store so frequently during the period *after* the representation election, despite the fact that Barkman was still a new store manager at that time. In addition, the increase immediately after the April 20 or 21 announcement of the campaign is unsatisfactorily explained by the arrival of Barkman because he did not start at the store until May 16. Tr. 323–325; Brief of Respondent at Page 10.

IV. KUHNLE-HAMBSTER'S PRE-ELECTION ONE-ON-ONE MEETINGS WITH EMPLOYEES OF THE STUYVESANT STORE

Between the announcement of the union campaign at the Stuyvesant store and the union vote there, Kuhnle-Hambster initiated numerous one-on-one meetings about the Union with employees at the Stuyvesant store. According to both Kuhnle-Hambster and Melendez, Kuhnle-Hambster would ask employees if they had 5 or 10 minutes to talk. (Tr. 52–53, 365–366.) Kuhnle-Hambster testified that she would tell employees what the topic was and then speak to them about the Union. Tr. 366, 398. She testified that before starting the meeting she would ask the employee "are you okay speaking with me?," and that every single employee she asked to meet with had "consented" to the conversation. (Tr. 366.)

Melendez and Evans were among those who Kuhnle-Hambster met with during the lead-up to the union vote. Kuhnle-Hambster approached Melendez at work on May 11 and asked if Melendez had 5 minutes to talk. Melendez testified that she told Kuhnle-Hambster that she wanted to wait until her break so that the meeting would not prevent her from continuing to assist coworkers complete team tasks. (Tr. 54, 70–71.) According to Melendez, Kuhnle-Hambster did not honor that request, but rather continued the meeting. Ibid. Kuhnle-Hambster testified that since employees' breaks were their "own time" she did not conduct the anti-union meetings during the employees' breaks. (Tr. 366.)

I credit Melendez' testimony that when Kuhnle-Hambster asked her to meet on May 11, Melendez responded that she wished to wait until she was on a break, but that Kuhnle-Hambster proceeded with the meeting without waiting. That testimony was specific and confident. Kuhnle-Hambster's contrary testimony that she did not start any of the anti-union meetings without first obtaining the employee's consent was very general, and she did not assert that she had a specific recollection of her May 11 meeting with Melendez. In addition, Melendez' testimony that Kuhnle-Hambster declined her request to postpone the meeting until a break is lent credence by Kuhnle-Hambster's own testimony that she intentionally refrained from holding the meetings during employees' breaks.

There is no dispute that, during her meetings with Stuyvesant employees, Kuhnle-Hambster made statements to employees regarding the relationship between unionizing and benefits, and in particular regarding unionizing and the college tuition reimbursement benefit.[7] (Tr. 54–55, 70, 277–278, 369.) There was, however, conflicting testimony about what precisely Kuhnle-Hambster told employees, and in particular Melendez, on that subject. According to Kuhnle-Hambster, what she told employees regarding the subject of unionizing and benefits was that if employees unionized "a lot of things would be up for – to bargaining." (Tr. 370.) Kuhnle-Hambster did not testify specifically about meetings with Melendez, but did deny that she told any employee that benefits would be unavailable if employees unionized. (Tr. 371.) Although Kuhnle-Hambster testified that she discussed the tuition reimbursement program during the one-on-one meetings with employees, she conceded that she did not have any specific recollection of those discussions. (Tr. 369-370.) She also stated that she had never discussed the Respondent's "coffee master" training program[8] during her anti-union

[6] Evans worked at the store four or five days a week for a total of about 20 hours weekly. Tr. 268. He was working during Kuhnle-Hambster's tenure in November and December 2021, but he was on leave with an injury from January 21 to April 11, 2022. Tr. 267.

[7] Starbucks offers employees free tuition to a 2-year on-line degree program from the State University of Arizona.

[8] Employees who participate in the Respondent's coffee master program receive training to become expert "ambassadors" for coffee. The Respondent does not provide enhanced pay, benefits, or scheduling prerogatives, to employees who complete the coffee master program, but does provide them with a special work apron. The coffee master program

meetings with employees at the Stuyvesant store. (Tr. 369.)

Melendez gave testimony that contradicted some of Kuhnle-Hambster's account. Melendez stated that Kuhnle-Hambster met with her about the union twice—on May 11 and May 23—the latter time with employee Kayla Lupi[9] present. (Tr. 56–57.) Both Melendez and Lupi were participating in the college tuition reimbursement program. According to Melendez' testimony, during the May 11 meeting Kuhnle-Hambster stated that she had noticed that Melendez was in favor of the Union, and then asked if Melendez "was in favor of potentially not having the benefits" because if employees unionized they would have to bargain for benefits. (Tr. 54, 56–57.) According to Melendez' direct testimony, during the second meeting—the one that also included employee Lupi—Kuhnle-Hambster stated that if employees unionized they "would no longer have access" to the tuition reimbursement program. (Tr. 56.)[10] In addition, Melendez testified that Kuhnle-Hambster had brought up the coffee master program in the context of discussing unionization. Specifically, Melendez testified that, on May 23, Kuhnle-Hambster told her that if employees unionized they would not have access to the coffee master program or other benefits that the Respondent was "rolling out." (Tr. 54–55, 73–74.) That testimony is called into question, however, by Melendez' own seemingly contradictory testimony during other parts of her examination. Specifically, I note the following exchange:

> Respondent's Counsel: You testified not only the coffee master program, but also that tuition reimbursement program?
>
> Melendez: Correct.
>
> Respondent's Counsel: You were never told by Beate[Kuhnle-Hambster] or any[one] else on behalf of Starbucks that you would lose those benefits if the Union, if you selected to unionize, correct?
>
> Melendez: We were told potentially for the benefits we'd have to bargain for them in a negotiation.
>
> Tr. 70. Similarly, at another point when Melendez was asked what Kuhnle-Hambster said about the coffee master program on May 23, she reported not that Kuhnle-Hambster had said the program would be unavailable, but rather that it was something employees "would bargain for." (Tr. 56-57.)

Kuhnle-Hambster initiated a one-on-one meeting with Evans on May 2 while he was working behind the store counter. Kuhnle-Hambster told Evans that the upcoming union election was a "big decision" and she wanted to make sure he "got all the facts" about joining a union. (Tr. 271, 276.) Evans told Kuhnle-Hambster that he hoped the union would be able to change the employees' "at-will" employment status. Kuhnle-Hambster replied that "whether employment would remain at-will" "would be uncertain." (Tr. 271.) Evans testified that Kuhnle-Hambster did not state that benefits would change if employees unionized, and did not make any promises. (Tr. 277–278.) Evans also testified that the meeting made him uncomfortable, but that he did not feel he could end the meeting given the "chain of command and authority" relationship. (Tr. 276–277.)

As indicated above, Melendez' and Kuhnle-Hambster accounts were in some respects contradictory on the subject of what was said regarding benefits. Regarding the question of whether Kuhnle-Hambster told Melendez that benefits would be unavailable to employees if they unionized (as opposed to telling Melendez that benefits would be subject to negotiation) I find that the record does not provide a basis for concluding that the statement was, or was not, made. Kuhnle-Hambster denied that she had ever made such a statement to employees, and Melendez' testimony that Kuhnle-Hambster did so was less than clear. Although Melendez' lack of clarity on that subject to some extent results from the fact that there were two separate meetings during which Kuhnle-Hambster discussed the subject with Melendez, the lack of clarity is not fully explained by that fact. Moreover, Kuhnle-Hambster's account about what she was telling employees is lent a modicum of credence by the account of Evans—a witness for the General Counsel—who testified that, when discussing the connection between unionization and benefits, Kuhnle-Hambster did not state that benefits would change if employees elected to unionize.

V. SCHENK: DISCIPLINARY MEETINGS AND DISCIPLINARY ACTIONS

Schenk was employed by the Respondent for 6 years, the last 4½ of those as a shift supervisor. His responsibilities as shift supervisor included deploying staff and delegating tasks to employees, providing "respectful coaching and feedback" to employees, and "assist[ing] with new partner training." (R. Exh. 1.)[11] Prior to the Union campaign, the Respondent disciplined Schenk on two occasions. The first discipline was a documented coaching, issued at the Latham store on April 9, 2018, which cited Schenk for failing to take appropriate action as a shift supervisor in response to employees' use of "obscene" and potentially "offensive or harassing" insults about a coworker. (R. Exh. 5.) The coaching required Schenk to read and sign the Respondent's antiharassment standards and warned that "further violations of this standard will lead to additional corrective action, up to and including separation." Schenk conceded that at that time he was made aware that it was inappropriate to use offensive and obscene language in the workplace. (Tr. 186.) The second discipline was a documented coaching, issued in 2021, which cited Schenk for failing to follow procedures for informing the Respondent when he was going to miss a scheduled shift.[12]

Schenk was active in the effort for union representation at the Latham store. He reached out to the Union in November 2021

was not active in May 2022. However, in April 2022, the Respondent's CEO had announced a plan to revive the program.

[9] This employee's name is spelled "Lupe" in the trial transcript, but in their briefs the parties spell the name "Lupi."

[10] No party called Lupi to testify.

[11] See also, supra, fn. 3 (Schenk was not a supervisor for purposes of Sec. 2(11) of the Act).

[12] When Schenk was asked to state what discipline the Respondent had issued to him prior to the union campaign, Schenk stated that there had only been the 2021 coaching, and neglected to mention the 2018 discipline that concerned obscene, and potentially harassing, statements about coworkers. See Tr. 81–82, 185–186.

and was one of the employees who identified themselves to the Respondent as a member of the union organizing committee in the March 2022 letter. Schenk also passed out union authorization cards and collected the signed cards from employees. After the union campaign became public, he wore a pro-union pin on his apron while at work. After the Union was certified as employees' bargaining representative on May 26, Schenk sent emails to the Respondent on June 8, June 16, and June 22, 2022, demanding that the Respondent bargain over the effects of a plan to renovate the store. (GC Exhs. 4, 5, and 6.) On June 23, 2022, the Respondent's counsel asked Schenk for "thoughts about arranging our first meeting," and also stated that the Respondent was seeking confirmation from the Union's counsel that Schenk was authorized to speak on behalf of the Union. The next day, the Union's attorney confirmed to the Respondent, by email, that Schenk was speaking on behalf of the Union.

Kuhnle-Hambster was an addressee of Schenk's bargaining requests. After receiving the June 16 bargaining request, Kuhnle-Hambster contacted the Respondent's human resources support team for a "separation consultation" based on Schenk sending the bargaining request email during working time. (GC Exh. 15.) Kuhnle-Hambster herself was "leaning separation" according to the human resources team's report.[13] Ibid. The report from human resources notes that while Schenk sent the email during his shift, it was not known when Schenk had been on break. The human resources team's "disposition" regarding Kuhnle-Hambster inquiry was to provide her with "no guidance"—declining, in other words, to concur with Kuhnle-Hambster who was "leaning" in favor of separation. Kuhnle-Hambster did not subsequently impose any discipline on Schenk based on his June 16 bargaining request email.

A. Final Written Warning: Shortly thereafter, on June 27, Kuhnle-Hambster issued a final written warning to Schenk, citing him for violating the Respondent's "How We Communicate" policy. (GC Exh. 9.) The warning cited Schenk for offensive statements made on May 24 in a group chat. The participants in the group chat were shift supervisors Gregory Ingram, Jessica Mahoney, Siena Phelps, Schenk, and Jordan Schultz. (Tr. 95, 280.) Phelps credibly testified that the chat was used by shift supervisors to communicate "store updates, things going on at the store" that were helpful for "crossover between shifts" and also "sometimes [to] just talk about like our days." (Tr. 281–282.) For example, the shift supervisors used the group chat when they needed to discuss an employee "call out" and how they were "handling backups." Ibid. The group chat topics sometimes included complaints about inadequate staffing levels.[14] (Tr. 284–285.) The participants would "occasionally" talk about union information in the group chat, but "not a ton." (Tr. 282.)[15]

The offensive statements that Schenk made in the group chat on May 24 came to the Respondent's attention on May 25 or 26 when Mahoney—a participant in the group chat and also a member of union organizing committee—informed store manager Cain about the remarks and shared photographs of the chat with Kuhnle-Hambster.[16] In the chat, Schenk complained that Cain had scheduled inadequate staff for a closing shift during which the Schenk was responsible for supervising "clean play"—a once-weekly deep cleaning of the store. (Tr. 98.) Schenk's comments in the shift supervisor group chat included the following:

> Nick[Cain] can suck my fucking dick. Closing with 2 people and still have to do clean play. . . .
> Leaves me with useless fucking [T]emera[17] for CLEAN PLAY
> WHAT THE FUCK CAN SHE CLEA[N] ARE YOU FUCKING SER[I]OUS
> Safe money is fucked too . . . .
> I fixed it
> I d[o]n't care
> Nick can suck my dick. . . . .
> Un fucking believable
> Especially when I told that fucking cocksucker to close at 2 when we had people
> If you're too fucking chicken shit to stand up to [Kuhnle-Hambster] when she "makes" your stay open then you can say by[e] to going above and beyond
> Fucking [p]ussy
>
> . . .
> Sick ass
> Get to do clean play solo with termera
> The dumb fuc[k]ing bitch who can't even use cleaners.
>
> . . .
> I d[o]n't give a fuck

[13] At trial, prior to being confronted with the human resources report, Kuhnle-Hambster denied that she was leaning towards firing Schenk for sending the email regarding bargaining. Tr. 406, 407–408. Given the documentary evidence, and the record as a whole, I find that Kuhnle-Hambster's testimony in this regard was not credible.

[14] Inadequate staffing had been raised by the Latham organizing committee as a matter of concern in its previous letter to management. GC Exh. 3. Kuhnle-Hambster stated that Latham store employees also raised staffing levels as an issue when she met with them about the union campaign. Tr. 400.

[15] I credit Phelps testimony that the group chat was used primarily as a means for shift supervisors to communicate information to help them run their shifts over Schenk's contrary testimony that it was a union organizing committee chat, Tr. 95, used primarily to discuss union activity. I note that Phelps was a union supporter and a witness for the General Counsel, and had no apparent motive to give testimony that weighed against the General Counsel's argument that the group chat communications were protected under the Act. I note, moreover, that Schenk's claim that the group chat was an instrument of the union organizing committee is undercut by the fact that the chat group only included four of the eleven persons identified as members of the organizing committee in the March 2022 letter, but did include Ingram, who was a shift supervisor but not a member of the union organizing committee. Tr. 94–95, 280.

[16] She shared them as photographs of a cell phone screen displaying the messages. In the photographs, one can clearly see the cell phone and the hand holding it. R Exh. 6.

[17] Temera was an employee who had a medical condition that prevented her from working with cleaning products used at the Latham store. Tr. 283-284, 301. Schenk was the shift supervisor on a shift to which Temera was assigned.

> DON'T FUCKING OPEN IF YOUR ARENT FUCKING
> STAGED
> What kind of lizard brain fucking stupidity does it take to convince himself it's okay to ask me to come in and do 3 fucking peoples jobs.

(R. Exh. 6.)

On June 16, 2022, Schenk was called in for a meeting with Kuhnle-Hambster and Cain. Kuhnle-Hambster showed Schenk the photographs that Mahoney had provided of the chat messages referenced above, and asked if he had written them. Schenk confirmed that he wrote the messages, but stated that he considered them "personal."[18] During the meeting, Schenk asked how the Respondent had obtained the images of the group chat, but Kuhnle-Hambster did not tell him. (Tr. 101–102, 237.) The evidence shows that after this meeting, Kuhnle-Hambster once again inquired about disciplining Schenk and obtained input from other company staff, including a company regional director. (GC Exhs. 16 and 17.) The company regional director observed that, according to Kuhnle-Hambster, the store manager might not have been holding employees accountable for using offensive language, but that Kuhnle-Hambster and herself were "aligned with Sep[aration]." (GC Exh. 17 at pg. 00095.) Ultimately a decision was made to issue a final written warning to Schenk, rather than to fire him.

Kuhnle-Hambster and Cain met with Schenk at the store again on June 27 and issued a final written warning to him at that time. Prior to doing so, the Respondent did not provide the Union with pre-implementation notice or an opportunity to bargain regarding the discipline. (Tr. 37–38.) Kuhnle-Hambster presented the written warning to Schenk and stated that the action was based on the severity of the work-related "verbiage" sent to coworkers. (Tr. 104 ff.) The written warning document itself stated that it was issued "for unprofessional behavior, including use of profanity and name calling which is in violation of Starbucks Code of Conduct & How we Communicate," and recounted some of the language quoted above, which the document characterized as part of "a work-related text message to another" shift supervisor. Schenk protested that the communications were "private conversations" and that he was not asking for work-related help. (Tr. 107; GC Exh. 9.) At the hearing, Schenk opined that the messages were part of a "private group chat to a group of friends with an expectation of privacy," and also that it was "protected speech." (Tr. 111.) After the Respondent issued the final warning, the employees stopped using the group chat. (Tr. 287.)

During the period relevant to this litigation, the Respondent maintained the following rule:

> How We Communicate
>
> Partners[19] are expected to communicate with other partners and customers in a professional and respectful manner at all times. The use of vulgar or profane language is not acceptable.

(R. Exh. 3.) The rule was contained in the Respondent's "Partner Guide," which is available to employees. There was credible evidence that, despite the existence of this rule, it was common for employees at the Latham store to use profanity and vulgarity. (Tr. 282, 287.) The record evidence does not show, however, that it was common, or tolerated, for employees to use vulgar or profane language as part of insults or name calling directed at other staff members (as opposed to as exclamations or intensifiers). (Tr. 301–302.) Indeed, well before the start of the union campaign, Schenk himself had been disciplined at the Latham store for failing to act appropriately as a shift supervisor to stop employees on his shift from using obscene insults about a coworker. (R. Exh. 5.) The coaching document that the Respondent issued to Schenk at that time warned that further violations could result in separation. Nevertheless, Schenk did not feel it necessary to moderate his own use of profanities, and even bragged at trial that when Store Manager Cain asked employees to be careful with their language, Cain had added "Except for James[Schenk], he's going to, you know he's going to say what he wants." Tr. 101. The evidence also shows that, after disciplining Schenk, Kuhnle-Hambster terminated a newly hired employee for, inter alia, using vulgarity towards a coworker. R Exh. 12.

B. Memorialized Coaching: On July 18, 2022, the Respondent issued a "memorialized coaching" to Schenk, stating that during a closing shift on June 30 he had "violat[ed] the standards and procedures as outlined in the Steps to Excellence – Clean & Maintained Stores." (GC Exh. 10.) Prior to issuing this coaching, the Respondent did not provide the Union with pre-implementation notice or an opportunity to bargain. (Tr. 37–38.) The document memorializing the coaching states that Schenk had left four tasks undone: high variance count; dating of pastries; stocking the bathrooms; and filling empty cold brew coffee kegs. The "high variance count" refers to an inventory tracking task in which particular items in the store are spot checked. (Tr. 222–223.) This task takes a few minutes to complete. (Tr. 223.) Dating pastries refers to taking the pastries out of the freezer so they will be ready for sale the following day and stamping each with a sticker that shows its expiration date. (Tr. 220–221.) This task takes a few minutes. (Tr. 223.) Stocking the toilet takes about 5 to 15 minutes and is confined to making sure there are two toilet paper rolls—a roll and a backup roll—in each dispenser. (Tr. 120, 222.) Regarding the kegs, the closing shift staff is required

[18] Schenk testified that, on the way into the meeting, he told Kuhnle-Hambster that if anything disciplinary was going to be discussed he wanted to have a union representative present, but that Kuhnle-Hambster "blew past" the request and proceeded with a disciplinary interview. Tr. 92-93. Kuhnle-Hambster testified, contrary to Schenk, that it was not until the end of the interview that Schenk stated he wanted to have a union representative present during meetings of this type. Tr. 379. I do not find a basis in the record for crediting Schenk's testimony over Kuhnle-Hambster on this point. I believe that both of these witnesses strained at times to conform their testimony to their own interests in this litigation. See, supra, footnotes 4, 12, 13, 15, and infra footnote 20. Moreover, I note that Schenk did not explain why he acquiesced when Kuhnle-Hambster ignored his purported pre-interview request for representation. Nor did he explain why he would have suspected that the meeting was a disciplinary interview before any questioning started and before any of the disciplinary actions at-issue in this case.

[19] The Respondent uses the term "partners" to refer to staff.

to leave at least half of the kegs filled and ready for the staff that opens the store the following day. (Tr. 116–117.)

Schenk testified that on the shift in question, he had made sure the bathroom was properly stocked "to the best of my knowledge" but when specifically asked whether he had placed the second, back-up, roll in the dispenser he first answered, "I don't know," and when asked again conceded that he "didn't take the time to do a second [toilet paper]roll in there." (Tr. 120, 221–222, 224.)[20] Schenk did not deny that the other deficiencies described in the memorialized coaching had occurred, but he stated that such deficiencies were common and that he was not aware of anyone else being disciplined for them. When store manager Cain confronted Schenk about the shortcomings, Schenk told him that he had been unable to complete the tasks because the coin-rolling machine was malfunctioning and because the coworker scheduled to close the store with him was inexperienced. (Tr. 111–114.) The coin rolling task was not one that the closing shift completed each day, but Schenk testified that it was part of the weekly distribution of tips to employees and he had prioritized it for the sake of his coworkers. (Tr. 215.)

There was credible evidence that the types of shortcomings mentioned in the memorialized coaching were not uncommon at the Latham store (Tr. 289–290, 307–309), and the record does not show that any closing shift supervisor had previously been disciplined at the Latham store, or by Kuhnle-Hambster, for the failures that Schenk was cited for in the memorialized coaching. At the same time, there was no evidence that any shift supervisor had previously been responsible for as many as four failures of this type on a single shift. (Tr. 308–309.)

Store manager Cain was the one who informed Kuhnle-Hambster of the shortcomings of Schenk's closing shift performance on June 30. (Tr. 389–390.) Nevertheless, Cain, during an August 1 conversation with (and recorded by) Schenk,[21] stated that he had "fought against" issuing the memorialized coaching because he considered Cain's deficiencies that day to be "one-offs." During this conversation, Schenk opined that Kuhnle-Hambster's "goal is to fire me" and that he was "feeling sick" at work. Schenk stated that he just "want[ed] it to be over with" and was actually disappointed that Cain had not told him he "was getting fired." Schenk further stated, "I'm going on 10 days in a row now where I've had a nightmare that I woke up to a text saying, like, don't come in, you're fired." Schenk told Cain that "quitting feels like letting [Kuhnle-Hambster] win" and Cain responded that Schenk should not quit and that he did not want Schenk "to feel stress from me or anyone because I feel like it's been affecting you in different ways here too." Cain stated he believed Schenk's mistakes were due to stress-related exhaustion. He warned that both Schenk and himself had to make sure "to cross our 'T's and dot our 'I's," because "that's what Beate[Kuhnle-Hambster] is going to be looking for." Later, when Schenk opined that Kuhnle-Hambster was "making it more and more miserable" for him so that he would quit, Cain responded "it sucks that then, she's winning, making it miserable to be here."

C. Termination of Employment:

Schenk was working as a shift supervisor at the Latham store on August 12, 2022. Towards the end of Schenk's shift, at a time when the store manager was not present, Schenk opened a letter that came to the store from the NLRB. The letter was delivered by United States mail, was addressed to "Starbucks Corporation," and gave the street address of the Latham store. (R. Exh. 7.) The pre-printed text on the envelope warned that the correspondence was "Official Business" and set forth the return addressee as the "United States Government National Labor Relations Board." After opening the envelope, Schenk examined its contents, shared them with other employees, and then placed the letter back in the envelope and left it on the desk of store manager Cain. (Tr. 144.) Schenk testified that he was aware that opening mail that is not addressed to you is a potential violation of the law. (Tr. 235.)

The next day, on August 13, Cain asked Schenk who had opened the letter from the National Labor Relations Board and Schenk responded that he was the one who had done so.[22] Cain told Schenk, "I would ask you not to just in case there's anything legal or anything like that . . . that's something that I would like to be able to open and look at first." Schenk responded: "Well, with respect, I am the Union liaison with the store and papers given to us by the NLRB to put up have been taken down after I've posted them. So I don't have a lot of confidence that I will receive that communication if I need it." At trial, Schenk expressed a similar view, testifying that "as the Union liaison" he viewed it as "well within my purview to read a letter from the NLRB." (Tr. 159.)

Cain called Kuhnle-Hambster and told her about the incident and that Schenk had admitted to opening the letter. (Tr. 391–392.) Kuhnle-Hambster discussed Schenk's conduct with the Respondent's human resources department and its legal department, and decided to terminate Schenk's employment. On August 31, Kuhnle-Hambster informed Schenk by phone that he was being terminated for opening the letter. Prior to taking this action, the Respondent did not provide the Union with pre-implementation notice or an opportunity to bargain over the termination. (Tr. 37–38.) Later that day, Schenk received a "notice of separation" document, dated August 31, 2022, which stated:

> This document is James Schenk's notice of separation for violation of the Standards of Business Conduct, specifically the expectations in the *Compliance with Laws and Regulations* section, which states that partners "must comply with all applicable laws, rules and regulations when performing [their] duties" and that "[a]ll Starbucks partners have a continuing obligation to familiarize themselves with applicable laws relating

[20] Given this inconsistent testimony, I find that Schenk's testimony that the bathrooms were properly stocked at the end of the shift is not credible.

[21] Schenk's recording of this conversation was played at the hearing by the General Counsel and made part of that hearing transcript. Tr. 124 ff.

[22] Schenk recorded this conversation with Cain. The General Counsel played the recording at the hearing and it was included in the trial transcript. See Tr. 150 ff.

> to their job responsibilities and all Starbucks policies. Breach of these standards, Starbucks policies or the law may give rise to disciplinary action up to, and including dismissal."
>
> On 6/27/22, James received a final written warning for sending an inappropriate text to his peers. Then on 7/14/22, James had a memorialized conversation due to not meeting the expectations of the shift supervisor role.
>
> Despite this, on 8/12/22, James opened a letter that was not addressed to him, despite the fact he was not an individual who is authorized to open Company mail or who has been designated as needing to know the information in order to perform his job duties. James admitted that he knew the letter was not intended for him and that he opened it because he wanted to know what it contained. James' conduct was not consistent with our Mission and Values and could have constituted a felony under federal law in violation of his responsibilities under the Standards of Business Conduct.[23]

(GC Exh. 13.)

The Respondent did into show that it has promulgated a policy specifically addressing which members of store staff are authorized to open mail. The record shows that on relatively rare occasions shift supervisors opened mailers and packages containing work supplies that were delivered to the store. (Tr. 288, 305–307, 336–337, 339.) The record does not support the notion that shift supervisors were generally authorized to open whatever mail came into the store or, more specifically, that they were authorized to open official business mail sent by government entities and addressed to Starbucks Corporation. Id. and Tr. 350. Schenk essentially recognized this himself, stating that he opened the NLRB letter to the Respondent in his capacity as *union liaison* and based on his distrust that the Respondent would share its contents with him. I find that it is not credible, facially or on the record here, that Schenk had, or honestly believed he had, the right as either a shift supervisor or a union liaison to open official business mail addressed to Starbucks Corporation by a government agency. This finding is buttressed by Schenk's attempts to avoid admitting that the letter was addressed to Starbucks *Corporation.* See Tr. 145 (Schenk testifies that the letter was addressed to "Starbucks 1210 Schenectady Road," and omits that it was addressed to Starbucks *Corporation*); (Tr. 151.) (when confronted by Cain, Schenk says "I opened the NLRB one because it was just addressed to the store"); Tr. 252 (when asked if any of the mail he opened "was addressed specifically for the Starbucks Corporation from [a] government entity," he answers "I do not know").

Discussion

I. SECTION 8(A)(1): ALLEGED INTERFERENCE

A. Impression of Surveillance

1. Stuyvesant Store: The General Counsel alleges that the Respondent unlawfully created the impression of surveillance at the Stuyvesant Store during the weeks prior to the union election there. An employer violates Section 8(a)(1) of the Act when, under all the relevant circumstances, reasonable employees would assume from the employer's actions that their union or other protected activities have been placed under surveillance. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 102 (2010); *Fred'k Wallace & Son*, 331 NLRB 914 (2000), quoting *Flexsteel Industries*, 311 NLRB 257 (1993). The Board has held that while "management officials may observe public union activity," those officials may unlawfully create the impression of surveillance when their observation of the union activity is "out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982) (Table); see also *Durham School Services*, 361 NLRB 407 (2014) (observation of union activities in a public area was unlawful surveillance when manager "was observing employees in way that was out of the ordinary"). To determine whether employer surveillance violates the Act, the Board considers whether the employer's conduct, under the totality of the circumstances, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Starbucks Coffee Co.*, 372 NLRB No. 50, slip op. at 23 (2023), citing *Sage Dining Services, Inc.*, 312 NLRB 845, 846 (1993) and *Brown Transportation Corp.*, 294 NLRB 969, 971–972 (1989).

Kuhnle-Hambster dramatically increased her presence at the Stuyvesant store during the time period from April 2022, when the union campaign there became public, and June 7, 2022, when employees at that location voted to be represented by the Union. During these extra visits Kuhnle-Hambster positioned herself in the customer seating area from which she could observe most of the employee workstations and also met with employees one-on-one to campaign against unionization. As discussed in the findings of fact, the increase in her presence was tied to the start of the union campaign, rather than, as Kuhnle-Hambster claimed, to the tenure of any particular store manager. The magnitude of the increase—from as little as one visit every 2 months before the union campaign to four or five visits every week during the union campaign—was far out of the ordinary and would reasonably tend to restrain employees' exercise of their Section 7 rights. Both Melendez and Evans testified that it inhibited them from talking to coworkers about the Union.

I find that the Respondent created the impression of surveillance and violated Section 8(a)(1) of the Act, from April 2022 to June 7, 2022, when district manager Kuhnle-Hambster dramatically increased her presence at the Stuyvesant store during the union campaign.

2. Latham Store: On June 16, Kuhnle-Hambster showed Schenk the photographs that Mahoney had provided to her of Schenk's statements in the May 24 group chat and did not tell Schenk how she had obtained those images. The General Counsel contends that this conduct created the impression that the group chat activities were under surveillance.

I find that under all the relevant circumstances here, a

[23] The Respondent's written Standards of Business Conduct state that Starbucks "depends upon its partners to follow the law and make appropriate decisions." R. Exh. 3 at internal pg.36; Tr. 176

reasonable employee would not assume that the employer had placed his or her union or protected activities under surveillance. Five employees were using the chat group to communicate information between shifts. An obvious explanation for Kuhnle-Hambster's possession of the photographs of the offensive messages was that one of those employees had provided them. Although the employees had sometimes in the past communicated union information in the chat, there is no claim that the Respondent had displayed an awareness of that information; rather the only information the record shows it possessed were the offensive statements, including about an employee with a medical condition, that the chat participants would reasonably feel obliged to voluntarily bring to the attention of management. The fact, moreover, that a hand was holding a cell phone that displayed the text messages is consistent with the idea that a recipient had provided copies of the messages to the Respondent, rather than that management had somehow hacked into the group chat and obtained screenshots without the participants' knowledge. I recognize that Kuhnle-Hambster's unwillingness to reveal that the texts were volunteered to management by a concerned coworker, while not unreasonable during an active investigation, left surveillance as an open possibility.[24] However, I find that under all the circumstances here, a reasonable employee would not believe that surveillance was the source.

The allegation that the Respondent unlawfully created the impression of surveillance in violation of Section 8(a)(1) on June 16 at the Latham store must be dismissed.

B. Meetings with Employees

1. Captive Audience Meetings at Stuyvesant Store: The General Counsel argues that the Board should find that captive audience meetings are per se unlawful and that Kuhnle-Hambster violated Section 8(a)(1) when she met with employees on May 2, 11 and 23 and tried to persuade them not to support the Union. The General Counsel concedes that finding a violation on this basis would require overruling the Board's decisions in *Babcock & Wilcox Co.*,77 NLRB 577 (1948) and other cases. Brief of General Counsel at Pages 36 to 46. The decision about whether to reverse Board precedent is for the Board, not me. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied."); see also *Austin Fire Equipment, LLC*, 360 NLRB 1176 fn. 6 (2014).

Applying existing Board precedent, and without considering the merits of the General Counsel's arguments for reversing that precedent, I find the allegation that the Respondent violated Section 8(a)(1) of the Act when Kuhnle-Hambster met with employees on May 2, 11, and 23, 2022, must be dismissed.

2. T hreatened Loss of Benefits at Stuyvesant Store: The U.S. Supreme Court stated, in *NLRB v. Gissel Packing Co.*, that an employer "may communicate with his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit." 395 U.S. 575, 618 (1969). An employer's statement that union representation will mean that certain benefits will be negotiated and "could go either way", is not, without more, considered a threat of reprisal. *Jefferson Smurfit Corp.*, 325 NLRB 280 n.3 (1998); *Telex Communications*, 294 NLRB 1136, 1140 (1989); *Pilliod of Mississippi*, 275 NLRB 799, 800 (1985). However, when an employer predicts that employees will necessarily lose benefits if they elect to be represented by a union, the prediction constitutes a "threat of reprisal" absent a "lawful explanation based on objective facts as to why such a loss of benefits would occur." *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), enfd. in relevant part by 260 F.3d 465 (5th Cir. 2001); see also *Dico Tire, Inc.*, 330 NLRB 1252, 1257 (2000) (employer threatens an employee in violation of the Act when it predicts that employees will lose benefits in negotiations if they select a union).

In this case, the General Counsel alleges that Kuhnle-Hambster made an unlawful threat to Melendez by stating that employees would necessarily lose their college tuition benefits and would be denied participation in the soon-to-be-revived coffee master program if they unionized. As I discuss in the statement of facts, however, the General Counsel failed to show that Kuhnle-Hambster made such a prediction. Although Kuhnle-Hambster did discuss the connection between unionization and benefits during conversations with employees at the Stuyvesant store, the General Counsel did not show that she went beyond stating that if employees unionized the benefits would be subject to negotiation. Since such statements are not, without more, unlawful, the General Counsel has not established this violation.

I find that the complaint allegation that the Respondent violated the Act on or about May 23, 2002, by threatening employees with the loss of a benefit if they selected the Union as their bargaining representative must be dismissed.

3. Weingarten Rights and Schenk Interview: In *NLRB v. J. Weingarten, Inc.*, the United States Supreme Court held that Section 7 of the Act prohibits an employer from refusing an employee's request for union representation during an investigatory meeting that the employee reasonably believes could lead to discipline. 420 U.S. 251, 260 (1975). When an employee makes such a request the Respondent has three options: "(1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview without a union representative or having no interview at all." *Troy Grove*, 371 NLRB No. 138, slip op. at 3 (2022).

On June 16, Kuhnle-Hambster brought Schenk into an investigatory interview regarding the offensive chat group messages that the Respondent cited as the basis for issuing the final written warning to Schenk on June 27. The General Counsel alleges that the Respondent violated Schenk's rights under *Weingarten* during that interview because Schenk requested union representation on the way into the interview, but Kuhnle-Hambster proceeded with the interview without allowing Schenk to obtain such representation. As discussed in the statement of facts, however, I find that the record does not establish that Schenk, in fact,

[24] See, e.g., *David Saxe Prods.*, 370 NLRB No. 103, slip op. at 38–39 (2021) ("unsourced" statement tends to cause employees "to speculate as to how the employer obtained the information, causing them reasonably to conclude that the information was obtained through employer monitoring").

made a request for union representation before or during the questioning. In the absence of such a request, the Respondent's failure to provide union representation did not violate the Act. *Praxair Distribution, Inc.*, 358 NLRB 27 fn. 2 (2012) (no *Weingarten* violation absent a showing that employee requested representation).

The allegation violated Section 8(a)(1) of the Act during the investigatory interview by failing to honor an employee request for union representation must be dismissed.

II. DISCIPLINARY ACTIONS AGAINST SCHENK

The General Counsel alleges that the challenged disciplinary actions against Schenk were all taken in retaliation for his protected union and concerted activity. Allegations that an employer discriminated based on protected union or concerted activity in violation of Section 8(a) (1) and 8(a)(3) of the Act, and which turn on motivation, are analyzed using the framework set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983); see also *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006) ("The Board applies the *Wright Line* framework to alleged violations of Section 8(a)(1) that turn on employer motivation."). Under the *Wright Line* framework, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by employees' protected union or concerted activity. *Mondelez Glob., LLC*, 369 NLRB No. 46 (2020) (evidence must show a causal relationship between the employee's protected activity and the adverse action). The General Counsel can meet its initial *Wright Line* burden by showing that: (1) the employee engaged in union or protected concerted activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the protected union and/or concerted activity, and there was a causal connection between the discipline and the protected activity. *Camaco Lorain Mfg. Plant,* 356 NLRB 1182, 1184–1185 (2011); *ADB Utility Contractors,* 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville,* 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council,* 330 NLRB 1100, 1105 (2000). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. *Camaco Lorain*, supra; *ADB Utility*, supra*; Intermet Stevensville*, supra; *Senior Citizens*, supra.

The Board has held, however, that the *Wright Line* analysis is not appropriate when the employer defends a disciplinary action based on the employee's alleged misconduct in the course of otherwise protected union or concerted activity. In such circumstances motivation is not at issue and the question is whether, in the course of otherwise protected activity, the employee engaged in conduct egregious enough to cause him or her to forfeit the Act's protection for that activity. *Lion Elastomers LLC*, 371 NLRB No. 83 (2001), overruling *General Motors*, 369 NLRB No. 127 (2020); *Atlantic Steel*, 245 NLRB 814 (1979); see also *Gross Electric Inc.*, 366 NLRB No. 81, slip op. at 2 (2018) ("[W]here an employer undisputedly takes action against an employer for engaging in protected activity, a *Wright Line* analysis is not appropriate."). If it is determined that the misconduct alleged by the employer did not cause the employee to lose the protection of the Act, the causal connection between the discipline and the employee's protected activity is established and "the inquiry ends." *Nor-Cal Beverage Co.*, 330 NLRB 610, 611–612 (2000).

A. Final Written Warning

Section 7 of the Act provides that employees engage in protected activity when they, inter alia, "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." When an employee shares criticisms about working conditions with coworkers, the criticisms are protected activity, not mere griping, if the problems raised affect coworkers or coworkers are unhappy about the same issues. *Tampa Tribune*, 351 NLRB 1324, 1334–1335 (2007), enf. denied on other grounds by 560 F.3d 181 (4th Cir. 2009).

The Respondent issued the June 27 final written warning to Schenk based on his conduct in the course of otherwise protected concerted activity in the group chat on May 24. Schenk's group chat messages focused on complaints that management was not properly staffing the store and that, as a result, he was being forced to complete the work of multiple employees. These are clearly work-related criticisms and are among the precise problems that a group of employees had recently raised to the Respondent in the organizing committee letter. That group letter flagged problems with "inadequate staffing" and complained that employees "are expected to work harder to accommodate the lack of sufficient coverage or training." Employees had also raised staffing problems during conversations with Kuhnle-Hambster. The staffing and workload issues discussed by Schenk in the group chat plainly fall within the category of working conditions that affected coworkers and that coworkers were concerned about.

Even though Schenk's communications with coworkers about staffing and workload issues were protected concerted activity, those communications forfeited the Act's protection under the Board's decision in *Atlantic Steel* if, in the course of such activity, Schenk engaged in sufficiently egregious or opprobrious misconduct. 245 NLRB at 816; see also *Lion Elastomers*, 372 NLRB No. 83, slip op. at 1, 2 (Board re-affirms *Atlantic Steel* standard); see also *Stanford New York, LLC*, 344 NLRB 558, 558 (2005) ("When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act."). In *Atlantic Steel* the Board stated that whether otherwise protected activity is sufficiently egregious to lose the Act's protection depends on a balancing of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, supra; see also *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 fn. 2 (2018), enfd. 763 Fed.Appx. 5 (2nd Cir. 2019), *Postal Service*, 360 NLRB 677, 677 fn. 2 and 683 (2014).

I find that consideration of the four factors set forth in *Atlantic Steel* weigh in favor of finding that Schenk's statements in the

group chat were egregious enough to cause his otherwise protected activity to forfeit the Act's protection. The only one of the four factors that weighs in favor of continued protection is "the subject matter of the discussion." As noted above, Schenk was complaining about staffing and workload problems that affected Latham employees generally and that employees had already collectively raised with the Respondent. The other three *Atlantic Steel* factors all weigh against finding continued protection. The "place" of the discussion was a group chat that shift supervisors used to communicate helpful "crossover" information between shifts. This meant that shift supervisors who wanted to benefit from the assistance provided in the group chat would have to absorb the highly offensive statements that Schenk injected into the conversation, including about the store manager and about an employee who shift supervisors were responsible for providing with respectful direction, coaching and feedback. See *Starbucks Corp.*, 354 NLRB 876, 878 (2009) ("The location of an employee's conduct weighs against protection when the employee engaged in insubordinate or profane conduct toward a supervisor in front of other employees regardless of whether those employees are on or off duty."), decision and reasoning affirmed by 355 NLRB 636 (2010), reversed in part on other grounds by 679 F.3d 70 (2d Cir. 2012). The highly offensive insults directed at an employee's medically-imposed limitations demonstrated hostility, and arguably encouraged hostility,

towards that employee and the accommodation she was receiving. One of the shift supervisors, herself a member of the union organizing committee, chose to bring Schenk's remarks to the attention of the store manager even though it was predictable that doing so might create problems for another organizing committee member.[25]

I also find that the nature of the outburst weighs in favor of finding that protection was forfeited. The statements, which are set forth fully in the statement of facts, included a torrent of unusually offensive insults, some invoking sex acts, directed at other members of the staff. These included insults referencing the medically-imposed limitations of an employee whose work Schenk was responsible for directing. In the group chat, Schenk referred to that employee as "the dumb fucking bitch who can't even use cleaners" and as "useless fucking" Termera. In addition, he referred to the store manager Cain as a "fucking pussy" and a "fucking cocksucker" who could "suck my dick" and "suck my fucking dick." Schenk used this language even though, well before the start of the union campaign, he had been disciplined for reasons related to "obscene" and possibly "harassing" insults directed at an employee. Indeed, at trial Schenk rather proudly recounted that when Cain previously told employees to avoid using offensive language he acknowledged knowing that Schenk was "going to say what he wants." The use of profane insults directed at coworkers has contributed in other cases to the Board finding that an employee had forfeited the Act's protection. See, e.g., *Cellco Partnership*, supra, *Tus Joist MacMillian*, 341 NLRB 369, 372 (2004) ("prostitute" and "lying bastard"), *Piper Realty Co.*, 313 NLRB 1289, 1289–1290 (1994) ("fucking asshole"). Tellingly, in its brief the General Counsel avoids repeating any of Schenk's highly offensive insults, but rather refers to them simply as profanity, as if all uses of profanity in the workplace are the same. They are not, and Board precedent recognizes that they are not.

Regarding the fourth factor, Schenk's outburst was not provoked by an unfair labor practice. The record does not show that the Respondent had committed any unfair labor practices at the Latham store as of the time of Schenk's remarks.[26] The staffing and workload issues that Schenk was reacting to are not alleged to constitute unfair labor practices. I find that, on balance, consideration of the *Atlantic Steel* factors weighs decisively in favor of finding that by his conduct in the course of the otherwise protected communications, Schenk forfeited the Act's protection. As the Board has stated, the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *Stanford*, 344 NLRB at 558, quoting *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984).

The allegation that the Respondent violated Section 8(a)(1) when it issued the June 27, 2022, final written warning to Schenk for engaging in protected concerted activity must be dismissed.[27]

The General Counsel also argues that the Respondent discriminated based on Schenk's other protected union and/or concerted activity in violation of Section 8(a)(3) and (1). This allegation, although it relates to the same disciplinary action discussed above, turns on motivation and therefore is appropriately analyzed using the *Wright Line* framework. I find that the General Counsel easily establishes the elements of a prima facie case under *Wright Line*. Schenk was a very active union proponent and the Respondent indisputably had knowledge of some of his union activities at the time it issued the discipline. For example, the Respondent knew that Schenk was one of the union committee members who identified themselves in the March 2022 letter. The Respondent also knew that Schenk, on behalf of the Union, had repeatedly contacted Kuhnle-Hambster to demand bargaining over a plan to renovate the Latham store.

The General Counsel has also shown the final element of the prima facie case—that the Respondent bore animus towards Schenk's protected activity and that the animus was connected to the discipline issued against Schenk. Such animus is

[25] I considered the fact that neither of the two individuals who were the targets of Schenk's obscene insults were participants in the group chat. Cf. *The Tampa Tribune*, 351 NLRB at 1326 (finding profane insult about a supervisor did not cause forfeiture of protection because, inter alia, it was not made "to his face"). However, the Board has not required that the employee make the insult directly to the other individual in order to forfeit protection. In *Cellco Partnership*, for example, the Board held that an employee forfeited protection when, while soliciting coworkers to support the union, he referred to a specific supervisor as a "bitch" and to others as "fucking supervisors." 349 NLRB 640, 642 (2007).

[26] Kuhnle-Hambster had unlawfully created the impression of surveillance at the Stuyvesant store, but not at the Latham store where Schenk and others were using the group chat. At any rate, Schenk's outburst was not about surveillance.

[27] It does not appear that the General Counsel is arguing that Schenk's communications on May 24 were protected as union activity, as opposed to as concerted activity. Any such argument would fail since even assuming that those communications were union activity, Schenk's misconduct during those communications forfeited the Act's protection based on the same *Atlantic Steel* analysis discussed above with respect to concerted activity.

demonstrated by Kuhnle-Hambster unlawfully creating the impression that employees' union activities were being surveilled. Kuhnle-Hambster was the same manager who issued the challenged discipline to Schenk. Anti-union animus is also shown by Kuhnle-Hambster's demonstrated eagerness to terminate Schenk. Prior to any of the discipline at-issue in this case, Kuhnle-Hambster was already "leaning" towards firing Schenk for emailing a bargaining request to her during his June 16 shift. In that instance, however, the human resources department declined to recommend terminating Schenk. The human resources report noted that Kuhnle-Hambster did not know when Schenk took his breaks on June 16 (and, therefore, presumably would not have known whether he had sent the email during work time or break time). When Kuhnle-Hambster found out about Schenk's chat messages she again inquired about firing Schenk, but decided against doing so after consulting with a company regional director who noted that the store might not have been holding other employees accountable for using offensive language. (GC Exh. 17 at pg.00095.)[28]

Since the General Counsel has established all three elements of its initial *Wright Line* burden with respect to disciplinary actions against Schenk, the burden shifts to the Respondent to show that it would have taken the same actions against Schenk for lawful reasons even absent his protected activity. Camaco *Lorain,* supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. With respect to the final written warning, I find that the Respondent has met that burden. For the reasons discussed above, I find that the torrent of profane insults that Schenk used in reference to members of the store staff was egregious. As discussed above, this included insults he directed at an employee he was responsible for overseeing, and focused on the medically imposed limitations of that employee. Schenk's conduct was a violation of the Respondent's "How We Communicate" policy that applies to all employees, and is also at cross purposes with Schenk's duties as a shift supervisor, which included providing encouragement and "respectful coaching and feedback" to employees whose work he directed.

In addition, the record shows that in 2018, well before the union campaign, the Respondent disciplined Schenk for reasons related to obscene, and potentially offensive or harassing, comments directed at a store employee. At that time, the Respondent required Schenk to read and sign the Respondent's anti-harassment policy and advised him that it was inappropriate to use obscene and offensive language in the workplace. The level of discipline that the Respondent subsequently imposed on June 27 was not disproportionate to the offensive chat group communication. That is especially true given that it was not the first time Schenk had been disciplined for reasons relating to offensive insults.

The General Counsel contends that the Respondent enforced their "How We Communicate" rule selectively and disparately based on protected activity and, in particular, did so with respect to Schenk's May 24 group chat outburst. That is not demonstrated by the record. To the contrary, as noted immediately above, well before Schenk's union activity the Respondent disciplined him for reasons related to obscene and offensive insults. In addition, the testimony shows that Cain had previously told employees to be careful with their language. Thus, the record shows that the Respondent did not knowingly tolerate the use of obscene and offensive insults in the workplace. It is true that other employees at the Latham store used profanity without being disciplined. However, it was not shown that the Respondent had tolerated other employees using such language the way that Schenk did in this instance – i.e., when directing highly offensive insults at other members of the staff. Indeed, Schenk essentially admitted that his use of offensive language outstripped that of others – testifying that when Cain told employees to watch their language, Cain added, "Except for James[Schenk], he's going to, you know he's going to say what he wants."

For the reasons discussed above, the General Counsel has not shown either that the Respondent selectively enforced its "How We Communicate" rule or otherwise discriminated in violation of Section (a)(1) and/or Section 8(a)(3) when it issued a final written warning to Schenk on June 27, 2022. Those allegations must be dismissed.

B. Memorialized Coaching

I also find that the Respondent has met its responsive burden with respect to the July 18, 2022, memorialized coaching. The evidence shows that Schenck was the shift supervisor responsible for closing the store on June 30 and that he left four mandatory closing tasks undone. Schenk testified that this occurred largely because of the time he devoted to a task—rolling coins—that was not generally completed at the end of each closing shift. Although there was credible evidence that shift supervisors sometimes failed to complete a closing task, the evidence did not show that any other shift supervisor had ever left so many tasks undone on a single shift. Under these circumstances, I credit the evidence this very mild form of discipline—a memorialized coaching—would have been issued to Schenk for the multiple deficiencies even in the absence of his protected activities.

For the reasons discussed above, I find that the allegation that the Respondent discriminated in violation of Section 8(a)(3) and (1) when it issued a memorialized coaching to Schenk on July 18, 2022, must be dismissed.

C. Separation

Lastly, I find that the Respondent has met its responsive burden with respect to the decision to terminate Schenk. Schenk's decision to open United States mail, from a federal government agency, that was addressed to "Starbucks Corporation," and which was explicitly designated on the envelope as "official business," was a brazen intrusion into management's prerogatives. The General Counsel's suggestion that opening the confidential letter was part of Schenk's duties as an employee is wholly without merit. As discussed in the statement of facts, the record shows that while employees designated as shift supervisors sometimes opened mailers and packages containing supplies, it was understood that they were not authorized to open

[28] The evidence discussed above is sufficient to establish that Kuhnle-Hambster bore animus towards Schenk's protected activity. Nevertheless, I also think it is also worth noting that during their August 1 conversation, store manager Cain, an admitted agent of the Respondent, see GC 1(n), paragraph 5, essentially agreed that Kuhnle-Hambster was targeting Schenk.

mail addressed to Starbucks Corporation. Indeed, Schenk himself told Cain, and testified at trial, that the reason he felt entitled to open the letter was because of his role *with the Union* and because he did not trust the Respondent to share the letter's contents with employees. Cf. *Berkshire Farm Ctr.*, 333 NLRB 367 (2001) (Board defers to compliance proceeding question of whether employee's entitlement to backpay was terminated due to the employee's misconduct in opening and reading mail addressed to management) and *Champion Parts Rebuilders, Inc.*, 260 NLRB 731 (1982) (employee engaged in protected activity when he complained about a supervisor opening union mail), enforcement granted in part and denied in part by 717 F.2d 845 (3d Cir. 1983). Moreover, when Cain specifically told Schenk not to open mail that came to the store in the future, Schenk did not agree to abide by that direction, but rather maintained that it was his right to open the Respondent's mail because he was union liaison and lacked "confidence" that the Respondent would share information with him.

My conclusion that the Respondent has met its responsive burden with respect to Schenk's discharge is based not only on the severity of Schenk's misconduct, but also on the fact that Schenk had received a final written warning only 2 months earlier. As found above, the issuance of that final written warning was not shown to be unlawful. Schenk knew, as he indicated during his August 1 conversation with Cain, that he was in danger of being terminated, and yet he engaged in further serious misconduct. That Schenk did so causes me to wonder whether he meant what he said on August 1 when he told Cain that he was hoping to get fired. It is true that Schenk had enthusiastically and effectively supported the Union and that Kuhnle-Hambster was hostile towards those activities. However, that did not afford Schenk license to engage in misconduct without appropriate repercussions.

In reaching the conclusion that the Respondent met its responsive *Wright Line* burden with respect to Schenk's termination, I considered that the Respondent was not shown to have written protocols or policies about opening mail. The Respondent points out that it does, however, have written "Standards of Business Conduct," referenced in Schenk's separation notice, and those standards state that the Respondent "depends on its partners to follow the law and to make appropriate decisions." The Respondent contends that Schenk "likely committed a federal felony" by opening a letter addressed to Starbucks Corporation. (Br. of R. at pg. 1, 34–35.) Raising the specter of a federal felony charge is an overreach in my view, but I do believe that even in the absence of a federal crime or of a mail-handling policy, Schenk violated a common sense understanding of the Respondent's Standards of Business Conduct by taking it upon himself to, based on his distrust of the Respondent, open official business correspondence addressed to the Respondent by a government agency. Indeed, even without reference to such standards of conduct, reasonable employees would know that doing that was wrong.

I also considered that there is no evidence that the Respondent had previously disciplined any other employee for opening mail. However, there was also no record evidence that any other nonmanagerial employee had intentionally opened official business correspondence addressed to Starbucks Corporation by a government agency or any other confidential mail, much less that the Respondent was aware of such misconduct. Given the lack of prior comparable misconduct, the lack of prior comparable discipline does not show disparate treatment.

I find that the allegation that the Respondent discriminated in violation of Section 8(a)(3) and (1) when it discharged Schenk on August 31, 2022, must be dismissed.

III. RESPONDENT'S FAILURE TO BARGAIN OVER DISCIPLINE ISSUED TO SCHENK

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by exercising disciplinary discretion without bargaining with the Union when it issued the final written warning, the memorialized coaching, and the termination to Schenk. The evidence does show that the Respondent exercised discretion in the imposition of these disciplinary actions at a time after the Union became the bargaining representative of unit employees at the Latham store, and that it exercised that discretion without bargaining with the Union. The General Counsel does not contend that this, or the other facts, shows a violation under current Board precedent. Instead it argues that the Board should overrule the current controlling Board precedent, *Care One at New Milford*, which holds that "upon commencement of a collective-bargaining relationship, employers do not have obligation under . . . 8(a)(5) of the Act to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice," 369 NLRB No. 109, slip op. at 7 (2020), and should find a violation under a different standard. As noted earlier in this decision, the question of whether existing Board precedent should be reversed is for the Board to decide, not me. *Waco, Inc.*, 273 NLRB at 749 n. 14; *Austin Fire Equipment,* 360 NLRB at 1176 fn. 6.

Applying existing Board precedent, and without considering the merits of the General Counsel's arguments for reversing it, I find the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by exercising disciplinary discretion without bargaining must be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent interfered with employees' exercise of their section 7 rights and violated Section 8(a)(1) of the Act when district manager Kuhnle-Hambster created the impression that union activities were under surveillance by dramatically increasing her presence at the Stuyvesant store during the period between when the union campaign there became public in April 2022 and when employees voted to be represented by the Union on June 7, 2022.
4. The above unfair labor practice affected commerce within the meaning of Section 2(6) and (7) of the Act.
5. The Respondent was not found to have committed the other violations alleged in the complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist

and to take certain affirmative action designed to effectuate the policies of the Act. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[29]

ORDER

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

1. Cease and desist from

(a) Creating the impression that employees' union activities are under surveillance.

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

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

(a) Within 14 days after service by the Region post at its Stuyvesant Store, located at 1475 Western Avenue, Albany, New York, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 3, 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, the notice 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 employees at the Stuyvesant Store 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. In the event that, during the pendency of these proceedings, 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 the Stuyvesant Store at any time since April 2022.

(b) Within 21 days after service by the Region, file with the Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 25, 2023

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 interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

STARBUCKS CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-296757 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.

[29] 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.

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