Starbucks Corporation *and* Workers United. Cases 21–CA–295845 and 21–CA–312405

March 27, 2025

DECISION AND ORDER[1]

BY CHAIRMAN KAPLAN AND MEMBERS PROUTY AND WILCOX

On February 22, 2024, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision, and on March 4, 2024, he issued an errata. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

On September 30, 2024, the National Labor Relations Board[2] issued a decision and order in this case, in which it adopted, in the absence of exceptions, the judge's findings that the Respondent violated Section 8(a)(1) of the Act by threatening employee Jesse De La Cruz with store closure and that it did not violate Section 8(a)(3) and (1) by reducing De La Cruz's work hours and causing his termination. 373 NLRB No. 115, slip op. at 1 fn. 2 (2024). The Board also severed and retained the complaint allegation that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with prior notice and an opportunity to bargain over its decision to discipline employee Araseli Romero and the effects of that decision. Id., slip op. at 1.[3]

Upon further consideration of the matter, the Board has decided to affirm the judge's dismissal of this allegation.[4]

ORDER

The remaining complaint allegation is dismissed.

Dated, Washington, D.C. March 27, 2025

Marvin E. Kaplan, Chairman

David M. Prouty Member

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lisa E. McNeill, Esq., for the General Counsel.
Arrissa K. Meyer, Esq. and *Kaleigh Hartigan, Esq. (Littler Mendelson, P.C.),* for the Respondent Company.
Robert S. Giolito, Esq., for the Charging Party.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In mid-March 2022, Workers United filed a petition with the NLRB for a representation election among the 19 baristas and so-called "shift supervisors" employed at Starbucks' South Central Avenue store in downtown Los Angeles. The election was conducted 2 months later, in May, and a majority of the ballots were cast in favor of the Union. Therefore, on June 1, the Union was certified as the exclusive collective-bargaining representative of the unit employees.

The complaint in this proceeding alleges that Starbucks committed four unfair labor practices at the store before, during, or after these events in violation of Section 8(a)(1), (3), and/or (5) of the National Labor Relations Act. First, it alleges that, in February, the store manager, Karina Alcantar, unlawfully told an openly prounion employee, Jesse De La Cruz, that the store could close if the employees voted for the Union. Second, it alleges that, in March, Starbucks unlawfully began reducing and limiting De La Cruz's work hours because he supported the Union. Third it alleges that, by doing so, on June 12 Starbucks unlawfully caused De La Cruz to terminate his employment. Fourth, it alleges that, on September 1, Starbucks unlawfully disciplined another employee, Araseli Romero, without providing the Union with prior notice or an opportunity to bargain over the discipline and its effects.

A hearing to litigate these allegations was held on October 17 and 18, 2023, in Los Angeles.[1] The General Counsel and Starbucks subsequently filed posthearing briefs on December 6. For the reasons set forth below, I find that the alleged unlawful threat of plant closure is both factually and legally well supported.

[1] Chairman Kaplan notes that, on January 27, 2025, President Trump removed Member Wilcox from her position. On March 6, 2025, the United States District Court for the District of Columbia held that Member Wilcox's removal violated Sec. 3(a) of the Act, declared her removal "null and void," and enjoined Chairman Kaplan from, inter alia, "in any way treating plaintiff as having been removed from office." *Wilcox v. Trump*, Case 1:25-cv-00334-BAH (Mar. 6, 2025) (dkt #34). On March 7, 2025, the Department of Justice appealed the district court's order to the United States Court of Appeals for the D.C. Circuit and, thereafter, filed a request for an immediate stay. See *Emergency Motion for Stay Pending Appeal*, *Wilcox v. Trump*, No. 25-5057 (D.C. Cir. filed Mar. 10, 2025). That request is pending as of the issuance of this decision.

[2] The Respondent asserts that Members Prouty and Wilcox should recuse themselves, claiming that their "past, present, and perceived relationships with Service Employees International Union (SEIU), SEIU Local Unions, and their affiliates, including Charging Party Workers United" create a conflict of interest. Members Prouty and Wilcox have determined, in consultation with the NLRB Designated Agency Ethics Official, that there is no basis to recuse themselves from the adjudication of this case.

[3] In the exceptions to the judge's dismissal of this allegation, the General Counsel did not challenge the judge's conclusion that the Respondent's conduct was lawful under extant Board law. Rather, the General Counsel urged the Board reconsider *800 River Road Operating Co., LLC d/b/a Care One at New Milford*, 369 NLRB No. 109 (2020) (*Care One*), enfd. mem. per curiam 848 Fed.Appx. 443 (D.C. Cir. 2021) (unpub.) and return to and expand the Board's previous holding in *Total Security Management Illinois 1, LLC*, 364 NLRB 1532 (2016).

[4] In affirming the judge's dismissal of this allegation, Members Prouty and Wilcox note that they would be open to reconsidering *Care One* in a future appropriate case.

[1] The hearing transcript, p. 191, line 7 should read "I was waiting. Are we done?"; and p. 248, line 17 should read "liberal test."

However, the remaining three allegations are not.[2]

I. ALLEGED THREAT OF PLANT CLOSURE

De La Cruz began working at the South Central Avenue (aka "Little Tokyo") store in August 2021. He initially worked as a barista, the same position he had worked at two other Starbucks stores in or near Los Angeles over the previous 4 years. However, he was promoted to a shift supervisor after about 2 months. A shift supervisor oversees and deploys the baristas, counts the register, gives out breaks, and serves as a keyholder.[3]

De La Cruz testified that, after becoming a shift supervisor, he regularly attended group meetings with other shift supervisors and managers in the region. Some were held in person, but most were done virtually by videoconference, with the participants appearing from their individual stores or offices. One such meeting was held in early February 2022, which he and Store Manager Alcantar joined virtually from the back of the store where her desk was located. The meeting was hosted by higher-level Starbucks officers or managers to discuss "ideas that would better the Starbucks experience for shift supervisors." There was no mention of unionization during that discussion, but he raised the topic near the end during the "open forum" portion of the meeting. Specifically, he asked how Starbucks was going to handle the unionization of a store in Buffalo, New York after the recent union election there.[4] One of the hosts of the meeting, whom he identified as a west-coast area president, responded that Starbucks "welcomes" unionization and that, if employees vote to unionize, it will be on a store-by-store basis.

De La Cruz testified that, immediately after the meeting ended, he also raised the unionization issue one-on-one with Alcantar. He told Alcantar that he thought unions are good. Alcantar responded that she didn't know much about unionization, but if the employees were to unionize "it would cost Starbucks money and they would possibly have to close stores down." He replied that unions are good for workers; that workers need unionization; and that if Starbucks couldn't sustain their current stores they shouldn't be opening up more stores. Alcantar responded that she didn't really know. De La Cruz then ended the conversation, saying that if he got the chance to unionize the store, he would do so.[5]

De La Cruz's foregoing testimony was uncontroverted; Alcantar did not testify. Moreover, his testimony about three other meetings where other Starbucks managers were present was confirmed by those managers.[6] Thus, De La Cruz appeared to be a reliable historian generally with respect to meetings and conversations with management.

Nevertheless, Starbucks argues that De La Cruz's account of the conversation with Alcantar should discredited because it was "self-serving and uncorroborated," and because some of his testimony regarding the other complaint allegations was inconsistent with his July 30, 2022 NLRB affidavit.[7] As for Alcantar's failure to testify, Starbucks blames the NLRB for this, arguing that the Associate Chief Administrative Law Judge improperly denied Starbucks' request to continue the hearing until she was available to testify. (Br. 17–24.)

Starbucks' arguments are unpersuasive. De La Cruz's testimony about his conversation with Alcantar may have been "self-serving," but the same could be said of virtually any testimony by a party or witness with a personal interest in the litigation. Further, there is no evidence that anyone else was present during the conversation to corroborate De La Cruz's account. As indicated above, De La Cruz testified that his post-meeting conversation with Alcantar in the back of the store was one-on-one. And Starbucks has not identified any inconsistencies between De La Cruz's testimony and his prior affidavit regarding that conversation.

As for the denial of Starbucks' postponement request, the fault lies squarely with Starbucks. Although the complaint and notice of hearing issued on June 1, 2023, Starbucks did not ask the General Counsel and the Union to agree to a postponement until over 3 months later, on September 12. Further, the only explanation it gave at the time was that Alcantar had taken a personal leave of absence in June and would not return to work until January 2024. Starbucks did not identify when in June Alcantar took the leave, why she took the leave at that time, or how it prevented her from testifying until after she returned to work in January 2024.

Not surprisingly, therefore, the General Counsel and the Union asked Starbucks for more information. However, Starbucks never provided any. Instead, about 3 weeks later, in early October, Starbucks informed them that Alcantar would be "willing" to testify during her leave, but she would be in Mexico visiting her family October 12–19, and therefore would not be able to testify until after she returned.

Starbucks did not provide any details about Alcantar's trip to Mexico, however. It did not disclose when Alcantar scheduled

[2] The Board's jurisdiction is undisputed and established by the record. Citations to the record are included to aid review and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[3] Tr. 49–50, 119–120, 166–167. Notwithstanding these duties, there is no dispute that shift supervisors are employees under the Act and are properly included in the bargaining unit.

[4] In December 2021, the Union was elected and certified as the bargaining representative for employees at Starbucks' Elmwood Avenue store in Buffalo (NLRB Case No. 03-RC-282115). The following month, in January 2022, the Union was also certified as the elected bargaining representative for employees at Starbucks' Genesee Street store in Buffalo (NLRB Case No. 03–RC–282139).

[5] Tr. 50–55. On cross-examination, De La Cruz testified that Alcantar said stores "could," rather than "would," possibly close down. However, Starbucks' counsel elicited this testimony by misstating De La Cruz's testimony on direct examination about what Alcantar said. See Tr. 113–114 ("Q. And then she said something along the lines of but unions can cost money and stores could possibly have to close down because of those costs? Is that fair? A. Yeah. Q. Is that accurate? A. Yes.") Whether deliberate or not, this was improper. See Graham, 5 Handbook of Fed. Evid. § 611:22 (9th ed. Nov. 2023 Update). And Starbucks' posthearing brief properly does not rely on this testimony or contend that it warrants discrediting De La Cruz's account of the conversation.

[6] Compare Tr. 70–76, 95–100 (De La Cruz), with Tr. 246–250, 254–255 (District Manager Brenda Burgueno) and 317–318 (District Manager Jewel Waters).

[7] See De La Cruz's testimony on cross-examination regarding whether January and February are typically slower months, and whether he had ever limited his availability to Saturdays and Sundays prior to May 2022, at that store or the other stores he worked at (Tr. 115–116, 121–123).

the trip, why she scheduled the trip for that particular week, and why she could not reschedule the trip to a different week. Further, by the time Starbucks informed the General Counsel and the Union about Alcantar's trip, one or both of them had developed scheduling conflicts between October 19 and the end of the year. Therefore, neither agreed to postpone the October 17 hearing based on the limited information Starbucks had provided.

This was the history when, on October 4, Starbucks filed its formal motion with the Associate Chief ALJ to postpone the hearing until January 2024. And the motion did nothing to improve on that history. Like Starbucks' prior communications with the General Counsel and the Union, the motion did not provide any additional information about the circumstances of Alcantar's leave of absence or her planned trip to Mexico to visit family. Cf. *Riverdale Nursing Home*, 317 NLRB 881 (1995) (finding that the associate chief judge properly denied respondent's motion to adjourn due to the unavailability of its administrator and key witness where the motion lacked supporting details).

Nor did Starbucks' motion provide other relevant information. For example, although the June 1 complaint specifically identified Alcantar as the manager who made the alleged unlawful threat of plant closure, the motion provided no information regarding what, if any, steps Starbucks took thereafter to ensure that she would be available to testify at the October 17 hearing. Cf. *Florida Coca-Cola Bottling Co.*, 321 NLRB 21 n. 2 (1996) (finding that the trial judge did not abuse his discretion by denying respondent's request for a continuance to present the testimony of a supervisor where respondent failed to offer a convincing explanation why it could not make its supervisor available on the scheduled hearing dates); and *Batchelor Electric Co.*, 254 NLRB 1145 fn. 1 (1981) (rejecting respondent's contention that it was improperly denied a continuance to present the testimony of its bookkeeper, as it failed to show any reason why it could not have taken steps to insure her appearance at the hearing), enfd. mem. 716 F.2d 903 (6th Cir. 1983).

Finally, the motion did not propose any reasonably available alternatives to such a lengthy postponement, such as taking Alcantar's testimony remotely from Mexico by videoconference (e.g., Zoom or Microsoft Teams).[8]

I therefore reject Respondent's arguments and credit De La Cruz's account of his conversation with Alcantar. Accordingly, I find that Alcantar did, in fact, state during the conversation that she didn't know much about unionization, but if the employees were to unionize it would cost Starbucks money and they would possibly have to close stores down.

I also find that Alcantar's statement violated the Act. It is well established that, because they can be highly coercive, predictions of adverse economic consequences such as plant closure "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [the employer's] control." *NLRB v. Gissel Packing*, 395 U.S. 575, 618 (1969). Alcantar cited no such objective facts in support of her statement that unionization would cost Starbucks money beyond what it could afford to keep stores open. The statement therefore clearly failed to comply with the foregoing requirement. See, e.g., *Neises Construction Corp.*, 365 NLRB No. 1269, 1272 (2017) (co-owner's statements that unionization would crush the company and that it could not afford to pay union wages were unlawful under *Gissel* as he did not provide any substantive support for his predictions); and *Daikichi Sushi*, 335 NLRB 622, 624 (2001) (assistant supervisor's statement that the company might close its east coast operation if employees unionized because the union's demands would increase costs of production was unlawful under *Gissel* as he failed to cite any objective facts in support), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003).

Somerset Welding & Steel, Inc., 314 NLRB 829 (1994), cited by Starbucks, is distinguishable. There, the employer's chairman provided certain objective facts in support of his plant closure statements, including the competitive nature of the industry and the recent closure of numerous unionized plants in the area. And the Board's supplemental decision (which issued on remand from the D.C. Circuit and applied the court's reasoning as the law of the case) emphasized this in finding that the statements were not unlawful.

Starbucks nevertheless argues that no violation should be found because Alcantar's statement was "grounded in common sense" (Br. 18). But, as indicated by *Neises Construction* and *Daikichi Sushi*, it was not. The Act only requires an employer to bargain in good faith with the employees' chosen union; it does not require the employer to agree to the union's demands. See 29 U.S.C. § 158(d). Thus, contrary to Alcantar's statement, the unionization of a store would not remove Starbucks' ability to control its costs to prevent them from exceeding what the store could bear to remain open.

Starbucks also argues that no violation should be found because Alcantar stated only that Starbucks would "possibly" close unionized stores. However, unsupported predictions of plant closure may be coercive even if they indicate closure is only a possibility rather than a certainty. See, e.g., *Daikichi Sushi*, 335 NLRB at 623-624 (finding a violation notwithstanding that the assistant supervisor said the employer "might" close if employees selected union representation,); and *Fleming Companies, Inc.*, 336 NLRB 192, 193 (2001) (finding a violation regardless of whether the division president said the plant "would" or "could" close down if employees voted in the union), enfd. in relevant part 349 F.3d 968, 974 (7th Cir. 2003).

Starbucks also argues that no violation should be found because De La Cruz solicited Alcantar's thoughts on unionization. However, De La Cruz did not actually solicit Alcantar's thoughts on unionization; he simply volunteered his own thoughts. Further, even assuming he impliedly invited Alcantar's thoughts by doing so, a supervisor's otherwise unlawful prediction of plant closure is not excused merely because an employee asked the supervisor's views about unionization. See, e.g., *Frazier Industrial Co.*, 328 NLRB 717, 727–728 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000); *Nu-Skin International, Inc.*, 320 NLRB 385, 395–396 (1995); and *Stoutco, Inc.*, 180 NLRB 178, 182–183 (1969).

Starbucks also argues that no violation should be found because Alcantar merely expressed her personal opinion. However, at no point did Alcantar say she was only expressing her personal opinion. Board and court decisions finding no violation where a supervisor did so are therefore distinguishable. Compare *Standard Products*, 281 NLRB 141, 151 (1986) (finding no

[8] See Starbucks' Oct. 4 request to postpone the hearing (GC Exh. 1(q)), the GC's Oct. 5 Opposition (GC Exh. 1(s)), and the Union's Oct. 6 Opposition (GC Exh. 1(u)). Associate Chief ALJ Gerald M. Etchingham issued his order denying Starbucks' postponement request on October 10 (GC Exh. 1(v)).

violation where the employee asked her department supervisor his opinion of the union, and he responded that his "personal opinion" was that he feared the plant would close if the union came in); and *NLRB v. Clinton Electronics Corp.*, 284 F.3d 731, 737–738 (7th Cir. 2002) (reversing the Board and finding no violation where the employee asked a coworker and friend, who had recently been made a department supervisor, what she thought of the union, and she responded, [O]ff the record . . . it's my opinion we could all be looking for a job.")

Starbucks also argues that no violation should be found because Alcantar lacked authority to close stores. However, Alcantar was the top onsite manager of the South Central Avenue store. Thus, even if she lacked the authority to close the store, employees would reasonably believe she had access to and conveyed the views of corporate managers who did have such authority. See *Central Transport, Inc. v. NLRB*, 997 F.2d 1180, 1190 (7th Cir. 1993) (rejecting the employer's similar argument, as the shop manager served as the employer's liaison with the employees and the employees could reasonably have considered his opinions those of the employer). See also *Wal-Mart Stores*, 364 NLRB 1729, 1729 fn. 4, 1759–1760 (2016); *Audubon Regional Medical Center*, 331 NLRB 374, 417 (2000); and *Avondale Industries*, 329 NLRB 1064, 1093 (1999) (finding plant closure statements unlawful notwithstanding that they were made by relatively low-level managers or supervisors).

Starbucks also argues that no violation should be found because there is no evidence that Alcantar's statement actually intimidated or coerced De La Cruz, who contacted the Union shortly thereafter and gathered enough employee signatures to support an election petition.[9] However, the test for evaluating alleged unlawful employer statements is an objective one—whether the statements would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Act. Thus, employees' subjective reactions to the statements are generally not relevant or controlling. See *Miller Electric Pump and Plumbing*, 334 NLRB 824 (2001); *Avondale Industries*, above, and *Central Transport, Inc. v. NLRB*, above.

FDRLST Media, LLC v. NLRB, cited by Starbucks, is clearly distinguishable. In that case, the Third Circuit found that consideration of the employees' subjective impressions was "particularly" appropriate because the employer claimed that its executive officer's tweet ("FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine") was made in jest; the statement on its face was "farcical," "bizarre," and "comical"; and it was posted on Twitter, which "encourages users to express opinions in exaggerated or sarcastic terms." 35 F.4th 108, 122–123 (3d Cir. 2022), denying enf. of 370 NLRB No. 49 (2020). No such circumstances are present here.

Finally, in evaluating Alcantar's statement, I have also considered the west-coast area president's previous statement at the meeting that Starbucks "welcomes" unionization. Arguably, this statement would have lessened the reasonable tendency of Alcantar's subsequent prediction of plant closure to discourage employees from supporting the Union. See, e.g., *David Van Os and Associates, PC*, 346 NLRB 804, 806 (2006) (finding that the owner's prediction of plant closure was not unlawful under all the circumstances, including the undisputed fact that, as he made clear in emails to the employee's representative, he sincerely welcomed unionization). But Starbucks' posthearing brief does not argue that it would have done so. And the record contains insufficient information regarding the context and known circumstances in which the statement was made to conclude sua sponte that it would have done so.[10]

II. ALLEGED REDUCTION AND LIMITATION OF DE LA CRUZ'S HOURS

As the store manager, Alcantar was responsible for assigning work shifts and hours to the baristas and shift supervisors. She posted them in the back of the store weekly, on a rolling 3-week basis, i.e., she posted 3 weeks at a time so employees could plan ahead.

Assignments were based primarily on two factors. The first was the store's business needs. For example, the holiday season (November and December) was typically busier than the post-holiday season (January and February).

The second factor was employee availability. The employees were required to complete a "partner availability form" indicating the days and hours they were available to work. Employees were expected to be available enough days or hours each week to meet the store's business needs. Generally, they were expected to be available at least 150 percent of their schedule (for example, at least 30 hours per week availability for a 20 hours per week schedule), so that Alcantar had flexibility in scheduling. And because there were fewer (only four or five) shift supervisors, they were expected to have more availability than baristas.

If employees' availability changed, they were expected to complete a new form and give it to Alcantar for consideration. There was no assurance or guarantee that the change would be approved.

If employees wanted time off, they were expected to submit a request to Alcantar for approval as far in advance as possible. Once the schedule was posted, the employees were expected to report to work as scheduled.

If employees knew they could not report as scheduled, they were required to provide as much advance notice as possible by calling and speaking directly to the store manager or assistant store manager (or the shift lead in their absence), or, if that was unsuccessful, by leaving a message or note. Simply sending an email or text was not acceptable. In addition, they were required to arrange for another employee at one of the stores in the downtown Los Angeles area to substitute. Employees typically arranged for substitutes by phone, a group chat, or a Starbucks app.

[9] See Tr. 31–40, 54–61 (De La Cruz).

[10] Compare the area president's response to De La Cruz's question with Administrative Law Judge Michael A. Rosas's factual findings regarding Starbucks' response to the union campaigns at its Buffalo area stores during 2021 and 2022 (*Starbucks Corp.*, Cases 03–CA–285671 et al., JD–17–23, 2023 WL 2327467 (March 1, 2023), currently pending before the Board on the parties' cross-exceptions). "[A]s a general rule, '[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.'" *Greenlaw v. U.S.*, 554 U.S. 237, 243–244 (2008), quoting *Castro v. U.S.*, 540 U.S. 375, 386 (Scalia, J., concurring in part and concurring in judgment). This principle is "supple, not ironclad," and "[t]here are no doubt instances in which a modest initiating role for a court is appropriate." *U.S. v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020). But judges should be cautious in "cross[ing] the bench to counsel's table," particularly where there may be good reasons a party did not make the argument. *United Natural Foods, Inc. v. NLRB*, 66 F.4th 536, 546 (5th Cir. 2023), cited with approval in *Quickway Transportation, Inc.*, 372 NLRB No. 127, slip op. at 18 (2023). See also *Naabani Twin Stars, LLC v. Travelers Companies, Inc.*, 497 F.Supp.3d 1011, 1023 (D. N.M. 2020), and cases cited there.

However, if employees could not report for an unanticipated reason (e.g., an illness, injury, or emergency), they were only required to notify the store manager or assistant store manager (or shift lead in their absence). They were not responsible for finding a substitute.[11]

De La Cruz testified that, from February through April 2022, his requested and approved weekly availability was Tuesday, Thursday, Friday, Saturday, and Sunday from 4:30 am–10:30 pm (essentially all day). He was not available on Monday and Wednesday because of his school schedule. For the same reason, he was not available after closing time on Sundays to do the regular 2-hour deep cleaning of the store (so-called "clean play").[12]

Alcantar therefore did not schedule De La Cruz on Mondays or Wednesdays or after closing time on Sundays to deep clean the store. However, she did not always schedule him on every day he was available. Instead, as indicated by the following chart, his scheduled days and hours varied week to week:[13]

Weeks (Mon–Sun)	Hours Scheduled	Days Scheduled
1/31–2/06	Fri, Sat, Sun	19.25 hours
2/07–2/13	Thu, Fri, Sun	17.00 hours
2/14–2/20	Tues, Thu, Fri, Sat, Sun	29.75 hours
2/21–2/27	Tues, Thu, Fri, Sun	22.50 hours
2/28–3/06	Tues, Thu, Fri, Sat, Sun	31.00 hours
3/07–3/13	Th, Fri, Sat, Sun	24.00 hours
3/14–3/20	Tues, Fri, Sat, Sun	22.50 hours
3/21–3/27	Tues, Thu, Sat, Sun	24.00 hours
3/28–4/03	Sat, Sun.	11.00 hours
4/04–4/10	Tue, Fri, Sat, Sun	25.00 hours
4/11–4/17	*Tue, Thu	13.00 hours
4/18–4/24	Fri, Sat, Sun.	18.50 hours
4/25–5/01	Thu, Fri, Sat, Sun	22.00 hours
5/02–5/08	Fri, Sat, Sun	21.50 hours
5/09–5/15	Thu, Fri, Sat, Sun	25.75 hours

* De La Cruz had scheduled vacation leave on Fri, Sat, and Sun

As previously indicated, the complaint alleges that, "beginning about March," Starbucks unlawfully "reduced and limited" De La Cruz's work hours because he supported unionizing the store. The General Counsel asserted at the opening of the hearing that Starbucks reduced his work hours "for weeks" for that reason (Tr. 23).

However, as indicated in the above chart, aside from the week of March 28–April 3, when De La Cruz's scheduled hours were a three-month low (and excluding April 11–17, when he took vacation leave on three of his five available workdays), his scheduled hours were within his normal range. Thus, the evidence shows that De La Cruz's scheduled hours were actually "reduced" for at most one week.[14]

Further, there is no substantial record evidence that De La Cruz's scheduled hours were "limited" beginning in March, i.e., that his scheduled hours in March and April or thereafter were significantly less than those of the three or four other shift supervisors compared to previous months. The only evidence the General Counsel presented in support of this allegation was De La Cruz's testimony that he complained to Alcantar in early to mid-April that, unlike other shift supervisors, his hours had not increased since February. The General Counsel did not introduce any timecards or other personnel records showing the actual scheduled hours of the other shift supervisors. Thus, there is no evidence which, if any, of the other shift supervisors' scheduled hours were higher than De La Cruz's, what weeks or months their scheduled hours were higher, or how much higher their scheduled hours were.[15]

[11] Jt. Exhs. 5, 6; Tr. 65–66, 116–117, 129–131 (De La Cruz), 167–172, 187, 203–204 (District Manager Burgueno), 322–323 (District Manager Waters).

[12] Tr. 66–68, 111–112, 120–121 (De La Cruz). See also R. Exh. 4 (indicating that his effective availability since February 2022 was 4 am–11 pm Tuesday and Thursday through Sunday).

[13] The General Counsel did not introduce any evidence regarding De La Cruz's scheduled days and hours. However, Starbucks introduced timecard statements showing his scheduled days and hours beginning the week of January 31, 2022 (R. Exh. 9), and the chart is based on that evidence. The chart does not include days and hours scheduled after the week ending May 15 because, as discussed infra, De La Cruz found a second job in early May and asked Alcantar to reduce his availability.

[14] As noted above, no documentary evidence was introduced showing De La Cruz's scheduled hours prior to January 31, 2022, shortly before De La Cruz told Alcantar he wanted to unionize the store. The only documentary evidence of De La Cruz's hours before that date is a joint exhibit showing the number days and hours he actually worked since January 1, 2022, which averaged 4.7 days and approximately 32 hours per week over the 4 weeks beginning January 3. See Jt. Exh. 9. (The calculated average of hours worked is based on a Monday through Sunday week, consistent with R. Exh. 9 and the chart, and excludes unpaid half-hour lunch breaks.) It does not show the hours Alcantar scheduled him to work. De La Cruz's testimony is also insufficient to determine his scheduled hours prior to January 31. Although he testified that he "averaged" 24 to 32 hours a week before March 2022, he was never asked, and never said, whether this average was for hours scheduled or hours worked. See Tr. 68–69. If days and hours worked were a reliable indicator of those scheduled, this might not be a problem. But the record indicates the opposite. The hours scheduled and hours worked were often different, up to a few hours each shift. And the hours worked could be significantly higher than those scheduled if employees substituted for a scheduled employee for all or most of a shift. Indeed, the record shows that, in January, De La Cruz worked two Mondays (Jan. 3 and 10) and two Wednesdays (Jan. 5 and 26), for a total of about 24 hours. See Jt. Exh. 9. If he had not picked up those extra days and hours, his average hours worked the 4 weeks beginning January 3 would have been only 3.7 days and approximately 26 hours a week. See also R. Exh. 9 (indicating that De La Cruz worked almost 5 hours more than originally scheduled the week of March 21–27 by covering a shift on Wednesday, March 23).

[15] Starbucks did not present any such documentary evidence either. The only evidence Starbucks introduced that addresses the average hours of the other shift supervisors is a May 13 email from Alcantar to District Manager Burgueno regarding De La Cruz's availability. Among other things, the email describes the average hours being worked by the shift supervisors since February 28, when a fifth shift supervisor was added (24–30 hours), and before that date when there were only four ("close to 30 hours"). See R. Exh. 3; and Tr. 178–184 (admitting the email into evidence over objection, as it generally qualified as a "business record" under the FRE 803(6) exception to the hearsay rule and Starbucks indicated that certain objected-to statements would be corroborated).

Moreover, there are substantial problems with De La Cruz's testimony about his work hours. De La Cruz's specific testimony was that his work hours "went down to 17 to 18 hours" in February after Alcantar announced across-the-board cuts due to slowing business. And he was still averaging only 17–18 hours 2 months later, in early to mid-April. So, he raised the issue with Alcantar in the back of the store. He asked her why his hours were still cut; why he was only getting 17. She said that she had to cut everybody's hours across the board. He replied that he had "checked . . . everybody else's hours" and "everybody's back to normal and I'm the only one cut . . . I'm the only one still receiving 17 hours." Alcantar said he had consider that she had to hire an additional shift supervisor. He replied that it made no sense that only his hours would be cut to compensate for the new shift supervisor. Alcantar said that, if he wanted more hours, he should make himself more available and do "clean play" on Sundays. He replied that doing so would only add 2 hours to his weekly schedule. He then ended the conversation because it was going nowhere.[16]

However, as indicated in the chart, De La Cruz actually averaged about 22 scheduled hours a week in February. And this rose to an average of about 25 scheduled hours per week the first four weeks in March, a 14 percent increase over his February average (and a 38–47 percent increase over what he claimed his February average was). Although he was scheduled for only 11 hours the week of March 28–April 3, he was scheduled for 25 hours the following week. And he was on vacation leave 3 of his 5 available days the next week. Thus, there is good reason to question whether he accurately checked and compared his work hours to those of the other shift supervisors.

Finally, the General Counsel failed to establish that the reduction in De La Cruz's hours the week of March 28–April 3 was unlawful. In order to prove such a violation, the GC had to show that De La Cruz's union activity was a motivating factor for the reduction. The GC could meet that burden by presenting evidence that De La Cruz supported unionization, Starbucks knew or suspected he supported unionization, and Starbucks had animus against unionization, and other direct and/or circumstantial evidence (e.g., suspicious timing, disparate treatment, or shifting reasons) supporting an inference that Starbucks' animus was a motivating factor for reducing De La Cruz's hours that week. If the GC made the required showing, the burden would shift to Starbucks to show that it would have reduced De La Cruz's hours that week even absent his support for unionization. See *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 Mgt. Corp.*, 462 U.S. 393 (1983). See also *Intertape Polymer Corp.*, 372 NLRB No. 133 (2023).

The General Counsel presented sufficient evidence that De La Cruz supported unionizing the store and that Starbucks knew it and had animus against unionization. As discussed above, De La Cruz announced to Alcantar that he wanted to unionize the store and began doing so in early February, well before Alcantar first prepared and posted De La Cruz's rolling 3-week schedule through the week of March 28–April 3. Further, Alcantar responded to De La Cruz's announcement by unlawfully stating that Starbucks would possibly close stores if employees unionized. Such an unlawful statement is sufficient to establish animus. See, e.g., *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117, slip op. at 3 (2021), enfd. 41 F.4th 518 (6th Cir. 2022); *Martech MDI*, 331 NLRB 487, 501 (2000), enfd. 6 Fed. Appx. 14 (D.C. Cir. 2001); and *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 255 (2006).

However, the record as a whole fails to support an inference that Starbucks' union animus was a motivating factor for the reduction in De La Cruz's scheduled hours the week of March 28–April 3. Indeed, the record indicates the opposite. As discussed above, Alcantar learned that De La Cruz wanted to unionize the store in early February. Yet, she subsequently increased his scheduled hours by 14 percent during the first 4 weeks in March. And there is no evidence that she increased the scheduled hours of the other shift supervisors any more than that.

The General Counsel's brief argues that Starbucks' unlawful motive for the subsequent reduction in De La Cruz's hours may nevertheless be inferred from the fact that, in the interim, he actively gathered employee signatures between shifts at the store to support a union election petition.[17] He eventually gathered enough of them for the Union to file an election petition with the NLRB on March 15. And the same day, he and a coworker put their names on an "intent to organize" letter addressed to Starbucks' CEO, which the Union posted on its Twitter (now X) page on March 16. At two meetings during the next 2–3 weeks, he also complained directly to Alcantar and the district manager, Brenda Burgueno, that Starbucks was not paying a living wage and was giving out misleading negative information about unionization to employees.[18]

However, by March 15, Alcantar had already posted De La Cruz's rolling 3-week schedule through March 28–April 3.[19]

However, it does not describe the average hours they were being scheduled to work.

[16] Tr. 64, 69, 77–79, 118–119. As previously discussed, Alcantar did not testify. Thus, De La Cruz's account of his conversation with her about his hours is uncontroverted. With respect to hiring another shift supervisor, see Alcantar's May 13 email to District Manager Burgueno's, R. Exh. 3; and Burgueno's testimony, Tr. 198–203 (a barista was promoted to be the store's fifth shift supervisor on February 28 because a metro station was scheduled to open down the street and the store was expected to get busier in the summer). The General Counsel does not allege or argue that Starbucks unlawfully added a fifth shift supervisor because of De La Cruz's union activities or to cause him to terminate his employment.

[17] De La Cruz testified that he did not disclose to any managers that he was organizing or circulating authorization cards (Tr. 114–115). Nevertheless, the GC's brief (pp. 27–28) argues that Alcantar's knowledge of De La Cruz's efforts to gather signatures at the store can be inferred given that everyone worked together in extremely close quarters. However, it is unnecessary to reach this issue. For the reasons discussed infra, even if Alcantar did know or suspect he was gathering signatures for a union election petition, the record as a whole would still not support an inference of an unlawful motive.

[18] Jt. Exh. 2; GC Exhs. 2, 3; Tr. 38–39 (former Union organizer Fernando Hernandez), 58–59, 70–77 (De La Cruz). Although De La Cruz and his coworker only put their first names on the open letter to Starbucks' CEO, De La Cruz was the only "Jesse" employed at the store at the time (Tr. 63). As for the subsequent meetings, Burgueno admitted that she and Alcantar held two meetings with each employee, including De La Cruz, between the union petition and the election. She also confirmed De La Cruz's testimony that they gave him documents and facts about the Buffalo store and a store in Canada that had unionized, and that he made statements at both meetings indicating that he supported the Union, including that employees were not paid a livable wage and that Starbucks' was giving out misleading negative information about the Union. (Tr. 246–250, 254–255.)

[19] De La Cruz testified that the rolling 3-week schedule could be changed "at the drop of a hat" (Tr. 142). However, he did not testify that

Moreover, as the General Counsel concedes, the reduction was "not protracted" (Br. 21). In fact, as indicated above, it did not last even a few weeks. Alcantar scheduled De La Cruz to work 25 hours the very next week beginning April 4.[20] And she scheduled him to work 18.5 hours the week beginning April 18, 22 hours the following week, 21.5 hours the next week, and 25.75 hours the week after that.[21]

The General Counsel also argues that Starbucks' unlawful motive may be inferred from Alcantar's "shifting" responses when De La Cruz complained in early to mid-April that he was still receiving the same 17 hours a week he received after the February across-the-board cuts (Br. 21–22, 30).[22] However, as discussed above, De La Cruz's assertions regarding his average hours since the February across-the-board cut were incorrect. Thus, it is not surprising that Alcantar would have had difficulty understanding De La Cruz's complaint and tried to offer various possible explanations and suggestions on how he could get more hours.[23]

Finally, the General Counsel argues that a violation should be found because Starbucks failed to show that Alcantar would have scheduled De La Cruz to work 11 hours the week of March 28–April 3 even absent his support for unionizing the store. However, as indicated above, Starbucks was only required to make such a showing if the GC presented sufficient evidence supporting an inference of an unlawful motive for that week's schedule. And the GC failed to do so.

Accordingly, the allegation will be dismissed.

III. ALLEGED CONSTRUCTIVE DISCHARGE OF DE LA CRUZ

The complaint also alleges that, by unlawfully reducing and limiting De La Cruz's work hours beginning in March, Starbucks unlawfully caused his termination in June. More specifically, as explained in the General Counsel's opening statement, the allegation is that by unlawfully reducing and limiting De La Cruz's hours, Starbucks "set in motion a series of events that eventually led and forced [him] to resign his employment in June" (Tr. 22–23). These series or chain of events were: (1) De La Cruz decided to take a full-time, Monday through Friday, 8 am to 4 pm, job at a local building products company so he could pay his bills; (2) De La Cruz therefore requested to reduce his availability at Starbucks to Saturday and Sunday only; (3) Starbucks failed or refused to approve De La Cruz's requested change in availability, even though he agreed to demote to a barista in order to get it approved; (4) De La Cruz called off or did not call or show for three of his scheduled weekend or weekday shifts in a row; and (5) Starbucks issued De La Cruz a final written warning for failing to do so.

There are significant problems with this allegation, however. The first and most obvious one is its premise. To establish a traditional constructive discharge, the General Counsel must prove both that the burden imposed on the employee caused, and was intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign, and that the burden was imposed because of the employee's union or protected concerted activity. *Mercy Hospital*, 366 NLRB No. 165, slip op. at 4 (2018), citing *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).[24] As discussed above, the GC failed to prove that the reduction in De La Cruz's hours was either protracted or motivated by his support for unionization. Thus, as a matter of law, the reduction in hours could not have led to his alleged constructive discharge. Cf. *EDP Med. Computer Systems Inc.*, 284 NLRB 1232, 1234 (1987) (finding no constructive discharge because, although the prior reduction in the employee's hours was unlawful, it lasted only 3 weeks).[25]

The second problem derives from the first. In order to establish that Starbucks' subsequent action (failing or refusing to grant De La Cruz's requests to reduce his availability because of his new full-time job) led to his constructive discharge, the General Counsel was required to prove that it independently satisfied both requirements of a traditional constructive discharge. The GC adequately proved the first. De La Cruz obviously could not have continued working with the same availability on weekdays if he was working full time weekdays elsewhere, and Starbucks therefore knew or reasonably should have foreseen that denying his request to work only on weekends would force him to quit. Cf. *St. Joseph's Hospital*, 247 NLRB 869, 873, 880 (1980) (finding a constructive discharge where the employer denied a prounion employee's request to reduce her work hours because she had enrolled in college). See also *American Licorice Co.*, 299 NLRB 145, 148–149 (1990) (employer's intent to cause a prounion employee to quit was established as the employer reasonably should have foreseen that denying her request to change shifts due to childcare issues would have that result). However, as discussed below, the GC failed to prove the second requirement, i.e., that the failure or refusal to approve De La Cruz's availability request was motivated by his support for unionization.

In evaluating the second requirement for a constructive discharge, the Board applies the same *Wright Line* framework described above. See *Davis Electric Wallingford Corp.*, 318 NLRB 375, 376 (1995). See also *Grand Canyon Mining Co.*, 318 NLRB 748, 761 (1995), enfd. 116 F.3d 1039 (4th Cir. 1997); and *La Favorita, Inc.*, 306 NLRB 203, 205 (1992), enfd. 977 F.2d 595 (10th Cir. 1992). Applying that framework, for the reasons previously stated, I find that the General Counsel presented

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his schedule for the week of March 28–April 3 was changed after March 15. Nor is there any other evidence that it was changed.

[20] De La Cruz actually worked just 20 hours the week of April 4–10 because, although he picked up an extra shift on Thursday, he called off sick on Saturday and Sunday.

[21] The Union did not file the initial unfair labor practice charge regarding De La Cruz's hours until May 12, well after Alcantar posted the schedules for these weeks.

[22] The General Counsel's brief does not contend that an adverse inference should be drawn with respect to Starbucks' motive (or any other issue in the case) based on Alcantar's failure to testify.

[23] The General Counsel acknowledges that Alcantar's initial response indicated that she believed De La Cruz's complaint "was [a] figment of [his] imagination" (Br. 30).

[24] Some Board decisions have stated the first of these requirements disjunctively, i.e., that the burden imposed on the employee must cause, "or" be intended to cause, such a change in working conditions. See *EXCEL Protective Services, Inc.*, 371 NLRB No. 134, slip op. at 39 (2022), quoting *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1170 (2004). However, this appears to have been inadvertent. Indeed, both of the decisions cited in *Chartwells* used the conjunctive "and."

[25] The General Counsel does not allege a so-called "Hobson's Choice" constructive discharge. See *Mercy Hospital*, above, slip op. at 4 ("Under the Hobson's Choice theory of constructive discharge, 'an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of [ ] Section 7 rights and the employee quits rather than comply with the condition.' *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 4 (2001).")

sufficient evidence that De La Cruz supported unionizing the store and that Starbucks knew it and had animus against unionization. See also Burgueno's May 18 email to Partner Relations Consultant Alyona Colyer, which forwarded a copy of a message De La Cruz had recently posted on a Facebook Starbucks Shift-Swap page urging Starbucks employees at all the LA stores to unionize (GC Exh. 6); and Partner Relations Manager Cara Childress's June 1 email notifying Colyer's replacement about De La Cruz's availability request and attendance issues, which mentioned that De La Cruz was "a main union organizer" for the South Central Avenue store (GC Exh. 5). However, as with the reduction in hours, the record as a whole fails to support an inference that Starbucks' denial of De La Cruz's request to reduce his availability was motivated by his support for unionization.

The relevant facts are as follows. De La Cruz agreed to take the full-time weekday job at the building products company in early May, with a start date of Monday, May 16. Immediately after accepting the job, he submitted a new form on the Starbucks hours app requesting that his work availability at the store be reduced to only Saturday (4 a.m.–11 p.m.) and Sunday (4 am–9 or 11 p.m.).[26]

Alcantar subsequently consulted with District Manager Burgueno and the Partner Relations Office about De La Cruz's request. They decided that the request should be denied on the ground that the business needs of the store required having a shift supervisor with more than just Saturday and Sunday availability. However, by email dated May 9, a Partner Relations specialist advised Alcantar that the "best thing we can do in any store environment[,] including when store petitioned for union [sic], is to stay consistent and disciplined." The specialist therefore advised her to provide De La Cruz with the "options" to increase his availability to meet the needs of the store; to "voluntarily" seek a different position such as barista if his reduced availability would meet business needs in that position; to "consider a transfer" to another store if he "is qualified"; or to voluntarily resign.[27]

Alcantar spoke to De La Cruz about the request shortly after. She asked him why he made it. He told her that he had taken a new primary job and could no longer work at Starbucks during the week. She said that she could not grant the request because it did not fit the store's needs and would be unfair to the other shift supervisors. He disagreed, stating that he had only been working 3 days a week and no one wanted to work weekends. She said that he would have to demote to a barista if he wanted to continue working at the store only on weekends.[28]

Several days later, on Sunday, May 15, De La Cruz texted Alcantar that he would "demote in order to get the weekend availability." He asked her to let him know what else she needed from him "to proceed with the process." The following day, he also texted that he had found a coworker to cover his Friday, May 20 shift and was looking for coverage for his Thursday, May 19 shift. Alcantar texted him back the next day, thanking him for finding coverage for Friday and stating that she had found coverage for his Thursday shift. However, she did not respond to his first text about demoting.[29]

A week later, on or about Saturday, May 21, Alcantar spoke to De La Cruz again about his request to reduce his availability. Apparently unaware of De La Cruz's May 15 text, she repeated that he could not continue working as a shift supervisor at the store with only weekend availability. She said she had spoken to other store managers and they had never heard of a shift supervisor working only weekends. She said his only options were therefore to keep his same availability, demote, transfer, or quit. De La Cruz responded that he had already texted her that he would demote. She replied that she never got it, and that, if he wanted to demote, he needed to state in writing that he was doing it voluntarily; that no one forced him to. He agreed to do so.

De La Cruz subsequently gave Alcantar a handwritten note at the end of his shift. The note, however, did not say he was demoting voluntarily. Instead, it stated, "I Jesse De La Cruz must demote not through personal want, but due to the fact that this store's 'inability' to accommodate my requested availability [sic]."[30]

Alcantar did not respond to his note at that time or indicate whether his request to work only Saturdays and Sundays would be approved. Nor did she speak to him the next day, Sunday, May 22. De La Cruz texted her at 9 am that morning, saying he would not be able to show up for his 11:15 am–5:45 p.m. shift as he fallen and sprained his ankle and wrist on a hike.[31]

Alcantar likewise did not speak to De La Cruz the following week, May 23–29. She had previously agreed to schedule him only on Saturday and Sunday, May 28 and 29, that week. And she was on vacation leave the latter half of the week.[32]

The record is unclear exactly when, but sometime during that week or the next, De La Cruz modified his availability again. Specifically, he requested to reduce his availability from all or most of Saturday and Sunday to only four hours (6–10 a.m.) on both days. He decided to do so because, after thinking more about it, he concluded that, if he was going to get paid $4–5 less per hour as a barista, he would rather work just the morning shift, which was easier and more convenient for him.[33]

De La Cruz also decided that week to call off for both of his shifts on Saturday, May 28 (5 a.m.–1:15 p.m.) and Sunday, May 29 (12–6 p.m.). He texted the substitute store manager sometime before the shifts that he wanted the weekend off to study for school finals. But he did not find himself a substitute as required. As a result, the substitute store manager had to shorten the store's hours to 7 a.m.–2:30 p.m. on Saturday and cancel the late-evening clean play on Sunday.[34]

De La Cruz also did not report for his previously scheduled 4–10:30 am shift on Tuesday, May 31, which Alcantar had not removed from his schedule since their conversation on May 21. And he did not notify anyone or find a replacement. He did not

[26] Tr. 80–82, 121 (De La Cruz); R. Exh. 3.
[27] R. Exh. 2; Tr. 287–289 (Burgueno).
[28] Tr. 83–84, 125–126 (De La Cruz).
[29] Jt. Exh. 11.
[30] Tr. 87–91, 126–127, 135–136 (De La Cruz); Jt. Exh. 10.
[31] See Jt. Exh. 11; R. Exh. 9; and Tr. 91–92, 94–95 (De La Cruz).
[32] See R. Exhs. 3, 9; Tr. 184–193 (Burgueno).
[33] See R. Exh. 4; and Tr. 85, 91, 127–129 (De La Cruz). See also Jt. Exh. 1 (stipulating that De La Cruz earned $21.65 per hour as a shift supervisor, and that baristas earned $16.24–$17.86 per hour). De La Cruz initially testified that he requested 4:30–10 a.m. But the electronic request form itself indicates 6—10 a.m., and he later acknowledged that he reduced his total availability to only 8 hours a week.
[34] R. Exhs. 10, 11; Tr. 93–94, 131–132 (De La Cruz), 209–213, 274–277 (Burgueno). Alcantar's May 31 email to Burgueno (R. Exh. 11) states that De La Cruz subsequently told the substitute store manager that his other job was making him work on Saturday and he only had Sunday to study. However, De La Cruz did not confirm this at the hearing; he testified only that he told the substitute store manager that he had to study for school finals both Saturday and Sunday. He was never questioned whether he also had to work at his other job on Saturday or whether he told the substitute store manager that.

do so because, in his view, he had given Alcantar plenty of time to change his schedule and he did not have the time to call off and find substitute coverage for every weekday shift she continued to schedule him for. He told this to another shift supervisor when she called him to find out why he had not shown up.[35]

De La Cruz likewise did not work his previously scheduled shifts on Thursday and Friday, June 2 and 3. And he took time off on Saturday, Sunday, June 4 and 5. In fact, he did not work again until Saturday, June 11.

In the meantime, Alcantar, who returned from vacation on or about May 31, tried to reach De La Cruz by phone to discuss the events since their last conversation on May 21. But she was unsuccessful. So, on June 6, she sent him a text stating,

> Hi Jesse. This is Karina from Starbucks on 2nd and Central. I just left you a voicemail. I have been trying to reach you. Please give me a call back. Thank you.

De La Cruz, however, did not call her back. Instead, he texted her back the next day, stating, "How's it going Karina? I'd prefer to text. [A] little busy [at the moment] for phone calls."[36]

Around this same time, Alcantar also sought guidance from Burgueno (who had also been on vacation during the week of May 23–29) and Partner Relations Manager Childress about what corrective action should be taken regarding De La Cruz's attendance violations under the circumstances. On May 31, she provided them with his timecards and described his call outs or texts on May 19, 20, 22, 28 and 29 and his no call/no show on May 31. A week later, on June 7, she also provided them with a summary of all the related events, including his previous request for availability only on Saturday and Sunday; her conversations with him where she denied that request and offered him various options, including demoting, and requested a letter stating his intention; his note stating that he was forced to demote because the store could not accommodate his request; his revised request to reduce his availability to just 6–10 am on Saturday and Sunday; and her inability to connect with him since because he had not shown for his shifts and did not respond to her voicemails until she sent him a text on June 6. She attached his June 7 text in response. She also attached his last corrective action for policy violations a couple months earlier, on February 22, involving a customer complaint and a coworker complaint against him on January 30 and February 2, respectively.

A collective decision was subsequently made to issue De La Cruz a final written warning for his call offs on Saturday and Sunday, May 28 and 29, and his no call/no show on Tuesday, May 31. A corrective action form was therefore completed on June 9 stating that he was being given a final written warning for those three attendance violations. The form also noted that he had been given the prior written warning on February 22.[37]

Alcantar gave the final written warning to De La Cruz a few days later, when he arrived for his shift on Sunday June 12. Another district manager in Los Angeles, Jewel Waters, was also present as a witness. De La Cruz became upset, said the warning was unfair, and refused to sign it. He did not dispute that the violations occurred but said he had told her that he was not available during the week. Alcantar responded that his reduced availability request had not been approved yet; that he was still responsible to work his scheduled shifts; and that the May 28 and 29 shifts were actually within his requested availability. De La Cruz replied that Starbucks was no longer his priority; that it was his second job now; and that he had more important things to do than wake up every morning to call off. He then handed his keys to Alcantar and said, "I'm over this; I'm done; I quit." Waters asked him to put his resignation in writing, and he did so.[38]

The General Counsel's brief argues that Starbucks' antiunion motive may be inferred from a number of the foregoing facts and circumstances. It suggests, for example, that such a motive may be inferred from Starbucks' insistence that De La Cruz demote to a barista at substantially less pay if he wanted to work only weekends at the South Central Avenue store. However, Burgueno testified that shift supervisors were generally required to have greater availability than baristas; that none of the 12 stores in her downtown LA district permitted a shift supervisor to work with only 2 days of availability; that she was also unaware of any stores in other districts that did so; and that it was not unusual for Starbucks to offer employees the option to demote when their availability changed (Tr. 243–245, 257–258, 281–282,).

The General Counsel argues that Burgueno was not a credible witness, citing certain inconsistencies between her testimony regarding other matters and the documentary evidence. In particular, the GC cites Burgueno's testimony (Tr. 278) that 2 days was also insufficient availability for baristas. The GC argues that this testimony appears to be contradicted by Partner Relations Manager Childress's June 1 email to the new Partner Relations consultant, which indicated that Starbucks was willing to work with De La Cruz's limited availability, at least with respect to his initial request for availability limited to all or most of the day on Saturday and Sunday. See GC Exh. 5 ("[De La Cruz] did ask to step down and as a barista we could work with the limited availability, from my understanding.").[39] However, the GC presented no substantial evidence to contradict Burgueno's testimony regarding shift supervisors' required availability.[40]

The General Counsel also argues that Starbucks antiunion motive may be inferred because the other options it offered De La Cruz—increasing his availability or transferring to another store—were clearly "unfeasible" given his work schedule at the other job and Burgueno's testimony above that there were no

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[35] R. Exhs. 11, 12; Tr. 133–135 (De La Cruz), 213–219 (Burgueno). Although the time-card statement for that week indicates that De La Cruz "called off" on May 31 (R. Exh. 9), he admitted at the hearing that he was a no call/no show that day.

[36] Jt. Exh. 11; R. Exh. 12; Tr. 143 (De La Cruz). Alcantar's June 7 email to Burgueno

(R. Exh. 12) states that she called and left De La Cruz a voicemail twice, on June 2 and 6. However, De La Cruz testified that he recalled receiving only one phone call from Alcantar.

[37] Jt. Exh. 7; R. Exhs. 11, 12; Tr. 215–221, 269, 274, 289–290, 309 (Burgueno)

[38] Tr. 95–99 (De La Cruz), 314–318 (Waters); R. Exh. 13.

[39] There is no evidence that Alcantar (or Burgueno) had consulted with Childress or anyone else in Partner Relations before June 1 about De La Cruz's revised request for only 4 hours availability on Saturday and Sunday. Alcantar's May 31 email only addressed his immediate attendance issues, not his prior availability requests.

[40] As indicated above, De La Cruz's May 21 demotion note placed what appear to be scare or sneer quotes around the word "inability," indicating, consistent with his previous statements to Alcantar, that he did not believe Starbucks was unable to accommodate his request for 2 days availability as a shift supervisor. But he did not offer any examples at the hearing where Starbucks had permitted other shift supervisors, at either the South Central Avenue store or any of the other stores he had worked at the previous 5 years, to have only 2 days of availability. And he admitted that, when Alcantar mentioned transferring as another option on May 21, she did not identify any store he could actually transfer to (Tr. 140).

stores in the district that allowed a shift supervisor to have only 2 days of availability (Br. 25). However, the record indicates that these were simply standard options that Partner Resources typically advised managers to present for employees with availability issues to consider in order to avoid being terminated. See R. Exh. 2. Further, there is no evidence Alcantar actually offered either of these "unfeasible" options to De La Cruz during their initial conversation in early May. Rather, as indicated above, De La Cruz testified that she mentioned the additional options during their second conversation on May 21, when she apparently thought he had not yet responded or agreed to demote.

The General Counsel also argues that Starbucks' antiunion motive may be inferred from its "radio silence" after De La Cruz agreed to demote, i.e., its failure to inform him that his request was approved or denied (Br. 24). However, as indicated by Starbucks (Br. 11–12, 24, 28), there are at least two obvious alternative explanations for this, which make such an inference unreasonable. First, De La Cruz moved the goalpost after his early-May conversation with Alcantar by submitting a revised availability request that reduced his original request for reduced availability by over 75 percent.[41] Second, De La Cruz did not come into work thereafter until June 11, and did not call Alcantar in the interim in response to her voicemail and text asking him to call her.

The General Counsel also argues that Starbucks' antiunion motive may be inferred because Alcantar "deliberately continued to schedule De La Cruz for weekday work knowing he could not show up to work" (Br. 24). However, this argument ignores what Alcantar did to help De La Cruz avoid attendance violations after his initial availability request for weekend-only shifts. She helped him find a substitute for his Thursday, May 19 shift. And she modified his schedule the following week so that he did not have to work any weekday shifts. The record indicates that she also either modified his schedule or did not seek to discipline him for not working any weekday shifts after his no call/no show on Tuesday, May 31. See R. Exh. 9.

Moreover, as Alcantar explained to De La Cruz on June 12, his attendance violations on Saturday and Sunday, May 28 and 29, were for shifts that were within his initial availability request. And the General Counsel presented no evidence that Starbucks treated De La Cruz disparately from other employees by issuing him a final written warning for those violations and the May 31 violation.

Thus, as with the allegation about reducing and limiting De La Cruz's hours, Starbucks was not required to show that it would have taken these subsequent actions even absent his support for unionization. However, for all the same reasons stated above, I find that the evidence is sufficient to establish that it would have done so.

Accordingly, the constructive discharge allegation will be dismissed as well.

IV. ALLEGED UNILATERAL DISCIPLINE OF ROMERO

The final allegation involves the discipline of another shift supervisor, Araseli Romero. Specifically, the General Counsel alleges that on September 1, after the Union's June 1 certification but before the parties had reached an initial contract, Starbucks issued a final written warning under its discretionary progressive disciplinary policy to Romero for walking off a shift. The GC alleges that this was unlawful, not because it was motivated by union activity in violation of Section 8(a)(3) of the Act, but because Starbucks did not give the Union prior notice and an opportunity to bargain over the discipline and its effects in violation of Section 8(a)(5) of the Act.

There is no real dispute about the relevant facts regarding this allegation.[42] Nor is there any dispute that Starbucks did not violate Section 8(a)(5) of the Act based on those facts under extant Board precedent, specifically *Care One at New Milford*, 369 NLRB No. 109 (2020).[43] Rather, the sole disputed issue is whether *Care One* should be overruled. The General Counsel argues that it should. Starbucks argues that it should not, and in any event, such a change in the law should not be applied to it retroactively.

These arguments are obviously for the Board to address; administrative law judges are required to apply existing Board precedent. Accordingly, consistent with *Care One*, I will dismiss the allegation. The parties may thereafter press their arguments before the Board pursuant to timely filed exceptions.

CONCLUSIONS OF LAW

1. Starbucks, through its Los Angeles South Central Avenue store manager, committed an unfair labor practice in violation of Section 8(a)(1) of the Act by threatening that it would possibly have to close stores down if employees supported unionization.

2. Respondent's unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent did not otherwise violate the Act as alleged in the complaint.

REMEDY

Consistent with the Board's standard remedies for such violations, Starbucks will be ordered to cease and desist from making the same or any like or related unlawful threats of closure to employees in the future, and to post a notice assuring employees that it will comply with the order.[44]

ORDER

The Respondent, Starbucks Corp., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that it would possibly have to close stores down if they supported unionization.

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

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

(a) Post at its South Central Avenue store in Los Angeles,

[41] There is no substantial evidence that Starbucks was willing to permit De La Cruz to work as a barista with only 8 hours total availability per week. Burgueno testified that so little availability was not acceptable (Tr. 203–204). And the General Counsel presented no evidence specifically contradicting that testimony. See fn. 39, above.

[42] See Jt. Exhs. 4, 8; and Tr. 41–44 (Hernandez).

[43] *Care One* overruled *Total Security Management Illinois, LLC*, 364 NLRB 1532 (2016), which had overruled *Fresno Bee*, 337 NLRB 1161 (2002).

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

California, copies of the attached notice marked "Appendix."[45] Copies of the notice, on forms provided by the Regional Director for Region 21, 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 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the store involved in this proceeding, 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 that store since February 1, 2022.[46]

(b) Within 21 days after service by the Region, file with the Regional Director for

Region 21 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 alleged violations not found are dismissed.

Dated, Washington, D.C., February 22, 2024

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 threaten to close stores down if you support unionization.

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

STARBUCKS CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-295845 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.

[45] 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."

[46] If the store is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. In accordance with current Board policy, if the store is temporarily closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted at that store within 14 days after it 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, Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." See, e.g., *North Mountain Foothills Apartments, LLC*, 373 NLRB No. 26, slip op. at 2 fn. 4 (2024).