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

STARBUCKS CORPORATION,

Respondent

Cases 10-CA-300921
and 10-CA-302699

WORKERS UNITED, SOUTHERN REGIONAL
JOINT BOARD A/K/A WORKERS UNITED, A/W SEIU

Charging Party

Jordan N. Wolfe, Esq.,
for the General Counsel.
Kevin Kraham, Alex Frondorf, Laura Spector, and Asley Farris, Esqs. (Littler Mendelson, P.C.),
for the Respondent.
Richard Rouco, Esq. (Quinn Connor Weaver Davies and Rouco),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

LISA FRIEDHEIM-WEIS, Administrative Law Judge. This case was tried in Greenville, South Carolina before me on July 24 through July 28, 2023, August 1 and 2, 2023, October 24, 2023, and February 26, 2024, during which time I afforded all parties a full opportunity to be heard, to examine and cross examine witnesses, to make motions, and to introduce evidence. Pursuant to a motion to correct the transcript containing several material errors, I issued an Order to Correct Transcript on June 12, 2024, after which all parties submitted post-trial briefs on June 26, 2024.[1]

[1] References throughout the decision shall read as: Tr. is transcript; JX is Joint Exhibit; GCX is Counsel for the General Counsel's exhibit; and RX is Respondent's exhibit. The Act refers to the National Labor Relations Act. The Board refers to the National Labor Relations Board.

Workers United, Southern Regional Joint Board a/k/a Workers United, a/w SEIU (the Union) filed the charges against Starbucks Corporation (Starbucks or the Respondent) on August 8 and September 6, 2022[2] and the General Counsel[3] issued the Order Consolidating Cases, Consolidated Complaint on April 27, 2023, an Amendment to Consolidated Complaint on July 7, 2023, and a Corrected Consolidated Complaint on October 24, 2023. (Tr. 1069-1070). The complaint alleged that Starbucks violated Sections 8(a)(1), (3) and (5) of the Act.

ISSUES

Specifically, the complaint alleges that:

1. Starbucks violated Sections 8(a)(1) and (3) of the Act by discharging five employees on September 2 who entered the store at issue after hours on July 24;

2. Starbucks violated Sections 8(a)(1) and (3) of the Act by suspending and banning eleven (11) employees from the store at issue after they participated in a "March on the Boss" on August 1;

3. Starbucks violated Sections 8(a)(1) and (3) of the Act by closing the store at issue from August 6-8 and changing its store hours thereafter;

4. Starbucks violated Sections 8(a)(1) and (3) of the Act by issuing final written warnings on or about October 3 to the eight remaining employees who had participated in the August 1 "March on the Boss;" and

5. Starbucks violated Section 8(a)(5) of the Act by failing to notify and bargain with the Union before it took any of the aforementioned adverse actions or changes to the employees' terms and conditions of employment.

Respondent denied all these allegations, with the exception that it admitted that it did not notify or bargain with the Union prior to issuing the disciplines or discharges. As will be examined below, Starbucks asserts it had no obligation to notify or bargain with the Union under the existing precedent of *Care One at New Milford*, 369 NLRB No. 109 (2020). Counsel for the General Counsel asserts that the Board should overrule *Care One*.

Based on the entire record, including my observation of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Union, I make the following proposed report, together with a recommended order to the Board. 29 U.S.C. Section 160(c):

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

[3] Note that at the time of issuance of this decision, there is an Acting General Counsel in place as chief prosecutor of the NLRB, while at the time the Consolidated Complaint issued and briefs were filed, there was a General Counsel in place. All references to the prosecutor herein for ease of reference shall be to General Counsel or Counsel for the General Counsel or CGC.

I. FINDINGS OF FACT

A. JURISDICTION

Respondent admits, and I find, that it is a Washington corporation headquartered in Seattle, Washington, and is engaged in the retail operation of coffee shops throughout the United States, including in and around Anderson, South Carolina.[4] Respondent admits that it was and is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act, and I so find. (Tr. 13-14).

Further, Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. (Tr. 14).

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction over this case pursuant to Section 10(a) of the Act.

B. BACKGROUND

1. CB2's Operations

At all relevant times during 2022, Nicole Davis (Davis) was the District Manager of District 2084 (covering at least 14 Stores in South Carolina, including CB2). As District Manager, Davis, inter alia, coached and supported leaders, specifically the store managers in her district, to assess their business and to assist them to make results-driven decisions. Davis has since been promoted to Regional Director, covering Starbucks stores in West Virginia, North Carolina, and South Carolina (including CB2). During the operative events of 2022, Jeff Danley held the Regional Director position that Davis took over in May 2023. (Tr. 52-57; 1127-1128).

Kaylea Jett[5] was the Store Manager of CB2 beginning in October 2021. At that time, she was a "dual manager" – meaning that she was the Store Manager of two stores – CB2 and the other Clemson Blvd. store in Anderson, SC. Mandy Hardy became the Store Manager of CB2 in January, allowing Jett to focus on managing the other Anderson Store. However, after Hardy failed to return from a leave of absence around the end of May or June, Jett returned as the Store Manager of CB2 in June. (Tr. 1216-1218).

[4] The parties stipulated that the Anderson, South Carolina Store at issue in these cases is Store Number 56069, located at 4686 Clemson Boulevard, Anderson, South Carolina 29621 (also referred to as "the Anderson Store," "I85," or "CB2" since there is another Starbucks store also on Clemson Boulevard. (GCX 37; Tr. 49-50). For uniformity, I will refer to the store at issue as CB2 throughout the Decision.

[5] Jett testified that she was married during the events at issue and changed her last name to Henderson. I certainly acknowledge her name change, but because the employees knew and referred to their Store Manager as Kaylea Jett, I will refer to Kaylea Henderson as Jett throughout the Decision.

On August 1, Melissa Morris came to CB2 as the new Store Manager, but for reasons fully discussed below, Morris did not return to CB2 after August 1, and once again Jett returned as Store Manager of CB2 as of August 4. (Tr. 1216-1218).

It is undisputed that the Store Managers and District Manager and Regional Director are all 2(11) supervisors and 2(13) agents within the meaning of the Act. (GCX 1(o), (y)).

2. Relevant Starbucks Policies and Procedures

Company-wide general policies relating to how partners[6] should conduct themselves to foster the atmosphere that the Respondent wishes to create between partners and with customers are largely set out in the Respondent's Partner Guide and Operations Manual[7]. These are provided to partners during their onboarding. (RX 2 and 3).

Starbucks' Partner Guide, inter alia, contains a Mission and Values Guide. A core precept of this guide is for partners to create a "culture of warmth and belonging, where everyone is welcome." (RX 6). Similarly, Starbucks maintains a Third Place Policy, where all stores "should be a third place, a warm and welcoming environment where customers can gather and connect." (RX 4). Partners also receive a document entitled Upholding the Third Place Policy explaining that the welcoming third place is for customers and partners alike, and that they must act responsibly and maintain the warm and welcoming environment Starbucks intends. (RX 5).

Starbucks Respectful Workplace Policy extolls comparable expectations of its partners, in that they are not to disrupt, subvert, or obstruct another partner's movements or work performance. (RX 8). Starbucks Workplace Violence Policy outlines actions which could constitute harassment, including disruptive and aggressive behavior, and behavior that creates an intimidating, disrespectful, degrading, offensive, or hostile working environment. (RX 9).

Starbucks Operations Manual, inter alia, contains a store opening and closing policy, and mandates that "only closing partners and identified vendors are allowed in the store after closing." (RX 3).

All the partners who testified acknowledged that they had received or seen these policies and that they understood them.[8]

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[6] It is undisputed that the employees, which include the baristas and the shift supervisors, are referred to in Starbucks culture as "partners."

[7] I note that I took administrative notice of the entire Starbucks Partner Guide and Operations Manual even though Starbucks refused to comply with the GC's subpoena duces tecum to provide the entire documents. Instead, Starbucks provided and entered only the portions of the Partner Guide and Operations Manual it deemed appropriate for the trial. (Tr. 1028-1029).

[8] See generally for acknowledgement and receipt of Starbucks policies RX 2-9 by partners: Tripathi: Tr. 151-153, 159, 166-170, 175; Terrill: 318-319, 321-326, RX 12; Hudson: Tr. 385-389, 391-397, RX 14; Mann: Tr. 499-509, RX 15; Britt: Tr. 475, 559-565, RX 17; Cobb: Tr. 618-620, 623-628, RX 18; Mobley: Tr. 688-691, RX 19; Greer: Tr. 751-753-760, RX 20; Blume: Tr. 869-878; Ourada: Tr. 985-992, RX 24.

3. Union's History at CB2

On March 22, the Union filed a petition to represent the employees at CB2 in the following Unit:

> All full-time and regular part-time hourly Baristas and Shift Supervisors employed at its facility located at 4686 Clemson Blvd., Anderson, SC 29621; but excluding all Store Managers, office clerical employees, professional employees, guards, and supervisors as defined by the Act. (GCX 37; Tr. 53-54, 900).

On June 8, the Union was certified as the collective-bargaining representative of the CB2 Unit following a unanimous vote of 18-0. The Union has been the exclusive collective- bargaining representative of the Unit since it was certified. (Tr. 53-54, 920-921, GCX 15, 37, 38). The lead Union organizer leading up to and after the election was Shift Supervisor Aneil Tripathi (Tripathi), who served as CB2's Union representative. (Tr: 53-54). Tripathi and each partner who testified asserted that Tripathi had formed the Union organizing committee and that he was the main contact between the Union and the partners after the election. (Tr. 53-54, 230-232, 446, 538, 672, 720-721, 961).

As of July 22, there were about twenty (20) partners working at CB2. (Tr. 1129).

4. July 22-24 Strike

On July 22, several partners, including Tripathi, Jon Hudson (Hudson), Cadence Britt (Britt), and Rhiannon Greer (Greer) testified that they went to CB2 in the early morning hours with a list of demands and a plan to go on strike. (Tr. 54-56, 61, 335, 539-540, 722).

At 7:00 a.m., the partners who were scheduled to work that morning (including Hudson, Britt, and Greer), as well as partners Charlie Thrasher (Thrasher) , Virgil Downs (Downs), Skylar Blume (Blume), and a few others joined Tripathi and partner Natalie Mann (Mann) to walk out of the store as soon as Jett arrived for the day. (Tr. 61). Tripathi testified he texted Jett and Davis a strike notice electronically signed by eighteen (18) partners outlining their reasons for the strike. (GCX 7 (attachment), GCX 42 (group chat with Tripathi, Davis, Jett); Tr. 56-61). Davis and Jett both testified that they received the strike notice either by group text chat or email or both that morning. (Tr. 1129, 1223). Jett was in the store at the time and witnessed the partners assembling with picket signs and walking out of the store. (Tr. 1223-1224).

Jett and Davis discussed that there was no one remaining to staff the store given the strike, so they concluded that Jett would close the store. (Tr. 1130-1131; 1225). Jett testified that she performed a minimum of safety-related tasks in the store after the partners walked out, including turning off the machines, setting the alarm, and locking the door. (Tr. 1225-1226).

Each of the partners who testified about the strike testified that they went on strike for several reasons. First, partners noticed that their weekly hours had been declining.[9] Second, the equipment

[9] Hudson and Greer specifically testified that they had been asking management for more hours, but they

in the CB2 store had been failing. (Tr. 54-55, 335, 722-723). The strike notice demanded, inter alia, new equipment, not allowing partner hours to fall below a certain level, keeping CB2 weekly store hours at a status quo, and waiving bargaining rights over a raise that was set to take place for the non-unionized Starbucks stores. (GCX 7, 42).

On July 22, the partners on strike stood for several hours on a grassy area in front of the CB2 store with picket signs which had slogans such as "We Are On Strike," "Partners Over Profits," and "No Contract No Coffee." (Tr. 63, 337, 724). Tripathi and other partners testified that they could see inside the glass windows of the store that there were several food items and drinks out on the counters, tips out in a cannister on the counter, and beverage components (milk, cream) left out on counters. Tripathi testified that he and the partners (scheduled and not scheduled) left the store "as is" on July 22 when they walked out on strike, so everything that was out on any counter in the front of the store and in the back of the store was left out in the heat. (Tr. 62-63; 337).

On July 23, the partners withheld their labor but stayed home. There was no active picketing on July 23. (Tr. 64, 337, 724).

On July 24, partners picketed at the store in the same grassy area in front of CB2 as they had on July 22. The partners picketed from about 7:00 a.m. to 3:00 p.m. (Tr. 65, 338, 724).

C. ALLEGED ULP's

1. July 24 Nighttime Cleanup of CB2

The Starbucks Operations Manual (RX 3) sets out procedures for opening and closing. District managers, store managers, assistant store managers, and shift supervisors are provided with a set of keys used to open and close the door at the entrance to the store. On each shift, there is one "key holder" who has that responsibility. This is normally the shift supervisor on duty. If there are more than one shift supervisor, one of them is the key holder, and if managers are present, they can either assume the role or delegate it to a shift supervisor.

The job description of shift supervisor sets out their responsibilities, including organizing opening and closing duties as assigned and ensuring safety and security of all partners during each shift. (RX 1).

Ryan Welton (Welton) is a current shift supervisor at CB2 and held that position in 2022. Welton testified that key privileges only apply when the shift supervisor is scheduled to work and that he (or any shift supervisor) is not permitted to use his key privileges to enter the store when he is not scheduled to work without managerial permission. (Tr. 1120, 1122-1123).

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were receiving fewer and fewer hours. (Tr. 336, 723). Hudson testified he was full-time and asking for close to forty (40) hours per week, but that he had been receiving only 9-20 hours per week in July. (Tr. 336). Greer testified that she had been working 20-30 hours per week, but that after the Union was certified, her hours were decreased to 12-15 hours per week. (Tr. 723). It was not disputed that partners are required to work a minimum of 20 hours per week to get two critical benefits from Starbucks: health insurance; and free tuition for on-line college coursework at Arizona State. (Tr. 56; 723).

Tripathi, Mann, Welton, Thrasher, and Lauren Elsor were the shift supervisors at CB2 in July. (Tr. 1236-1237). The remaining partners were baristas. Baristas and shift supervisors comprise the bargaining unit at CB2. (GCX 15, 37, 38).

Around 5:00 p.m. on July 24, after the strike activities were completed for the day, five partners decided to go inside the closed store to clean it before it re-opened the next day. These five partners (Tripathi, Hudson, Britt, Sarah Mobley, and Greer – collectively "The Nighttime 5") determined that the store was dirty from sitting idle and uncleaned since the inception of the strike on July 22, so they decided to clean it up on the night of July 24 in preparation for re-opening on the morning of July 25. (Tr. 65, 338, 542-543, 673, 726).

Tripathi testified that he had a conversation during the last day of picketing on July 24 with several coworkers, including Welton, Hudson, Greer, Britt and Mobley, about going into the store that night to clean it and have it ready for customers at 5:00 a.m. opening the next morning. Tripathi testified that he told other partners present at the picket on the afternoon of July 24 that the store was in no shape to be ready for the morning and that there was a lot to do inside to clean it up. (Tr. 67). Hudson, Mobley, and Greer testified consistently that such a conversation took place and that the decision was made to go into the store later that evening for the purposes of cleaning it before the store re-opened on July 25. (Tr. 339-340; 544; 678-679; 728).

Conversely, Welton testified that, although he went to CB2 to observe the strike in July, and he may have participated (he did not recall), he did not take part in a conversation with Tripathi or anyone else about going into the store on the night on July 24, that no one contacted him to get permission to work the night of July 24, and that he only found out that partners had gone into CB2 while it was closed on the night of July 24 when Jett questioned him about it after the fact. (Tr. 1110-1111, 1115).

Tripathi testified that he solicited volunteers to help him clean the store on the night of the July 24, and that Hudson, Britt, Mobley, and Greer agreed to assist. Tripathi testified that he did not seek or obtain managerial approval for himself or for Nighttime 5 as a group to enter the store. Tripathi testified that as shift supervisor, he had a key to CB2 and that he used his key to open the closed store around 5 p.m. on this occasion. (Tr. 69-71, 163-164). Tripathi acknowledged that CB2 was closed when he used his key to enter the store on the evening of July 24. (Tr. 161).

Tripathi testified that the Nighttime 5 were going to CB2 on the evening of July 24 to perform a "clean play." A clean play is performed after store hours and when the store is closed to customers so partners can perform a deep cleaning of the store. Tripathi testified that clean plays were most often performed at CB2 on Sunday nights. (Tr. 68-69). Jett testified that clean plays were scheduled for Tuesday nights. (Tr. 1221).

Hudson testified that he believed he was performing a clean play and he testified that the store was unlocked when he got there. (Tr. 340-342). Hudson testified that he could have called or texted Jett before going to store on July 24, and that he knew CB2 was closed when he entered to clean it that night. Hudson further testified that he did not contact any Starbucks manager for permission to enter the store on the evening of July 24. (Tr. 399-401, 405).

Britt testified that she assumed someone got permission to be in the store because there were already some people in there when she got there, and that she did the work she typically did when she was performing a clean play. (Tr. 549).

Mobley testified that she believed she had permission to be there, and that Tripathi let her into the store with his key that he had as a keyholder. (Tr. 679-680). Mobley testified that she performed work consistent with a clean play. (Tr. 674, 680).

Greer testified that she thought there was already a clean play scheduled that night because, on the morning of July 22 prior to the strike, she saw a clean play listed for the evening of July 24 in the partners' daily schedule.[10] (Tr. 727). Greer testified that the store door was already unlocked when she arrived to clean. (Tr. 729).

The Nighttime 5 all testified consistently, and it is not in dispute, that they cleaned the store the night of July 24 – collectively, they mopped the floors, wiped the counters, took care of all the food and drink products that had been left out on various counters when then employees went on strike on July 22, restocked supplies in the front of the store and the back of the store, wiped down equipment, checked food temperatures of foods, counted the money left in the drawers, and counted the tips. (Tr. 71-72, 343, 549, 680, 729).

The Nighttime 5 all clocked in when they arrived to clean CB2 the evening of July 24, and they all clocked out when they left. The Nighttime 5 acknowledged that they were paid for that time. Davis testified that when partners clock in, they are paid for their time as a matter of course – once the payroll goes through, the partners are paid even if it triggers a concern. The Nighttime 5 were all paid for the time they spent cleaning CB2 on the evening of July 24. (Tr. 74, 340-343, 550, 680, 729, 1163-1165; GCX 36, 40, 44-46).

Welton, Jett, and Davis testified that there was no clean play scheduled for the night of July 24. Welton acknowledged that during a clean play, the store is not completely "closed" because partners are physically inside performing the cleaning tasks, but that the store is closed to customers. (Tr. 1116). Welton also testified that it is against Starbucks policy to work while the store is closed. (Tr. 1111).

Jett testified that partners are not allowed to come in to do their own clean plays. (Tr. 1222). Jett further testified that no partners, including Welton, ever contacted her to discuss doing a clean play on July 24, and that in fact, none of the partners contacted her at all on July 23 or July 24. (Tr. 1226-1229). Jett further testified that shift supervisors can and do open and close the stores, but only when they are scheduled to do so. Further, partners do not have the authority to determine when to do a clean play. (Tr. 1243). Davis testified that when a store is closed for staffing issues, partners are not allowed to make the decision to enter for store for any reason. Davis further testified that baristas cannot rely on the word of their shift supervisor alone to come in for a scheduled clean play, and that only management schedules clean plays. (Tr. 1178-1181).

[10] No record of a clean play scheduled for July 24 was produced at trial.

2. Starbucks Discovers the Nighttime 5 Entered CB2 on July 24

On the morning of July 25, Jett and the partners reported back to work at CB2. Jett was at CB2 doing her weekly Monday tasks, including payroll. Tripathi was working as well.

At some point during the day on July 25, Jett testified that she noticed several punch-ins and punch-outs from the pervious evening (July 24), and that she asked Tripathi as shift supervisor "what is this?" Tripathi testified that he told Jett "we clocked in to get the store ready for the next day," and that Jett replied "okay, I just didn't know what it was." (Tr. 73-74; JX1). Jett testified that she saw punch-ins and punch-outs for Tripathi, Hudson, Britt, Mobley, and Greer and that she was surprised as they were not scheduled. Jett called Davis to tell her about these punch-ins and punch-outs while the store was closed, after which Jett went on vacation through August 14. (Tr. 1228-1229).

Davis testified that the Nighttime 5 were paid for the time they cleaned the store on the evening of July 24 because it was purely a function of payroll being processed. "If a partner enters a punch, they will be paid." (Tr. 1165). Davis testified that she forwarded the issue of the Nighttime 5 to Starbucks Partner Relations, [11] "as we would with any type of concern" because the Nighttime 5 were not scheduled and the store was closed when they punched in and out on July 24. (Tr. 1131-1133). Davis testified that Partner Relations started an investigation of the Nighttime 5 and communicated the results of its investigation to her in September. (Tr. 1134, 1138).

3. August 1 "March on the Boss"

On August 1, partners Tripathi, Hudson, Braden Terrill, Mann, Paul Cobb, Greer, Blume, Thrasher, Dowis, Ashley Melendez (a/k/a/Cook), Emma Fretwell, and Mya Ourada (collectively the "August 1 Partners") engaged in a concerted action they called "March on the Boss." (GCX 13, 14). Eight of the August 1 Partners testified at trial: Tripathi, Terrill, Hudson, Mann, Cobb, Greer, Blume, and Ourada.

The August 1 Partners testified that they had engaged in discussions prior to August 1 to plan for a concerted action aimed at Starbucks management in response to what they perceived as a failure by Starbucks to grant them a raise, as well as to address their concerns about the equipment problems at CB2. The partners had seen a flyer and testified it was common knowledge nationwide that all nonunionized Starbucks stores were set to implement a raise at those stores on August 1. The August 1 Partners testified that they decided to participate in a March on the Boss because they believed it was unfair that the partner raise was not being implemented for Starbucks' unionized stores, including CB2. (Tr. 74-76, 233, 344, 448-449, 596-597, 730, 841, 963). Tripathi testified that he spoke to the partners ahead of time and, as the leader, arranged for the March on the Boss to take

[11] Though there was much argument at trial as to whether Partner Relations functioned as Section 2(13) agents under the Act and whether their actions and statements bind Starbucks, Starbucks admits on brief (R Brief p. 9, ftnt. 18 and see also Tr. 1189) that Partner Relations functions as its internal Human Resources Department. See also Tr. 370-372, 463 for my rulings on the record admitting what Partner Relations representatives told partners pursuant to F.R.E. 801(d). Based on the admissions by Respondent through its witnesses' testimony on the record and on brief, I find that Partner Relations (in all its communications to and from CB2 managers and partners herein) is a Section 2(13) agent of Respondent under the Act.

place on August 1. (Tr. 76; 232). Tripathi made it clear to the partners that this was not a Block the Boss. (Tr. 232).

Employees at unionized Starbucks stores nationwide planned for a March on the Boss to take place on August 1 because that was the day Starbucks planned to implement the raises for partners at all the nonunionized stores across the country. (Tr. 75, 232, 344-345, 449-450, 596-597, 729-730, 841).

On August 1, Melissa Morris (Morris), started working at CB2 as the Store Manager. (Tr. 178; 344,).

Tripathi testified that he arrived to CB2 around 10:00 a.m. and introduced himself to Morris. Tripathi told Morris that this was a union store and that things were going to be a little different. Tripathi handed Morris a copy of the Act. Morris responded that she was not interested in learning about the "union stuff," and that she had already been briefed on it by Davis.[12] Tripathi and Morris then discussed their respective employment histories with Starbucks. (Tr. 77-78).

At 11:00 a.m., the August 1 Partners gathered to perform the March on the Boss. Some of them were scheduled that morning and were working at the time and others were not. (Tr. 232, 345, 597, 841, 965). The August 1 Partners testified that they chose 11:00 a.m. for time of their action because it was the slowest time of day and would impact the fewest customers. (Tr. 79, 964, 994). Morris was sitting on a booth at a table in the lobby of CB2 and working on her laptop. (CGX 13(b) and (c)).

There is a video and an audio recording of the initial part of the March on the Boss (GCX 13(b) and GCX 14(b)[13], respectively), as well as a partial still photo of the partners as they stood around Morris during the start of the March on the Boss (GCX (a)), so the facts as to exactly what was said, by whom, where the partners stood vis-à-vis Morris, and how Morris moved around the August 1 Partners for the first portion of the event is not actually dispute even though ten (10) partners and Davis testified about the events of the day. The audio recording (GC 14(b)) captures the entire March on the Boss.

To ensure the record is complete and to add to the video (GCX 13(b)) and audio (GCX 14b)) recordings and transcripts of the video (GCX 13 (a)) and audio (GCX 14(b)) recordings, the testimony regarding the March on the Boss was as follows:

The August 1 Partners formed a semi-circle to the right and in front of Morris, who was sitting at a table with her laptop across from the front registers and cases of food products. (Tr. 450-451, 731; GCX 13(b) and (c)). They stood roughly next to each other (some partners characterized the semi-circle as "loose," while others described it as "shoulder to shoulder," and each of them either kept their hands down at their sides, in their pockets, or behind them. Many of them had donned a Union t-shirt to do the March on the Boss. (CGX 13 (b) and (c)). The only other people

[12] Morris did not testify at trial.

[13] Tripathi testified, and it is undisputed, that Terrill made the audio recording of the entire March on the Boss on Tripathi's phone and that it had not been altered in any way. (Tr. 89).

inside the store when the March on the Boss started were a contractor working on the espresso machine, two of Thrasher's friends, and Thrasher's fiancée, who had come to support the March on the Boss. (Tr. 450, 964-965).

Tripathi testified, and the audio and video show, that Tripathi read and then presented a letter to Morris (GCX 9) which detailed the partners' demands and rationale explaining why the partners were performing this March on the Boss to Morris: demanding the raise that all of the nonunionized stores' partners were receiving that day; and new equipment and repairs to poorly functioning equipment in CB2. The letter Tripathi read aloud and presented to Morris stated that a cessation of all production on the floor would remain in effect until these demands were met or a plan to meet the demands in the immediate future was made and agreed to by management and the partners. The letter was signed by thirteen (13) partners, ten of whom were physically present at this March on the Boss. (Tr. 79-81, 235, 345, 450; 596-598, 731, 842-843, 963-965; GCX 13 (a-b), CGX 14 (a-b), GCX 9.

Tripathi then presented Davis with another letter from the Union, which stated that the Union was waiving its right to bargain with Starbucks over the issue of the August 1 raise. (Tr. 80; GCX 8, GCX 13, 14).

From her seated position amid the semi-circle of partners, Morris called Davis and reported to her that the partners were not going to resume work until they received their raise. Each of the partners testified that Morris told Davis she would take pictures of the letters Tripathi had presented, which she did. Morris then reported to the partners that they would be receiving their raise at a later date. Tripathi countered to Morris that this was "illegal" and that he would be filing an unfair labor practice charge. (Tr. 82, 236-237, 452, 731, 966; GCX 13, 14).

Mann then delivered a speech she had prepared about her belief that the partners at CB2 deserved the raise, why she felt it was wrong for Starbucks not to give the CB2 unionized workers the raise, the need to fix broken or outdated equipment inn the store, and to express the deep anxiety the CB2 partners felt while Starbucks was enjoying record profits. (Tr. 452). At the end of Mann's speech, she said "we will not move an inch until we get our raise." (Tr. 533; GCX 13,14). The partners testified and the video and audio show that Morris was still on the phone with Davis, asking if she (Davis) had heard Mann's speech. (Tr. 243, 967, GCX 13, 14). The partners remained still with their hands down by their sides or down in front of their bodies, in their pockets, or behind their backs. (GCX 13, 14).

As shown in the video, Morris, still on the phone with Davis, stood up, and walked around the table in front of her, moving between the table and the semi-circle of the August 1 Partners. When she made her way past Hudson, she brushed into him while moving past him toward the two sets of double doors at the front of the store. (GCX 13(b)).

The August 1 Partners testified that they did not block Morris as she left the table and headed toward the front doors. They testified that they did not move out of Morris' path as she came around the table. (Tr. 191, 408, 533, 632, 777, 892, 1001). The partners also testified that it was Morris who either moved past, brushed past, or pushed into Hudson and that it was Morris who initiated the bodily contact. (Tr. 237, 244, 346, 511-513, 599, 732, 845-846, 967). The video shows Morris

moving around the table and by the partners, making physical contact with Hudson on her way through. The video shows, and Hudson admits, that he did not move out of Morris' way and that he stood his ground. Hudson testified that Morris "pushed past me." (GC13(b); Tr. 346-347, 407-408, 418). The video and audio capture a few partners asking Morris why she was pushing Hudson. (GCX 13, 14). Most of the partners speculated that Morris would not have been able to move from the semi-circle unless they moved or that Morris may have been semi-obstructed based on where they were standing. (Tr. 191, 408, 486, 639, 777, 785, 892, 1007).[14]

Morris walked to the front double doors while continuing to talk to Davis, but she did not exit the store. She stayed inside the store and continued to talk to Davis.

Each August 1 Partner testified that, while they followed Morris, they did not stand between Morris and doors or block the doors. The partners followed behind Morris to hear what Morris and Davis were discussing regarding their raise (or lack thereof). The partners testified that they stayed behind Morris (approximately 5 feet behind) and that they then either congregated by the front counter behind Morris (and behind the front doors) or sat in the seating area adjacent to the double front doors. The partners testified, and the Starbucks floor plan shows, that the locations where the partners stood after Morris left the table and walked toward the front doors were not between Morris and the exit doors.[15] (Tr. 83-84, 237, 347, 453-454, 600-602, 733, 843-844, 967; GCX 43).

Morris continued to talk to Davis on the phone by the front doors. Morris told the partners that they had to clock out if they were striking, to which Tripathi responded that "this is a march on the boss not a strike." (GCX 14(b)).

Morris then told Davis "they're not letting me…Yes…Yes…May I please exit the building?" (GCX 14(b)). Tripathi told Morris to tell Davis to call him. Morris asked Davis to call Tripathi and then asked "Will you let me exit the building?" Tripathi said "Yes," and added that he could not block her from walking out of the building. (GCX 14(b)). During this exchange, the partners remained behind Morris or off to the side in the customer lounge area – no one, including Tripathi, stood between Morris and the double front doors. (Tr. 83-84, 237, 347, 453-454, 600-602, 733, 843-844, 967; GCX 43). Partners also testified that Morris did not state that she was scared or feeling claustrophobic at any time during the March on the Boss. (Tr. 844-847). The August 1 Partners testified that the exit double front doors remained clear at all times when Morris walked up to the

[14] Though Cobb testified that Morris made bodily contact with Hudson, he also speculated that Morris could have exited between Terrill and Melendez, or that she could have slid down the bench to her left to move toward the front double doors. (Tr. 635, 650; GCX 13(c)). Ourada speculated that Morris could have moved out of the semi-circle between herself and Dowis. (Tr. 1005; GCX 13(c)). Greer and Blume also testified that Morris could have avoided the March on the Boss employees by exiting to her left on the booth instead of coming around the front of the table as there was only one person sitting to Morris' left on the entire bench – Thrasher's fiancée. (Tr. 778, 890). Blume testified that Morris could have stood up and passed by Thrasher's fiancée on the bench without touching anyone. (Tr. 890).

[15] Morris did not testify in this proceeding, and Respondent relies on an email Davis (who was not there) created after the March on the Boss to assert that the partners "blocked the front doors" when Morris walked up to the front of the store after leaving the table. (R Brief, p. 10). Respondent's assertion is wholly unsupported by any record testimony and I do not credit it.

front of the store and had the brief discussion with Davis and interaction with Tripathi. (Tr. 83-84, 237, 347, 453-454, 600-602, 733, 843-844, 967; GCX 43).

After Morris hung up with Davis, Morris walked back toward the back of the store to the table where she had been sitting during the first portion of the March on the Boss, retrieved her laptop and belongings, and then walked out of the store.

During the entire March on the Boss while Morris was in the store, each August 1 Partner testified that none of them blocked Morris from exiting the store, stood between Morris and the front double doors or blocked the doors, raised their voices, screamed at Morris, hit, pushed, pulled, shoved, or bumped Morris, blocked her exit, prevented her from leaving, used abusive language, or were violent. (Tr. 115-117, 257, 347-348, 355, 358, 457-459, 600-602, 735-736, 844-847, 967, 973-974). The video and audio recordings do not show any yelling, profanity, pushing, pulling, hitting, screaming, shoving, or bumping (except on the part of Morris when she moved past Hudson). (CGX 13, 14). The audio reflects that Morris remained in the store even after the August 1 Partners made their demands while she was seated at the table, and that she made a phone call to Davis inside the store and continued talking to the August 1 Partners near the front door for several minutes before she eventually walked out of CB2. (CGX 14).

Tripathi and Davis then spoke by speakerphone. Tripathi testified that he put Davis on speakerphone so all the August 1 Partners could hear what Davis had to say about their raise. Tripathi asked if they were going to get their raise on August 1 like everyone else. Davis reported to Tripathi that there was going to be an alternate date for their (the CB2 partners) raise and that she could not change that because it was a national issue and to call Partner Resources. Tripathi reiterated that it was illegal to withhold their raise because they were unionized. Davis asked if they were on strike, if the store was closed, and if partners had refused to let Morris leave the store. Tripathi replied No to each question and confirmed that Morris was gone. (Tr. 102-103 247, 454, 609, 733, 967-970, 1145).

Each of the partners individually called Partner Relations, from whom they received varying responses about who could initiate a raise.[16] After sharing their varied responses, the partners gathered again and Tripathi called Davis on speakerphone so everyone could hear Davis. Tripathi told Davis that some of the Partner Resources representatives told partners that District Managers could authorize their raise. Davis denied that this was accurate. (Tr. 103-104, 250-253, 341, 345-346, 455, 592-593, 610-611, 715, 733-734, 953, 971-973).

After this call, the March on the Boss ended. Partners who were scheduled to work that shift returned to work, and the remaining partners left the store. It is not disputed that no work was performed inside CB2 during the March on Boss, which lasted around one hour. (Tr. 104-105, 346, 438, 593, 612, 734, 954, 973). During the March on the Boss, any customers who came to the front

[16] Partner Resources told the August 1 Partners the following: raises were up to the District Managers (Tr. 104 – Tripathi); Partner Resources would create a ticket (Tr. 250 – Terrill); the District Manager and Store manager would have to work out the issue of raises (Tr. 362 – Hudson); the raise would go into effect on their next paycheck (Tr. 456 – Mann); it was too late to get raises from the District manager that day (Tr. 610-611 – Cobb); managers had control over their pay; the District Manager or Store Manager could give raises, but not Partner Resources (Tr. 734 – Greer); (Tr. 971-972 - Ourada).

doors or the drive through were told (by Hudson) that the partners were engaged in a work stoppage and that they could go down the street to the other Clemson Boulevard Starbucks. (Tr. 413-414).

4. Police Investigation of March on the Boss

Morris contacted Davis and then the Starbucks Threat Assessment Team almost immediately after March on the Boss. Steven Wood, Manager of the Threat Assessment Team, testified that he recommended to Morris that she file a police report.[17] (Tr. 1187).

Morris went to the Anderson County Sherrif's Office and filed criminal charges against the August 1 Partners at some point between August 1 and August 3. (Tr. 823). Anderson County Detective David Elgin (Detective Elgin) testified that Starbucks Threat Assessor Steven Wood (Wood) emailed the Sherriff's office a list of partners involved in the March on the Boss[18] (CGX 34) and emailed the Sherriff's office a link to the video of the March on the Boss (which the Union had posted to Tik Tok) and a copy of the demand letter Tripathi gave to Morris at the start of the March on the Boss (CGX 35). (Tr. 823-826, 1186-1187; GCX 34, 35).[19]

On August 4, two Anderson Sherrif's County police detective came to CB2 and interviewed Tripathi, Terrill, and Blume, all of whom were working that day. Mann also came to CB2 after Blume texted her that the police were there and were asking about the March on the Boss. The police asked the partners what happened (separately) what happened at CB2 on August 1 during the March on the Boss. Tripathi, Terrill, Blume, and Mann each testified that they relayed the events of the March on the Boss, after which the police left. Terrill also testified that he affirmatively told police that none of the partners pushed or blocked Morris, and that it was Morris who had pushed Hudson on August 1. (Tr. 105-106, 258, 460-461). None of the August 1 Partners ever heard back from the police. (Tr. 107, 258, 461).

Wood testified that he was asked to "hold off" on any internal Starbucks investigation until the police completed their investigation (Tr. 1188-1189). On August 5, Jett called or told most of the CB2 partners that the store would be closed August 6-8, and she told several of them the closure was due to short or low staffing[20]. (Tr. 260, 367-369, 461-462, 551, 995-996).

Tripathi, who was not working on August 5, testified that he called Jett late in the day as the Union partner representative to find out what was happening at the store. Tripathi testified that Jett told him there were "staffing issues," and that the store would therefore be closed August 6-8,

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[17] Starbucks argues on brief that it played no role in Morris filing a police report – "Morris…of her own volition, without consulting Starbucks, filed a police report. Starbucks did not ask or encourage her to do so." (R Brief, p. 12, ftnt. 23).

[18] Wood referred to the incident as "Block the Boss," thought the audio and video confirm that the partners referred to the event as a March on the Boss. (CGX 34). Cobb and Blume testified that they never heard the term "Block the Boss" until they were questioned about it by Starbucks counsel at trial. (Tr. 641, 883).

[19] I note that communications between Starbucks and the Anderson Sherriff's Office were subpoenaed by Counsel for the General Counsel but were not fully provided despite my order that Respondent provide the records. (Tr. 805-807).

[20] See also Starbucks' stipulation on the record to admit to paragraph 7(a) of the consolidated complaint that Jett told Britt the store would be closed from August 6-8 due to staffing issues. (Tr. 552-553; GX 1).

reopening on August 9. Tripathi sent an email to Davis (copying the Union and Starbucks attorneys) demanding bargaining over the closure of CB2. (CGX 4, 5). There is no dispute that Starbucks did not notify or bargain with the Union over the August 6-8 closure of CB2. (CGX 1).

5. August 6 Suspensions and Bans of "March on the Boss" August 1 Partners

On August 6, Partner Relations Manager James Cook[21] called each of the August 1 Partners individually and told them they were suspended indefinitely (some partners testified that Cook called it a suspension, and some partners testified that Cook called it mandatory paid time off), and also that they were not to enter CB2 or any Starbucks store until further notice. (Tr. 109-111, 261-262, 372-373, 462-463, 603-604, 737-738, 850-851, 880, 976-977). Nothing was issued in writing to the August 1 Partners reflecting their indefinite paid suspension or ban from all Starbucks stores. (Tr. 119).

It is undisputed that Cook did not ask any of the August 1 Partners any questions about the March on the Boss or tell them why they were being placed out of work. It is also undisputed that none of the Nighttime 5 had ever been suspended, been placed on paid time off, banned from Starbucks stores, or received any discipline from Starbucks prior to August 6. (Tr. 119, 123, 261-262, 380, 557, 743-744, 880, 977).

6. August 6-8 CB2 Store Closure

It is undisputed that CB2 was closed on August 6, 7, and 8.

On August 8, Detective Elgin emailed Wood to confirm that the police had interviewed several of the August 1 Partners. (Tr. 827-828; GCX 48). Detective Elgin testified that at the conclusion of the Anderson Sherriff's Department investigation, no warrants were issued (no police action was taken). (Tr. 831, 836).

7. August 9 CB2 Store Reopening

CB2 reopened on August 9 with shorter operating hours. Britt testified that CB2 store hours were 5:30 a.m. to 9:00 p.m. prior to August 6, but that after August 6, CB2 store hours changed to 6:00 a.m. to 2:00 p.m. (Tr. 553). Mobley also testified that the operating hours were shorter after reopening on August 9 than they had been prior to August 6. Mobley also testified that she was

[21] Throughout trial, Starbucks objected to testimony by the Partner Relations representative who called each of the August 1 Partners on August 6 because the partners did not know his name or full name, and that it was not established that Partner Relations was an agent that could bind Starbucks under the Act. Some of the August 1 Partners referred to this individual as a man calling from Partner Relations; some referred to him as James, and Terrill recalled that his full name was James Cook. On brief, Respondent admits that it was James Cook who made all the August 6 calls to the August 1 Partners (R Brief, p. 12). In addition, Starbucks stipulated during trial that James Cook was a supervisor under the Act. (Tr. 795-796). As such, his conversations with each of the partners is admissible. F.R.E. 801.3. Cook was not called as a witness. See also my ruling that Partner Relations is a function of Human Resources in dispensing discipline to partners, and that testimony about communications from Partner Relations is admitted. (Tr. 463 and ftnt. 10 of this Decision).

switched to being a store opener. (Tr. 681). Cobb testified that, with the shorter store hours, he worked around 15 hours per week as of August 9 as opposed to around 18 hours per week prior to August 6. (Tr. 605).

The August 1 Partners all testified that they were paid their wages while on time off or suspension, but they did miss out on the opportunity to earn tips that they would have had they not been placed on paid time off. (Tr. 119, 263, 374, 465, 605, 744-745, 859-860, 980-981). The partners testified that they missed out on between $20-40 in tips per week during the pendency of their suspensions. Id.

8. September 2 Discharge of Nighttime Cleanup Employees

Corrin Crowley from Partner Resources reached out to Tripathi and Hudon on August 18 and 19, respectively, but neither spoke with her. (Tr. 120, 395). Greer testified that a woman from Partner Resources called her in mid-August to ask about a pay discrepancy concerning her hours logged on July 24. Greer reported to Partner Resources that she had gone in the night of July 24 to do what she believed to be a clean play at what she believed to be the authorization of Tripathi and Welton. (Tr. 740-742). No one at Starbucks ever questioned Tripathi or Hudson about the night of July 24. (Tr. 123, 380).

Davis called Mobley around August 18 and asked her questions about the July 24 nighttime clean of CB2. Mobley testified that Davis asked if anyone went in for a clean play the night of July 24. Mobley explained to Davis that a few of them had volunteered to go in the night of July 24 so they could be prepared for the next morning and the week to come. Davis asked if Jett had approved the clean play, and Mobley answered that she believed Jett had approved it. (Tr. 681-682).

Davis contacted Britt on August 22 and explained to her that Starbucks was starting an investigation about the nighttime cleaning of the store on July 24. (Tr. 554-555). Davis asked Britt who gave her authorization to be there on July 24, who was there that night, and asked what she (Britt) was doing there. Britt testified that she did not tell Davis who else was cleaning the store on July 24, but that she described the cleaning tasks she did that night. Britt also testified that she explained to Davis that "someone was supposed to get in touch with Kaylea (Jett), and I assumed that they did." (Tr. 555).

On September 2, Davis called Tripathi, Britt, Mobley, and Greer separately[22] and told each one of them that Starbucks was discharging them. Davis told both Tripathi and Greer they were discharged for unauthorized entry into the store on July 24. (Tr. 121, 743). Davis told Mobley that she violated Starbucks policy by going into the store on July 24. (Tr. 683).

Starbucks mailed each of the Nighttime 5 a Notice of Separation on September 2. (Tr. 122, 379, 556, 684, 747-748; 1170-1171 (GCX 16-20). Each notice of separation stated that the Nighttime 5 were separated for "entering into a closed store without the store manager's approval or

[22] Hudson testified that he missed a call from Davis on September 2, but that he had also received texts from the other Nighttime 5 to inform them that they had been fired. Hudson never spoke to Davis, but he received his discharge letter in the mail. (Tr. 378-379, GCX 18).

knowledge and for performing unauthorized work during the evening of July 24…Starbucks policy prohibits off-duty partners from performing any work and entering the store while closed." (GCX 16-20). The discharge letters for Tripathi, Hudson, and Greer[23] also stated that they were under investigation for the August 1 incident (March on the Boss), which could constitute a separate basis for separation. Id.

9. October 3 Final Written Warnings to "March on the Boss" Employees

Wood testified that at some point after the Anderson police completed its investigation in early August, he interviewed a handful of the August 1 Partners, but he could not recall any of their names. (Tr. 1189-1190). Wood also consulted with Morris and with Davis in early August. Davis testified that she spoke with Morris after the March on the Boss and that she emailed Wood about it. (Tr. 1146-1146; RX 32). As a result of these consultations, and upon viewing the March on the Boss video (GCX 13(b)), Wood testified that he determined that the August 1 Partners had "incited fear in an individual" based on their "behavior and communication." (Tr. 1195-1196).

Wood did not communicate with all the August 1 Partners, but he called Terrill, Greer, and Blume some time in August about the March on the Boss. (Tr. 266, 738—730, 850-852). No one from Starbucks ever contacted Tripathi, Hudson, Mann, Cobb, or Ourada about the March on the Boss. Besides the one conversation with Wood, no other managers or supervisors from Starbucks (including Jett or Davis), questioned Terrill, Greer, or Blume about the March on the Boss. (Tr. 123-124, 372-373, 469-470, 613, 980).

Greer and Blume each testified that Wood was unpleasant during the short time he questioned them by phone about the March on the Boss. Greer testified that Wood was "very accusatory in his tone" (Tr. 740) and Blume testified that Wood was "intimidating with his tone" and "pushy" (Tr. 855, 904, 908) while he questioned her. Terrill, Blume, and Greer all testified that they reported to Wood that none of August 1 Partners yelled, threatened, or touched Morris during the March on the Boss; rather, that they stood there with hands by their side waiting for an answer about getting their raise.

In early October, Davis called each of the March on the Boss August 1 employees who had not been fired on September 2[24] and told them to report to CB2 on October 3. Davis and Jett met with most[25] August 1 Partners and issued each of them a Final Written Warning. (Tr. 270, 466-467, 857, 978-979, 1138-1141, 1231, GCX 22, 26, 28).[26]

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[23] This additional notification of an investigation about the August 1 events was not included in Britt's or Mobley's notice of separation because they did not participate in the August 1 March on the Boss.

[24] Tripathi, Hudson, Britt (who did not participate in the March on the Boss) , Mobley (who did not participate in the March on the Boss), and Greer had already been discharged for their actions as the Nighttime 5 as described above.

[25] Terrill testified that though he met briefly with Davis and Jett on October 3 as ordered, Davis ended the meeting when he was told he was not permitted to record the interview. Terrill was called in again on October 5 and was shown a Final Written Warning, which he refused to sign. Terrill does not dispute that it was shown to him by Davis and Jett but he testified that he never received a copy of this Final Written Warning. (Tr. 268-270; GCX 29). Cobb testified that he returned to work and met only with Jett on October 7, and that this is when he received his Final Written Warning. (Tr. 606-607; GCX 23).

[26] It is not in dispute that Starbucks issued identical final written warnings on October 3 to remaining

The Final Written Warnings issued on or shortly after October 3 to the August 1 Partners who did the March on the Boss references that the partners violated the Starbucks Workplace Violence Policy by engaging in intimidating, threatening behavior that caused the Store Manager to fear for her personal safety. The substance of each final written warning denotes:

> The Starbucks Workplace Violence Policy Statement states "Starbucks strictly prohibits violence and threats of violence in the workplace that may put a partner at risk, including violent conduct between partners, violent conduct toward partners made by vendors or customers, and any domestic violence directed toward a partner while at work." In addition, within the policy workplace violence includes "Conduct or behavior that reasonably could be interpreted as conveying an intent to engage in violence or to cause injury of harm to a person or property," as well as actions that "significantly affect the workplace, generate a concern for personal safety, or could result in damage to property, physical injury, or death," and "Disruptive, aggressive, or abusive behavior that generates anxiety or creates a climate of distrust." (CGX 22, 23, 26, 28, 29).

After the issuance of these final written warnings, Ourada received another disciplinary action and was discharged in November because she was on the final written warning from October 3, though Ourada acknowledged that she was speculating because she did not know if or how much the final written warning factored into her discharge in November. (Tr. 981-982; GCX 47). Blume testified that she had to wait to be moved up to a shift supervisor because partners cannot be promoted for six months while on a final written warning. (Tr. 859).

II. ANALYSIS

A. CREDIBILITY AND REQUEST FOR ADVERSE INFERENCES

1. Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions--indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622.

After consideration of their demeanors, established or admitted facts, the admitted evidence, and inherent probabilities, I find that the partners were all credible witnesses as they each had a detailed recollection of the most significant facts and they testified in a sincere manner without assistance from any lawyer. Each partner provided detailed information about the events they were

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August 1 Partners Davis, Fretwell, and Melendez a/k/a Cook (GCX 24, 25, and 27).

present for and participated in, from the July strike, the July 24 nighttime cleanup, the August 1 March on the Boss, the September 2 discharges, and the October 3 final written warnings.

I find the testimony of Terrill, Cobb, and Blume to be particularly credible as they were currently employed by Starbucks at the time of their testimony, thereby acting against their own economic interests. See *Shop-Rite Supermarket*, 231 NLRB 500 (1977).

Though Respondent urges me to discredit Mann because she surmised toward the end of her testimony that perhaps Morris could have jumped over the partners during the March on the Boss, I decline to discredit Mann. I found her testimony to be truthful and specific. Only when badgered on cross examination repeatedly about how Morris might have made it through the congregation of partners did Mann hyperbolically state that perhaps Morris could have jumped over the partners. (Tr. 509-518, 533-535). I find that this solitary statement does not detract from Mann's overall credibility and the fact that her testimony squared with the audio and video tapes of the March on the Boss.[27]

Welton, who was also currently employed by Starbucks at the time of his testimony, has somewhat enhanced credibility for the same reason that Terrill, Cobb, and Blume do. However, I found Welton's memory of some significant events to be poor and that he answered many questions on direct examination (he was called by Starbucks as a Respondent's witness) as simply Yes or No.

I find that Jett and Davis were both generally credible witnesses, both in their demeanor and as to the pertinent facts, though both had only limited information to offer about core events and were not intimately involved with the disciplinary decision-making. Neither Jett nor Davis was physically present for the March on the Boss, and they testified candidly that they passed off the issue to Partner Relations. Further, Jett testified that after July 25 when she processed the payroll for the Nighttime 5, she went on vacation through August 14 and had no further involvement with Starbucks' decision about the Nighttime 5. Jett was present for the events surrounding the July strike as the Store Manager, and I credit her testimony about those events.

Wood, on the other hand, provided general information, third-hand information, and less than full recollection of events. Many of his responses were a product of leading questions by Respondent's legal counsel. Also, much of Wood's testimony was not from his firsthand knowledge or involvement which I find unreliable. For example, Wood could not recall who he spoke to about the March on the Boss and testified that he only spoke briefly to a few of the partners who performed the March on the Boss, while steadfastly maintaining that Starbucks takes perceived threats of violence extremely seriously. Wood also testified that he held off on the internal investigation of the March on the Boss at the behest of the police, yet Starbucks made plans and implemented those plans to shut down CB2 by August 6 for three days, just days after the August 1 March on the Boss. When in conflict with the testimony of the partners, Wood's self-serving and conclusionary testimony is discredited.

[27] I note that Mann voluntarily resigned from Starbucks within ten (10) days of returning to work following her suspension in October. (RX 16).

2. Adverse Inferences[28]

The General Counsel asks that I draw adverse inferences against Starbucks for its failure to comply with my order that it submit certain subpoenaed documents for an in-camera inspection, which Starbucks refused to do. The General Counsel also asks that I draw an adverse inference against Starbucks because Starbucks refused to delineate when it was seeking "just and proper" testimony for an ancillary Section 10(j) proceeding in federal district court.

Though I certainly do not condone Starbucks' repeated and intentional refusal to heed my order (which I made repeatedly) to delineate when it transitioned to questioning about "just and proper evidence" with any witnesses, I decline to draw an adverse inference, as the 10(j) proceeding is not before me, and also because the General Counsel made timely objections every time Starbucks' counsel began its questioning about just and proper evidence, so it is delineated in the record despite Starbucks' counsels' refusal to do so.

As to the subpoenaed documents which were subpoenaed, ordered to be produced, and for which Starbucks failed to provide to me for an in-camera inspection, I decline to draw an adverse inference as the lack of these documents[29] did not preclude me from making an informed decision.

B. THE DISCHARGE OF THE NIGHTTIME 5

1. Applicable Law for Alleged Mixed Motive (8)(a)(3) Discipline Cases

Under Section 8(a)(3), it is an unfair labor practice to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In mixed-motive situations for cases arising for possible antiunion animus under Section 8(a)(3), the standard applied is found in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Also see *Tortillas Don Chavas*, 361 NLRB 101 (2014), and *Signature Flight Support*, 333 NLRB 1250 (2001). Under this framework, General Counsel must prove by a preponderance of the direct and/or circumstantial evidence that the employee's protected concerted activity or union activity was a substantial or motivating factor in taking the adverse employment action, i.e., that a causal relationship existed between that activity and the adverse action. This inquiry includes establishing that the employee engaged in protected concerted and/or union activity, that the employer knew or suspected it, and that the employer had animus against such activity. See *Intertape Polymer Corp*., 372 NLRB No. 133 (2023).

A discriminatory motive may be established by circumstantial evidence, which can include, among other factors: the timing of the employer's adverse action in relationship to the employee's

[28] See generally the discussion of the remaining subpoenaed items at issue, the General Counsel's call for adverse inferences, Starbucks' responses, and my orders at Tr. 792-813, 819-822; GCX 49 and RX 22.

[29] Additional communications between the Anderson police and Starbucks about the July 24 entry into the store (which resulted in no police action taken); the complete Partner Guide and Operations Manual (which I took administrative notice of on the record); a single email between Starbucks and Hudson; partner files for the comparator disciplines (which I have given the weight I believe they are due from what I can glean from the disciplines on their faces); and communications between Starbucks and a third party public relations firm (which was not raised during the hearing).

protected activity; the presence of other unfair labor practices; statements and actions showing the employer's general and specific animus; the disparate treatment of the discriminatee(s); departure from past practice; or shifting, false or exaggerated reasons offered for the action. See *Intertape Polymer Corp*., above, slip op. at 6 (2023); *Safety System, LLC*, 370 NLRB No. 90, slip op. at 1 (2021). The Board will infer an unlawful motive or animus where the employer's action is "'baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive.'" *J. S. Troup Electric*, 344 NLRB 1009 (2005) (citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995)); See also *ADS Electric Co*., 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). The evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. *Tschiggfrie Properties, Ltd*., 3868 NLRB No. 120, slip op., at 8 (2019).

If the General Counsel makes a sufficient showing of causation, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same action even absent the protected concerted activity or union activity. *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 5-8 (2019). An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996); *T & J Trucking Co*., 316 NLRB 771 (1995). If the employer's reasons are found to be pretextual--reasons that are false or not in fact relied upon--the employer fails to sustain its burden and the inquiry is terminated. See, e.g., *Lucky Cab Co*., 360 NLRB 271, 275-276 (2014) ("finding of pretext defeats an employer's attempt to meet its rebuttal burden"); *Servicios Sanitarios De Puerto Rico d/ b/a A-1 Portable Toilet Services*, 321 NLRB 800, 804 (1996); *Caruso & Ciresi, Inc*., 269 NLRB 265, 268 (1984). When pretext is found, dual motive no longer exists. *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1124 (2002).

2. Discharge of the Nighttime 5

I find that the General Counsel has established a prima facie case[30] under *Wright Line*. All the discharged partners participated in either (and in some cases every event) the June strike, the July strike, or the August 1 March on the Boss. Jett was present when Tripathi, Greer, and Hudson walked out on their scheduled shift on July 22 and announced that the employees were on strike. (See Section I.B.4 above for full detail as well as other non-scheduled partners who came into the store on July 22 to join the walkout, including Blume and Mann). As the store manager on July 22, Jett experienced the strike firsthand, and she and Davis then made the decision to close the store from July 22-24 due to lack of staffing because of the strike. As described in Section I.B.4, there is no dispute that Tripathi presented a strike letter (CGX 7) to Jett and Davis on July 22 signed by all the discharged and disciplined partners.

Similarly, Davis was admittedly aware of the March on the Boss on August 1 because Morris reported it to her in real time as it was happening and because she spoke to Tripathi by phone as it

[30] The prima facie case findings under *Wright Line* will serve for the discharge analysis of the Nighttime 5 as well as for the suspension, ban, and final written warning analysis of the August 1 March on the Boss Partners.

was happening. Davis acknowledged the March on the Boss took place on August 1, and that the partners were demanding a pay raise. The Board has long held that employee wage discussions are inherently concerted and are as such protected. *Alternative Energy Applications*, 361 NLRB 1203, 1206 ftnt. 10 (2014); *Automatic Screw Products Co.*, 306 NLRB 1071 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); See also *Trayco of S.C., Inc.*, 297 NLRB 630, 634–635 (1990), enfd. denied mem. 927 F.2d 597 (4th Cir. 1991) (contemplation of group action not required when employee discussion is about wages); *Whittaker Corp.*, 289 NLRB 933, 933 (1988) (particularly with respect to wage discussions, "object of inducing group action need not be express").

Moreover, I find there was circumstantial animus present. Animus may be inferred from purely circumstantial as well as direct evidence. Proof of discriminatory motivation (animus) can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole, including timing. See *Volvo Group North America, LLC*, 370 NLRB No. 52, slip op. at 3 (2020); *Medic One, Inc.*, 331 NLRB 464, 475 (2000). In this case, there have been at least eight Board cases finding that Starbucks engaged in unfair labor practices across the country. In addition, there was some direct animus directed at the known Union leader in CB2 – Tripathi. When Tripathi posted the "Wanted" posters with a picture of then-CEO Howard Schultz, Jett told him to take them down even though Tripathi testified that other non-work-related flyers were allowed to remain in the store. (Tr. 124-131). Moreover, when Starbucks' counsel emailed the Union about the March on the Boss on August 1, it named Tripathi (not Hudson) as the one who "blocked" Morris, accused him of "using his body to stop Morris" from exiting the store, and demanded that Tripathi cease and desist from his "abusive, belligerent, and menacing" conduct. (CGX 50). I note that there are no independent 8(a)(1) allegations present here, and no direct evidence of animus prior to the investigation into the July 24 nighttime entry into CB2. On balance, though it is not a strong case of animus as to the Nighttime 5 discharges, I find that the general Counsel overcame its initial burden and established a prima facie case of discrimination when Starbucks discharged the Nighttime 5.

However, in shifting the burden to Starbucks to show that it would have fired the Nighttime 5 even in the absence of the protected conduct, I find that Starbucks would have fired the Nighttime 5 regardless of their union or protected concerted activities up to that point and I do not find its reasons in discharging the Nighttime 5 to be pretextual.

First, neither Starbucks Partner Relations nor more localized management (either at the district level or the store level) had disciplined any of the Nighttime 5 prior to their discharge on September 2 for unauthorized entry despite their well-known and acknowledged participation in the June strike, the July strike, and the March on the Boss (but for Britt). As to the discharges, Starbucks has a legitimate justification for maintaining and enforcing its Opening and Closing Policy Safety Procedures (RX 2). Each partner admitted that he or she received and signed Starbucks Partner Guide and Operations Manual (RX 2, 3) and that they understood the rules therein. These policies include being inside and going inside a Starbucks store when it is closed.

Second, Starbucks did not take disciplinary action against any partners for engaging in several other well-known Union or protected concerted activities from the time of the Union election in June. Starbucks took no action against any of the partners when they conducted a two-day strike at CB2 starting on June 11. Starbucks took no disciplinary action again Tripathi when he hung up posters of

then-CEO Howard Schultz "Wanted" posters in the store in July. (CGX 30; Tr. 124-127). Similarly, none of the eighteen (18) partners who signed the July 22 strike letter received any discipline for participating in the July strike itself. Starbucks clearly tolerated Union activities at CB2 in the month and days preceding the unauthorized entry of the Nighttime 5 on July 24.

Third, though the General Counsel contends that Starbucks' comparable disciplines should not be credited because they were admitted into the record without context, I note that the General Counsel failed to ask District Manager Davis any questions about these notices of separation and final written warnings. I find that RX 26, 28, and 29[31] appear to be directly comparable. The shift supervisor in RX 26 was fired after permitting a non-partner into the store during a clean play, and the shift supervisor was fired for allowing a non-partner into the store afterhours. The partner in RX 28 was fired for, inter alia, allowing off duty partners to remain in the store after the close of business. The partner in RX 29 was fired after she remained in the store after it was closed and she was off duty and that she also allowed opened the locked door to the store and allowed unauthorized persons into the store while it was closed. These comparators are similar in nature to what the Nighttime 5 did, though it is also reasonable to conclude that there are likely no exact comparators because it is extremely unique that partners would go inside a store to clean it in advance after the conclusion of a strike. The circumstances of the Nighttime 5 are highly unique, so the fact that there are not several, if any, direct comparables, is not to be construed against Starbucks.

Fourth, the General Counsel's comparison of instances when management allowed off-duty partners into CB2 to the events of the Nighttime 5 is inapposite. Partners testified that this took place with some regularity. (Tr. 160-161, 222-223, 579-580, 613-616, 716-718, 788-789). In the instances the General Counsel relies on, management tacitly permitted off-duty partners to come into the store and stand behind the counter or go into the back of the store, but during each of those times, the store was open for business. Again, the General Counsel misses the mark in not drawing the distinction between an open store (when partners may stop in to make themselves a drink or check their schedules in the back of the house) versus a closed store when no one is permitted to enter the store unless a scheduled clean play is taking place. Examples of partners who were not scheduled to work but who entered CB2 during business hours does not equate with partners using a key (or relying on a shift supervisor who had a key) to enter a closed store without permission.

Fifth, and perhaps most significantly, the General Counsel conflates a clean play with a closed store. The partners and Starbucks managers all agreed when they testified about a clean play that it is a *scheduled* event. The General Counsel introduced no evidence that a clean play was scheduled for the evening of July 24. Even in the comparator discharge RX 26, Starbucks wrote in the notice of separation: "On May 4, during an **afterhours scheduled clean play shift**, a non-partner was allowed to enter the store." (RX 26, emphasis added). On July 24, CB2 was still closed because of the strike. If a clean play had been scheduled, Tripathi would not have needed to talk to the partners about the idea of cleaning the store for the next morning, and he would not have needed to solicit volunteers,

[31] As will be discussed in the analysis of the March on the Boss section below, RX 27 is a purported comparable for the March on the Boss. RX 30 and 31 are two discharges of partners from the same store on the same day in 2020 for allowing non-partners or off-duty partners behind the front counter or in the office. Though offered as violations of Starbucks Opening and Closing Policy and direct comparators to the Nighttime 5, RX 30 and 31 do not provide any detail, nor does any testimony, regarding whether the store was open or closed at the time, and I do not rely on them as comparable discipline.

because the clean play would have been scheduled and already staffed with partners to do that work on that night.

Finally, though I found every one of the Nighttime 5 to be forthright about their intentions on the evening of July 24 – to clean the store after it sat dirty for three hot summer days during the strike - the irrefutable fact remains that these partners entered CB2 when it was closed without authorization from management and they stayed inside the store for hours while it was closed without management authorization. Whatever the baristas may have believed they had permission to do was both incorrect and irrelevant. I credit the baristas who testified that they believed they had permission because the door was open when they got there on the night of July 24, or that someone else had secured permission, or that they assumed a shift supervisor was going to clear it with Jett before they entered the store. But whatever the baristas subjectively believed, none of them cleared their nighttime entry with Jett (or any other Starbucks manager) on the evening of July 24. I have no reason to discredit Jett or Welton, who testified consistently that they did not speak to each other about any cleaning of the store on the night on July 24. That leaves Tripathi, the shift supervisor with the key, who admitted in his testimony that he did not contact Jett to ask if he and a group of baristas could enter the store after the conclusion of the strike to clean it. Tripathi was not at liberty to call a clean play, and the entry into the store, however well-intentioned it was, was an unauthorized entry into CB2 on July 24.

In light of all of the above, and especially given the fact that there is no record evidence showing an unscheduled clean play taking place in any Starbucks, the partners' admissions that they did not seek management permission to go into the store on the night of July 24, and especially Tripathi's admission against interest that he knew there was not a clean play scheduled, he did not seek management approval, he sought volunteers to join him inside the store after it had been closed for three days, and he used his key to gain entry into the store at a time when no clean play was scheduled, I find that Starbucks would have discharged Tripathi, Hudson, Britt, Mobley, and Greer regardless of their Union or protected concerted activities. Thus, I recommend dismissing the Section 8(a)(3) and (1) allegation that Starbucks discharged Tripathi, Hudson, Britt, Mobley, and Greer on September 2 in violation of the Act.

C. THE SUSPENSIONS, BANS, AND FINAL WRITTEN WARNINGS TO THE MARCH ON THE BOSS AUGUST 1 PARTNERS

1. Applicable Test Under the Act

The Board has held 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).

Under the *Atlantic Steel* inquiry, the August 1 Partners forfeited the Act's protection if, in the course of the their March on the Boss activity, they 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).

2. *Atlantic Steel* is the Proper Test

As a threshold**,** I find that the *Atlantic Steel* analysis is appropriate one for determining whether Starbucks violated Section 8(a)(3) and (1) when it suspended, banned, and issued final written warnings to the August 1 Partners.[32] In reaching the conclusion that the August 1 Partners did not forfeit the Act's protection, I find that all four factors set forth in *Atlantic Steel* weigh in favor of finding that the March on the Boss by the August 1 Partners was protected activity.

The first factor, the place of the discussion, favors continued protection of the Act. The March on the Boss took place inside the CB2 store at a time when customer traffic was at its lowest and partners were the least busy. Several partners testified they chose 11:00 a.m. for the March on the Boss specifically because it was after the morning rush. Additionally, the partners testified that only four other people were in the store when the March on the Boss started: two friends of Thrasher's, Thrasher's fiancée (all of whom who specifically came to the March on the Boss to add their support), and a contractor who was at the store to fix a piece of equipment. (See Section I.C.3 above). For the few customers who came in or came by the store's drive-thru, Hudson pointed them to the other Starbucks store on Clemson Boulevard. Moreover, the March on the Boss lasted for only one hour, and there was no showing made by Starbucks that it suffered any adverse financial consequences in that one-hour period. Therefore, the first factor favors continued protection.

The second factor, the subject matter of the discussion, weighs heavily in favor of continued protection. The partners presented a written list of demands and read the letter aloud to their direct store manager. Along with old or broken equipment and employee morale, the partners were particularly advocating for a wage increase that all the partners in the nonunionized stores nationwide were receiving that day. Mann reiterated in her own speech about how demoralized she felt in not

[32] On brief, the General Counsel suggests that I apply the *Atlantic Steel* analysis, while Starbucks fails to mention *Atlantic Steel* and relies on the *Wright Line* analysis.

receiving the raise that the nonunionized partners were receiving that day. Throughout the entire March on the Boss, from the time Morris was seated until the time Morris walked out through the double glass doors at the front of the store, Tripathi and Mann asserted their demands for an August 1 wage increase to Morris and to Davis and to Partner Resources.

The third factor, the nature of the outburst, weighs in favor of the partners' continued protection. As a threshold matter under this factor, the evidence does not show that any partners at the March on the Boss engaged in any outbursts, used abusive or profane language, or engaged in any physically threatening behavior. The video evidence shows that the partners stood still during the first part of the March on the Boss with their hands down at their sides, crossed behind them, or down in front of their laps. Except for Tripathi and Mann, none of the partners spoke during the March on the Boss.

The crux of this factor is whether the partners' semi-circle around Morris and their refusal to move when Morris came around the table from her seated position on the bench and the fact that they followed her near the front doors afterward constitutes an outburst such that it removes their actions from the protection of the Act. I find that the partners' semi-circle position around where Morris was seated and their momentary refusal to move out of her way to make their point did not remove them from the protection of the Act.

I disagree with Starbucks that the partners blocked Morris from leaving, and this disagreement is borne out by the fact that she did in fact leave the store shortly after the August 1 partners made their demands. The partners were certainly standing close to one another, and it may have been difficult for Morris to exit around the full semi-circle of partners without making contact, but it was Morris who instigated the contact (with Hudson). Morris could have chosen to exit to her left and slide down the bench past only one person (who was not taking part in the March on the Boss), but for reasons we will never know, she chose not to take that path. While she passed by, no partner cursed, made gestures, or otherwise threatened her. The fact that Mann exclaimed "we will not move one inch until we get our raise" cannot fairly be characterized as threatening or intimidating. In the heat of the moment, many employees make statements much more stringent or threatening or profane that the Board has found to remain protected. Moreover, despite Mann's proclamation, the partners *did* move an inch because Morris walked out of the store. Threatening statements may weigh against protection, but the Board uses an objective standard, rather than a subjective standard, to evaluate such statements. *Plaza Auto Center*, 360 NLRB 972 (2014).

Moreover, although the employees momentarily stood in the semi-circle around Morris, the record does not support a finding that the August 1 Partners blocked the exit. The record reflects that the partners trailed after Morris after she left the booth area and waited behind her (away from the front doors) or in an adjacent customer seating area to hear what Davis was telling Morris about their raise. When Morris asked if she could leave, Tripathi did not hesitate and told her "Yes." This directly contradicts Starbucks' attorneys' letter to the Union on August 1 that Tripathi "blocked" Morris, accused Tripathi of "using his body to stop Morris" from exiting the store, and demanded that Tripathi cease and desist from his "abusive, belligerent, and menacing" conduct. (CGX 50).

Further, whether Morris felt the employees subjectively incited fear by their actions is not determinative of the inquiry as to the nature of the outburst. As stated, the test is an objective one.

Here, Morris' own actions bely Starbucks claim that the partners objectively incited fear in Morris. After she moved past Hudson and around the semi-circle, she did not walk directly out of the doors at the front of the store. Instead, she chose to remain in the store, standing about five feet away from the August 1 Partners, and she continued to speak with them even though she had a direct and unobstructed path out the front doors. And then, Morris walked right back to the same table where she allegedly felt obstructed and intimidated, and in the presence of all the August 1 Partners, returning back to the same booth to gather her belongings before walking past the August 1 Partners again to leave through the double front glass doors. Morris did not gather her belongings and go out the side door, which was closest to the table with her laptop. I find that Morris' own actions do not meet the objective criteria of a creation of fear that would legitimize the issuance of a group final written warning for a violation of workplace violence policy or remove the August 1 Partners from the protection of the Act. Moreover, the police (certainly an objective arbiter of the incident) quickly determined that the charges Morris brought, at Wood's suggestion, deserved no action.

The Board has found employees' temper, inflammatory words, and inflammatory actions much more severe than the actions here, to have retained the protection of the Act. See *Plaza Auto Center*, 360 NLRB at 976 (finding employee's conduct was not objectively threatening where he stood up and pushed a chair aside while telling the employer he would regret firing another employee, but his conduct was not accompanied by threatening gestures, and the employee had no history of violent or threatening behavior); *Kiewit Power Constructors*, 355 NLRB 708, 710 (2010) (telling a supervisor that things could "get ugly" and that he should "bring his boxing gloves" did not constitute threats of physical harm, but only expressed resistance to a policy employees thought was unfair and unsafe), enfd. 652 F.3d 22 (D.C. Cir. 2011); *NLRB v. Southwestern Bell Telephone Co.*, 694 F.2d 974, 976-977 (5th Cir. 1982) (steward's repeated statements that he would see supervisor "fry" did not cause him to lose the protection of the Act)).

Finally, I note that the Act "imposes no obligation on employees to be civil in exercising their statutory rights." *Lion Elastomers*, 372 NLRB No. 83, slip op. at 11, affirming 369 NLRB No. 88, slip op. at 1 fn. 3 & 18 (2020) (employee did not forfeit the protection of the Act by, among other things, speaking persistently and argumentatively and telling a manager that he was not doing his job) (citing *Consumers Power Co.*, 282 NLRB 130, 132 (1986) ("The protections Sec[.] 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.")). See also *Goya Foods, Inc.*, 356 NLRB 476, 478 (2011) (observing that "the Board distinguishes between true insubordination and behavior that is only 'disrespectful, rude, and defiant"') (quoting *Severance Tool Industries, Inc.*, 301 NLRB 1166, 1170 (1990), enfd. mem. 953 F.2d 1384 (6th Cir. 1992)).

At most, the August 1 Partners were defiant during the March on the Boss, but Board law analyzing outbursts militates strongly that the August 1 Partners were not even close to removing themselves from the protections of the Act by engaging in the March on the Boss. Therefore, under the third factor, I do not objectively find that the nature of the outburst removes the August 1 Partners from the protection of the Act.

The fourth factor, whether the activities were prompted by unfair labor practices, also militates in favor of continued protection of the Act. The employees were doing the March on the

Boss in large part because they were not getting a raise that all the nonunionized partners were getting that day, and Tripathi announced at the March on the Boss that the failure to grant a raise to the unionized CB2 partners was an unfair labor practice.[33] The letter Tripathi delivered to Davis and Jett and Morris read in part "Beginning today, July 22, the I-85 and Clemson Blvd. [CB2] store partners will go on strike over the ULP of unilateral changes in our store…". (GCX 7).

I find that, on balance, consideration of the Atlantic Steel factors weighs decisively in favor of finding that by performing the March on the Boss, the August 1 Partners did not forfeit the Act's protection.

3. Partners Also Prevail Under *Wright Line*

Assuming, arguendo, that the Board determines that the *Wright Line* analysis should be applied for the March on the Boss, I would reach the same result.

The General Counsel establishes a prima facie case, largely as discussed above as to the Nighttime 5. In addition, the timing of the suspensions and bans of the August 1 Partners within days of the March on the Boss further supports Starbucks' animus and unlawful motive regarding the March on the Boss. See *Kag-West, LLC*, 362 NLRB 981 (2015) (close timing between an employer's knowledge of an employee's protected concerted activities provides independent evidence of unlawful motive); *Masland Industries*, 311 NLRB 184, 197 (1993) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action.").

Starbucks' reaction to the March on the Boss shows that the suspensions and bans and final written warnings were pretextual. The one comparator discipline proffered by Starbucks, RX 27, references a barista at CB2 who cursed into her headset when a customer requested to change the size of her drink. She blurted into her headset "No bitch, you can get the size you ordered." The barista was placed on a final written warning in 2021. There is no evidence if this barista had received any previous discipline (or not) for prior offenses. And while Starbucks argues on brief that this type of language is unacceptable and unprotected, I note that the March on the Boss is distinguishable in that none of the partners used profanity. The Board generally finds that even a few profane words are acceptable when employees are engaged in protected concerted activity, but that a "torrent of unusually offensive insults" is not. See *Starbucks Corporation*, 374 NLRB No. 8 (2024) (finding that profane insults directed at coworkers weighs in favor of finding that protection was forfeited). 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").

Moreover, unlike the July nighttime entry into the store (where it is more a matter of whether the entry was authorized or not), the August 1 March on the Boss turns much more on details of where everyone stood, what they said, and how they acted. Starbucks did but a cursory investigation of the March on the Boss, referring to it as Block the Boss and concluding that the August 1 Partners had violated the Workplace Violence Policy without speaking to Tripathi, who led the March on the Boss and who was the most vocal (of two partners) partner during the March on the Boss, or with Hudson,

[33] The subject of the August 1 raise and whether it was illegal to fail to grant to raise to only the nonunionized stores is not part of this matter.

who was the only partner who had any physical contact with Morris. Wood, who made the decision as the Manager of the Behavioral Threat Assessment team, admitted that he did not know who he talked to. If he made notes of his discussions with any of the partners, they were not referenced during trial.

Starbucks argues that the August 1 Partners violated not only the Workplace Violence Policy, but also its Mission Statement and Third Place Policy that every Starbucks store is to be a welcoming place by engaging in the March on the Boss, and that this is why Starbucks suspended the August 1 partners, banned them from its stores, and issued them each a final written warning on or about October 3.

Wood, however, admitted that he did not consider the Third Place Policy in making his determination to suspend, ban, and have final written warnings issued to the August 1 Partners. (Tr. 1202). Furthermore, none of Starbucks' witnesses testified as to why the August 1 Partners were banned from all Starbucks stores from August 6 through October 3. Wood performed at best a cursory investigation of the March on the Boss and instructed Davis and Jett to issue suspensions and bans. Animus can be inferred by the cursory investigation as well as Starbucks' failure to allow the August 1 Partners to submit a written statement to Behavioral Threat Assessment (or Partner Relations or local management) for review before deciding what discipline to recommend. It is long established that an employer's failure to give employees an opportunity to defend themselves may support a finding of pretext. See, e.g., *Diamond Electric Mfg. Corp.*, 346 NLRB 857 (2006), *LaGloria Oil & Gas Co*., 337 NLRB 1120 (1124) (2002), enfd. 71 Fed.Appx. 441 (5th Cir. 2003).

Finally, the record evidence clearly shows that Starbucks notified the partners of the impending shutdown and issued the suspensions and bans very soon after they did the August 1 March on the Boss (notification of shutdown was August 5, suspensions were issued August 6). Jett told or called every partner on August 5 and informed everyone of the plan to close the store from August 6-8 due to "staffing issues."

A respondent "cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *Consolidated Bus Transit,* 350 NLRB 1064, 1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). I find that Starbucks has failed to persuade by any yardstick, let alone a preponderance of the evidence, that it would have taken the same action but for the underlying Union and protected concerted nature of the March on the Boss on August 1.

I find that the General Counsel has met her burden to prove that Starbucks suspended the August 1 Partners on August 6, banned them from all Starbucks stores from August 6 through October 3, and then issued them final written warnings on or about October 3 based on their Union and protected concerted activities in violation of Section 8(a)(3) and (1).

D. CLOSING CB2 AUGUST 6-8 AND REOPENING WITH CHANGED HOURS WITHOUT NOTIFICATION OR BARGAINING WITH THE UNION

1. 8(a)(3)

The General Counsel alleges, and I find, that the CB2 store closure from August 6-8 was for discriminatory reasons. Starbucks admits that it closed CB2 from August 6-8 because of staffing issues, which flowed directly from the suspension of the August 1 Partners. As of August 6, the August 1 Partners comprised more than half of the CB2 workforce, so the store was unable to operate without the August 1 Partners. Moreover, the General Counsel presented record evidence that the CB2 store hours were 5:30 a.m. to 9:00 p.m. prior to August 6, but that the new store hours starting on August 9 were 6:00 a.m. to 2:00 p.m. and that this new schedule lasted about two months. (Tr. 553-554, 681, 1219-1220[34]). Having already concluded that the August 6 suspensions were illegal for the reasons delineated above, the subsequent store closure from August 6-8 and subsequent reduced store hours starting August 9 ipso facto were also illegal. If not for the illegal suspensions, there would not have been staffing shortages, meaning that the store would not have been closed from August 6-8 and the store hours would not have been temporarily reduced upon re-opening on August 9.

I find that the General Counsel has met her burden to prove that Starbucks closed the CB2 store from August 6-8 and then re-opened with reduced hours for two months based on the partners Union and protected concerted activities in violation of 8(a)(3) and (1).[35]

2. 8(a)(5)

The General Counsel alleges, and I find, that the store closing and changed hours also violates Section 8(a)(5).

Closing the CB2 store from August 6-8 and then changing the operating hours of the store without notice and giving the Union an opportunity to bargain violated Section 8(a)(5) of the Act. See *Eugene Iovine, Inc.,* 328 NLRB 294 (1999). The record does not establish that the temporary store closure and reduction of operating hours were made in the past with such regularity and frequency to establish a past practice. Thus, Respondent was required to give the Union advance notice and an opportunity to bargain over the reduction of store hours and temporary closure. These changes in store hours were not made with enough regularity and frequency that they could have been expected by employees, *Mike-Sells Potato Chip Co.,* 368 NLRB No. 145 (2019). Respondent did not introduce evidence that established that such changes were automatic pursuant to a company procedure or algorithm. To the contrary, the record establishes that such changes after August 6 were made at Jett's discretion. (Tr. 1220-1221).

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[34] To the extent that Jett testified that the hours at CB2 were reduced around June or July because the shift supervisors asked her to reduce store hours so more partners could be working for shorter times rather than stretching fewer partners for longer times (Tr. 1220-1221), I discredit this testimony as internally inconsistent. In addition, Welton, who Jett testified was among the shift supervisors who asked for this arrangement of having shorter store hours, did not testify about this topic.

[35] I note that Starbucks did not address this 8(a)(3) issue at all on Brief, so any argument it may have made in response to this allegation is waived.

I find that the General Counsel has met her burden to prove that Starbucks closed the CB2 store and then re-opened with reduced hours for two months without affording the Union with notice or an opportunity to bargain in violation of 8(a)(5) and (1).[36]

E. DISCIPLINARY ACTION TAKEN WITHOUT NOTIFICATION OR BARGAINING WITH THE UNION

The parties agree that Starbucks failed to notify or bargain with the Union over the discharges of the Nighttime 5 or over the final written warnings issued to the August 1 Partners. The General Counsel seeks to overrule the Board's decision in *Care One at New Milford*, 369 NLRB No. 109 (2020) and asserts that Starbucks should have had an obligation to notify and bargain with the duly elected Union over discretionary discipline issued to the partners in September and October.

The General Counsel's arguments are for the Board to address, as administrative law judges are required to apply existing Board precedent. Accordingly, consistent with *Care One*, I recommend dismissing the alleged 8(a)(5) failure to bargain over the September 2 discharges and the October 3 final written warnings.

F. STARBUCKS AFFIRMATIVE DEFENSES[37]

Starbucks contends that the complaint should be dismissed in its entirety because Board members and administrative law judges are unconstitutionally insulated from removal. However, the Board has rejected such defenses. See *Commonwealth Flats Dev. Corp. d/b/a/ Seaport Hotel Boston*, 373 NLRB No. 142 (2024). Following the Board's approach, I decline Starbucks' invitation to revisit that precedent here and deny Starbucks' challenge to the constitutionality of the agency's structure.

As to Starbucks remaining constitutional and due process defenses (which Starbucks does not address on Brief), I find that these are matters for the federal courts to decide. Further, since ruling on the constitutional questions here would entail (at least in part) the operation of the agency, and such a step would be in tension with my duty to faithfully administer the Act, I deny Respondent's constitutional challenges with the understanding that a federal court may address these issues at a future time. See *National Association of Broadcast Employees & Technicians – the Broadcasting & Cable Television Workers Sector of the CWA, ALF-CIO, Local 51 (NABET)*, 370 NLRB No. 114, slip op. at 1-2 (2021) (setting forth similar reasoning in declining to rule on a challenge to the constitutionality of the President's removal of the General Counsel and the appointment of an Acting General Counsel).

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[36] I note that Starbucks did not address this 8(a)(5) issue at all on Brief, so any argument it may have made in response to this allegation is waived.

[37] I note that in its Answer, Starbucks asserts twenty-eight (28) affirmative defenses, the majority of which make constitutional or due process arguments, and one of which is based on an argument for recusal of certain Board members. To the extent that Respondent Starbucks asserted other affirmative defenses, it produced no testimony or argument on brief to support those affirmative defenses, and they are thus deemed waived. See Affirmative defenses 4, 15, and 23 (GCX 1(y)) alleging Section 10(b) of the Act and unclean hands, estoppel, and laches.

III. CONCLUSIONS OF LAW

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

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

3. At all material times, the following employees of Respondent (the Unit) have constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time hourly Baristas and Shift Supervisors employed at its facility located at 4686 Clemson Blvd., Anderson, SC 29621; but excluding all Store Managers, office clerical employees, professional employees, guards, and supervisors as defined by the Act.

4. At all material times, the Union by virtue of Section 9(a) of the Act, has been and is the exclusive collective-bargaining representative of the Unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. Respondent violated Section 8(a)(3) and (1) of the Act on August 6, 2022, when it suspended and banned from its stores, Skylar Blume, Paul Cobb, Virgil Dowis, Emma Fretwell, Rhi Greer, Jon Hudson, Natalie Mann, Ashley Melendez, Mya Ourada, Braden Terrill, and Aneil Tripathi, because they supported the Union and engaged in protected concerted activities.

6. Respondent violated Section 8(a)(3) and (1) of the Act on August 6 through 8, 2022, when it closed its Anderson store.

7. Respondent violated Section 8(a)(3) and (1) of the Act on August 9, 2022, when it changed its Anderson store hours of operation from 5:30 a.m. to 9:00 p.m., to 6:00 a.m. to 2:00 p.m.

8. Respondent violated Section 8(a)(3) and (1) of the Act on about October 3, 2022, when it issued final written warnings to Skylar Blume, Paul Cobb, Virgil Dowis, Emma Fretwell, Natalie Mann, Ashley Melendez, Mya Ourada, and Braden Terrill, because they supported the Union and engaged in protected concerted activities.

9. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally closing the store on August 6 through 8, 2022, without first notifying the Union and providing it with an opportunity to bargain.

10. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its Anderson store hours of operation from 5:30 a.m. to 9:00 p.m., to 6:00 a.m. to 2:00

p.m., without first notifying the Union and providing it with an opportunity to bargain.

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

12. Respondent has not violated the Act in any other manner as alleged in the complaint.

IV. REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(3), (5), and (1) of the Act, 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[38]

ORDER[39]

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

1. Cease and desist from

   a. Disciplining, suspending, or otherwise discriminating against employees for engaging in activities in support of Workers United, Southern Regional Joint Board or any other labor union.

   b. Failing and refusing to bargain with the Union in advance of making changes to employees' terms and conditions of employment.

   c. 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. Bargain with the Union, the representative of employees.

   b. Within 14 days from the date of this Order, remove from its files any reference to the unlawful final written warning of Skylar Blume, Paul Cobb, Virgil Dowis, Emma Fretwell, Natalie Mann, Ashley Melendez, Mya Ourada, and Braden Terrill, and notify them within 3 days thereafter in writing that this has been done and that

[38] 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.

[39] I decline to order a Broad Explanation of Rights to be disseminated and I decline to order that the Notice be posted and read on the Partner Hub as General Counsel has not proved that the violations are widespread or severe enough to warrant such broad or extended relief.

the final written warnings will not be used against them in any way.

c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and bans from Respondent's stores of Skylar Blume, Paul Cobb, Virgil Dowis, Emma Fretwell, Rhi Greer, Jon Hudson, Natalie Mann, Ashley Melendez, Mya Ourada, and Braden Terrill, and Aneil Tripathi, and notify them within 3 days thereafter in writing that this has been done and that the final written warnings will not be used against them in any way.

d. Within 14 days after service by the Region, post at its Anderson, South Carolina store (located at 4686 Clemson Boulevard, Anderson, South Carolina 29621) copies of the attached Notice. Copies of the Notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted by 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, in manner that can be accessed by Respondent's employees nationwide. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at its Anderson, South Carolina store (located at 4686 Clemson Boulevard, Anderson, South Carolina 29621) at any time since August 6, 2022.

e. Notify the Regional Director in writing within 21 days from the date of this Order what steps 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. March 27, 2025

Lisa Friedheim-Weis

Lisa Friedheim-Weis
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

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

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

The Workers United, Southern Regional Joint Board (the Union) is the exclusive collective-bargaining representative of the employees in the bargaining unit set forth below:

> All full-time and regular part-time hourly baristas and shift supervisors employed at 4686 Clemson Boulevard in Anderson, South Carolina, excluding all store managers, office clerical employees, professional employees, guards, and supervisors as defined by the Act.

YOU HAVE THE RIGHT to freely bring pay, scheduling, staffing, equipment, and other issues and complaints to us on behalf of yourself and other employees, and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT discipline, suspend, or ban you from stores, because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees.

WE WILL NOT discipline, suspend, or ban you from stores, because of your union activities.

WE WILL NOT fail or refuse to notify and bargain with the Union over any store closings or changes in store hours.

WE WILL remove the suspensions and bans issued to Skylar Blume, Natalie Mann, Virgil Dowis, Paul Cobb, Emma Fretwell, Mya Ourada, Aneil Tripathi, Jon Hudson, Braden Terrill, Ashley Melendez, and Rhi Greer. **WE WILL** notify each of them in writing that this has been done and that the suspensions and final written warnings will not be used against them in any way.

WE WILL remove the final written warnings issued to Skylar Blume, Natalie Mann, Virgil Dowis, Paul Cobb, Emma Fretwell, Mya Ourada, Jon Hudson, Braden Terrill, and Ashley Melendez. **WE WILL** notify each of them in writing that this has been done and that the suspensions and final written warnings will not be used against them in any way.

WE WILL pay Skylar Blume, Natalie Mann, Virgil Dowis, Paul Cobb, Emma Fretwell, Mya Ourada, Aneil Tripathi, Jon Hudson, Braden Terrill, Ashley Melendez, and Rhi Greer for any wages and other benefits they lost because we suspended them.

WE WILL notify and bargain with the Union over any store closings or changes in store hours.

STARBUCKS CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

Harris Tower, 233 Peachtree Street, N.E., Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-300921 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (470) 343-7498.