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

RCL MECHANICAL, INC.

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, PLUMBERS AND GASFITTERS LOCAL 12, AFL–CIO

Cases 01–CA–336276
01–CA–336416
01–CA–336499
01–CA–336650
01–CA–337402

RCL MECHANICAL, INC. (Employer)

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, PLUMBERS AND GASFITTERS LOCAL 12, AFL–CIO (Petitioner)

Case 01–RC–333862

Daniel Fein and *Colleen Fleming, Esqs.*,
for the General Counsel.
Carol Chandler and *Katherine Clark, Esqs.*,
for the Respondent/Employer.
Michael Gillman, Esq.,
for the Charging Party/Petitioner.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The General Counsel contends that, in 2024,[1] RCL Mechanical, Inc. (Respondent) responded to a union organizing campaign by, during the critical period between the filing of the representation petition and the election: making statements and engaging in conduct that had a reasonable tendency to coerce employees in the exercise of their Section 7 rights; unlawfully disciplining one employee; and unlawfully reassigning employees who supported the United Association of Journeymen and Apprentices of the Pipe Fitting Industry of the United States and Canada, Plumbers and Gasfitters Local 12, AFL-CIO (Union) to job sites to keep them away from employees who were undecided about how to vote in the election. The General Counsel also contends that Respondent unlawfully

[1] All dates are in 2024, unless otherwise indicated.

failed and refused to recognize and bargain with the Union since about January 19, and that after the election (in which a majority of employees voted against unionizing), Respondent unlawfully disciplined and/or terminated five employees. As explained below, I have found that Respondent made several coercive statements and took unlawful adverse employment action against apprentices Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos. I have also found that the violations that Respondent committed warrant setting aside the results of the election, dismissing the representation petition, and issuing a bargaining order.

STATEMENT OF THE CASE

This case was tried in person on October 21–24 and December 3–5, 2024, in Boston, Massachusetts. The Union filed the unfair labor practice charges in this case on the following dates:

Case	Filing Date	Amendment Date(s)
1–CA–336276	February 16	
1–CA–336416	February 22	
1–CA–336499	February 23	
1–CA–336650	February 27	
1–CA–337402	March 7	

On July 25, 2024, the General Counsel issued an amended consolidated complaint.[2] In the amended consolidated complaint, as further amended during trial,[3] the General Counsel alleged that Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) On about January 22, via telephone calls, interrogating its employees about their union membership, activities, and sympathies by soliciting their response to employee Michael Griffin's statements made at a January 19 meeting;

(b) On about January 22, interrogating employees regarding their support for the Union, including by soliciting their response to employee Michael Griffin's statements made at a January 19 meeting;

(c) On about January 23, threatening employees with unspecified reprisals by endorsing a video posted to Instagram which implied that employees' organizing activities would impair the employees' and Respondent's ability to secure work in the industry and would bring about unspecified reprisals from contractors in Respondent's network;

(d) On about January 23, threatening employees with unspecified reprisals and discharge by endorsing a video posted to Instagram which included disparagement of the Union's

[2] The original complaint was filed on June 11.

[3] During trial proceedings on December 3, the General Counsel withdrew par. 7 of the amended consolidated complaint. (Tr. 460–461.)

supporters and their Section 7 activity, and demanded that they leave their jobs at Respondent rather than exercise their Section 7 rights;

(e) On about January 23, in a comment on a video posted to Instagram, threatening to discharge its employees and telling employees that their support for the Union was incompatible with their continued employment at Respondent by commenting "in my opinion, your word is everything! Your loyalty is everything!";

(f) On two occasions on about January 24, interrogating employees about their union membership, activities, and sympathies, by soliciting their response to employee Michael Griffin's statements made at a January 19 meeting;

(g) On about January 24, threatening employees with loss of benefits by stating that if the Union were to be voted in, employees would not get a raise for up to 2 years;

(h) On about January 24, promising employees benefits relating to preferential jobsite assignments and/or threatening to revoke such benefits by informing employees that Respondent likes to keep employees on jobsites close to where they live, and that they should remember that Respondent is responsible for job assignments when employees vote in the Union election;

(i) On about January 26, interrogating employees regarding their support for the Union by soliciting their response to employee Michael Griffin's statements made during a January 19 meeting;

(j) On about January 26, soliciting employee complaints and grievances and promising increased benefits and improved terms and conditions of employment by telling employees that they could go into Respondent's owners' offices and talk to them anytime;

(k) On about January 29, creating an impression among employees that Respondent had their union activities under surveillance, including by telling employees that they probably heard a lot of things at union meetings;

(l) On about January 29, promising to help employees expand their Instagram following for plumbing-related content, and thereby promising employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity;

(m) In about the first week of February, by telephone, creating an impression among employees that their union activities were under surveillance by Respondent, including by telling employees that Respondent was assigning workers so as to keep union supporters away from non-union supporters;

(n) On about February 1, soliciting employee complaints and grievances and thereby promising increased benefits and improved terms and conditions of employment;

(o) On about February 1, threatening employees with a 2–year wage freeze if they selected the Union as their bargaining representative;

(p) On about February 1, threatening employees with layoffs if they selected the Union as their bargaining representative;

(q) On about February 2, threatening employees with a 2–year wage freeze if they selected the Union as their bargaining representative;

(r) On about February 2, telling employees that certain employees were strong union supporters and that management was reassigning employees to different jobsites based on their union support, and thereby creating an impression among employees that Respondent had employees' union activities under surveillance;

(s) On about February 6, by text message and telephone, promising employees the possibility of work as an independent contractor for an unrelated company (owned by one of Respondent's owners) if they rejected the Union as their bargaining representative;

(t) On about February 7, interrogating employees about their union membership, activities, and sympathies by asking about their Facebook posts;

(u) On about February 7, by telephone, telling employees that Respondent could assign them work closer to home, and thereby promising them preferred jobsite assignments if they rejected the Union as their bargaining representative and/or threatening to revoke their preferred jobsite assignments if they selected the Union as their bargaining representative;

(v) On about February 7, creating an impression among employees that Respondent had their union activities under surveillance by telling a union representative, in the presence of employees, after employees participated in a Union-organized breakfast meeting, that he did not need any breakfast;

(w) On about February 7, threatening employees with layoffs if they selected the Union as their bargaining representative; and

(x) On about February 7, misrepresenting the Union's collective-bargaining agreement with other employers by telling employees that Respondent would not accept an agreement that is lower or different than the "master contract," and thereby informing employees that it would be futile for them to select the Union as their bargaining representative.

The General Counsel also alleged that Respondent violated Section 8(a)(3), (4), and (1) by taking the following actions regarding employees because employees assisted the Union and engaged in concerted activities (and to discourage employees from engaging in those activities) and/or because employees cooperated in the filing and investigation of the unfair labor practice charges that the Union filed against Respondent (and to discourage employees from engaging in those activities):

(a) Since about January 20, reassigning employees, including Michael Griffin, Bradford Allen, Georgios Tsimopoulos, and James Manduca, to different job sites;[4]

(b) On about January 31, issuing a written warning to Bradford Allen;

(c) On about February 22, terminating Bradford Allen;

(d) On about February 23, terminating Shane Froio;

(e) On about February 26, laying off James Manduca;

(f) On about February 27, issuing a written warning to James Manduca; and

(g) On about March 6, 2024, terminating James Manduca, Jacob Tomasik, and Georgios Tsimopoulos.

Respondent filed timely answers denying the alleged violations in the amended consolidated complaint.

In an order issued on June 12, 2024, the Regional Director for Region 1 consolidated the "CA" cases noted above with Case 01–RC–333862 for a hearing. In Case 01–RC–333862, the Union (Petitioner) filed 17 objections to allege that Respondent (Employer) engaged in a range of conduct that affected the results of a representation election conducted on February 9 to determine whether employees in the following appropriate bargaining unit wished to be represented by the Union for purposes of collective-bargaining:

> All full-time and regular part-time plumbers, HVAC technicians and apprentices working in the [Employer's] Commercial department, HVAC service and install experts, plumbing install and service experts, HVAC apprentices, and plumbing apprentices employed by the Employer at its 167R South St. West, Unit 3, Raynham, MA location; but excluding all office clerical employees, warehouse employees, warehouse managers, comfort advisors, customer service representatives, co-op students, success managers, managers, guards, and professional employees and supervisors as defined in the Act.

The Regional Director determined that the CA cases and RC case should be consolidated for a hearing because the issues raised in Petitioner's objections appear to be the same as, or are closely related to, the unfair labor practice allegations in the CA cases described above.

On the entire record,[5] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Union/Petitioner, and Respondent/Employer, I make the following

[4] This allegation is only alleged to violate Sec. 8(a)(3) and (1) of the Act.

[5] The transcript and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: Throughout: the case caption should include Case 01-RC-333862; p. 11, l. 8: "consulting" should be "consultant"; p. 11, l. 18: "main" should be "union"; p. 47, l. 8: "Matthew Messinger" should be "Michaael Griffin"; p. 62, l. 6: "Ty" should be "K---"; p. 73, l. 1: "card" should be

FINDINGS OF FACT[6]

I. JURISDICTION

Respondent, a corporation with an office and place of business in Raynham, Massachusetts, has been engaged in the business of providing commercial and residential plumbing and heating services. On an annual basis, Respondent purchases and receives goods at its facility that are valued in excess of $50,000 and come directly from points outside the Commonwealth of Massachusetts. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

For several years, Respondent has provided commercial and residential plumbing and heating services as a contractor at job sites in Massachusetts and Rhode Island. (Tr. 16, 671, 673.) The following individuals served as supervisors for Respondent during the relevant time period as defined under the Act: owner and president Richard Leon; owner and chief executive officer Marc Mason; and controller Kayla Leon.[7] (GC Exh. 1(v).)

For its commercial job sites, Respondent generally relies on plumbers and apprentices[8] to perform the assigned work, which may involve tasks such as installing plumbing systems, gas

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"car"; p. 85, l. 10: "received" should be "removed"; p. 111, l. 22: "3/07" should be "3:07"; p. 111, l. 25: "harness" should be "apprentice"; pp. 289-291 (throughout): "bin" should be "bend"; p. 390, l. 1: "mean" should be "need"; p. 419, l. 19: "Stephanopoulos" should be "Tsimopoulos"; p. 466, l. 10: "K" should be "kayyy"; p. 504, l. 17: "our sales" should be "RCL's"; p. 558, l. 23: "Cole" should be "Colon"; p. 643, l. 17: "an active" should be "inactive"; p. 722, l. 7: "fact" should be "effect"; and p. 755, l. 7: "I" should be "it". General Counsel exhibit 72 should be in a separate, rejected exhibits file. (See Tr. 322.) Respondent exhibit 3 should only be a one page document since the pages after the first one were not admitted into the evidentiary record. (See Tr. 339.)

[6] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

[7] The General Counsel alleges that additional employees were Respondent's supervisors and/or agents under the Act. (See, e.g., GC Exh. 1(p) (par. 5) (alleging that general foreman Matthew Ryan, project manager Devon Heon, consultant James Allen, and plumber Jadon Colon were also Respondent's supervisors and/or agents under the Act).) I have addressed whether consultant Allen was Respondent's agent under the Act in Findings of Fact (FOF) section II(D)(1), infra, and I address whether Ryan and Heon were Respondent's supervisors and/or agents in Discussion and Analysis Section B, infra. The General Counsel and Union have apparently abandoned their position that Colon was Respondent's supervisor/agent under the Act (since neither party argued the point in its posttrial brief), and thus I do not address that issue herein.

[8] Plumbers are also referred to as "journeyman plumbers," and apprentices are also referred to as "apprentice plumbers." For ease of reference, I will use the term "plumber" when referring to a

systems, fixtures, and appliances. Apprentices assist plumbers in their work (e.g., by cutting pipe, getting supplies), but apprentices with more experience may take on additional responsibilities and/or work independently with occasional oversight. (T. 120–121, 186, 210, 380.)

At commercial job sites with multiple plumbers and/or apprentices, Respondent will often have a plumber (and occasionally an apprentice) serve as foreman at the site. Employees who serve as foreman perform the following tasks in addition to the installation work: providing instructions to other employees on the job; reviewing changes to the project; ordering and returning supplies; communicating with the general contractor; attending monthly foremen meetings; communicating with Respondent's office about the status of the job and projected staffing needs; and verbally disciplining employees (and notifying higher-ups if a situation may warrant something beyond verbal discipline). Respondent generally provides a company van to the foreman along with a company gas card to cover fuel costs. (Tr. 48–49, 236, 260–261, 284–285, 295–297, 340, 673–675, 850.)

B. January 2024: Union Organizing Campaign Begins

On about January 9, apprentice Bradford Allen met with union organizer Matthew Messinger to discuss the possibility of having the Union represent Respondent's employees. Allen then signed a union authorization card for the Union to represent him in collective bargaining negotiations with Respondent in all matters relating to terms and conditions of employment. In similar meetings with Respondent's employees over the next several days, several additional employees signed authorization cards. Allen and other employees facilitated the effort to gain support for the Union by letting other apprentices and plumbers know that some employees were interested in unionizing. Allen also started a WhatsApp group chat (called "Brothers") for employees to discuss the effort to unionize. (Tr. 17–33, 49–50, 96–98, 121–128, 198–199, 210–211, 236–237, 261–263, 351–352, 381–382; GC Exhs. 3, 111.)

By about January 17, Messinger determined that a majority of employees in the proposed bargaining unit had signed authorization cards. Accordingly, Messinger called Respondent's owner Mason to advise that the Union had enough authorization cards for Respondent's employees to unionize. The Union subsequently, on January 19, emailed a letter to Respondent to demand that, based on the authorization cards that employees signed, Respondent recognize the Union as the exclusive bargaining representative of employees in the proposed bargaining unit. Respondent did not agree to the Union's demand for recognition and thus did not agree to engage in bargaining. (Tr. 34–35, 397–398, 681–682; GC Exh. 83; see also GC Exh. 2(d) (listing 51 employees eligible to vote in the representation election, plus an additional 7 employees who would vote subject to challenge); Tr. 117 (stipulation that employee T.G. was hired on January 22 and thus was one of the 51 employees eligible to vote in the election, but was not among the employees that the Union counted on January 19 when evaluating whether a majority of employees signed authorization cards); compare GC Exh. 3 (29 authorization cards that were signed by January 19).)[9]

journeyman plumber, and use the term "apprentice" when referring to an apprentice plumber.

[9] Two additional employees signed authorization cards between January 19 and the February 9 representation election. (GC Exh. 5; Tr. 36–37, 72–76.)

A few minutes after sending its January 19 email to Respondent, the Union filed a petition to represent Respondent's employees in the following proposed, appropriate bargaining unit:

> Included: All full time and regular part-time plumbers, HVAC technicians, and apprentices working in [Respondent's] Commercial department, HVAC service and install experts, plumbing install and service experts, HVAC apprentices, and plumbing apprentices employed by [Respondent] from its Raynham, MA location
>
> Excluded: Warehouse employees and managers; comfort advisors; customer service representatives; co-op students; project managers and junior project managers; service, project and success managers; general foremen; estimators; office clerical employees; and all other employees, supervisors, managers, and guards as defined in the National Labor Relations Act

(GC Exhs. 2(a) (Case 01–RC–333862), 13; see also GC Exh. 4 (showing that the Union's attorney emailed a copy of the petition to Respondent, and that the Union offered to withdraw its petition if Respondent was willing to voluntarily recognize the Union after having a third party inspect and count the authorization cards that employees signed); Tr. 35–36, 398.)

C. January 19 Staff Meeting

On January 19, Respondent held a meeting for commercial department employees (scheduled before the union organizing campaign began) to present information on how the company performed in the previous year, provide an overview of upcoming projects and other developments for 2024, and remind employees of certain company policies and training opportunities. Respondent also indicated that the company wanted everything to be transparent between the office and the field, and proposed that apprentice Allen serve as a liaison between those parts of the company. Towards the end of the meeting, plumber Michael Griffin asked why Respondent did not say anything during the meeting about the Union since the company had been informed that employees were seeking union representation. Owner Richard Leon responded that the meeting was an annual meeting and indicated that Griffin's question was beyond the scope of the meeting. Griffin replied that Leon's answer was an example of why the field doubts the sincerity of the office regarding transparency. The meeting then concluded without further discussion, apart from Leon inviting employees to come to a nearby restaurant for food and drinks. (Tr. 50–53, 98–99, 130–133, 181–182, 211–214, 237–239, 263–264, 344, 382–383, 416–417, 584, 586, 596, 684–690; R. Exh. 6 (PowerPoint outline used at the meeting).)

At the restaurant after the meeting, apprentice Allen spoke with plumber Jadon Colon (owner Richard Leon's brother). Colon asked Allen why "this" happened and indicated that he (Colon) knew what was going on. Allen responded that if Colon knew what was going on, then Colon knew that Allen started it (the union organizing campaign) because people were tired of feeling undervalued and overworked. Allen added that Colon had special benefits that other employees did not have, such as a company vehicle for Colon's personal use that effectively saved Colon money. When Colon indicated that he understood but did not think Allen needed

"to do it this way," Allen explained that he was not seeking union representation on his own, as several employees felt the exact same way. (Tr. 133–135, 182–183, 596.) A little later, general foreman Ryan asked, "what was that about?" in reference to Allen's discussion with Colon. Allen then gave the same explanation to Ryan that he gave to Colon regarding the union organizing campaign. (Tr. 135–136.)

Also after the meeting, project manager Devon Heon called apprentice Shane Froio. Heon and Froio initially spoke about a few work-related matters, but then Heon asked if Froio knew that Griffin was going to speak out at the January 19 meeting. Froio denied knowing that Griffin was going to speak at the meeting. (Tr. 265.)

D. January 19–26: Developments After the Union Petition

1. January 19: Respondent hires labor relations consultant

In the afternoon on January 19, Respondent hired National Labor Relations Associates to provide union election campaign management services. In connection with that agreement, consultant James Allen planned to travel to Boston to work with Respondent in the weeks leading up to the representation election. Consultant Allen's work would include using every available means of communicating with employees, including but not limited to small group meetings, individual meetings, written communication, text messages, email, signage, and handouts. (GC Exh. 84; Tr. 399–401, 609–612, 682–683, 690–692, 719–720; see also R. Exh. 7 (handout prepared by consulting group to provide information about what employers cannot do or say during an organizing campaign or election).) Based on the election campaign management services agreement and the services that consultant Allen provided (including accompanying Respondent on visits to job sites to talk to employees during the union organizing campaign), I find that consultant Allen was Respondent's agent under Section 2(13) of the Act.[10] (See Findings of Fact (FOF), sec. II(F), infra.)

2. January 22: Michael Griffin assigned work at Zoll medical job site

Based on an assignment sent at 9:48 a.m. on January 19 (before the January 19 staff meeting), plumber Michael Griffin reported to the Zoll Medical job site in Rhode Island on January 22.[11] At the end of the day, Griffin asked general foreman Ryan if he should continue working at the Zoll Medical site on January 23 or return to the Prima Care job site (where he had been working) because there was not much left to do at the Zoll Medical job site.[12] General

[10] See *Pan-Oston, Co.*, 336 NLRB 305, 305–306 (2001) (explaining that an employee is an agent under Section 2(13) of the Act if, "under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management").

[11] I find that Respondent contacted Griffin about working at the Zoll Medical job site before the January 19 staff meeting at which Griffin asked about the Union. (See, e.g., GC Exh. 99 (indicating that Griffin and other employees were at "training" from 11 a.m. to 2 p.m. on January 19, which I find to be a reference to the January 19 staff meeting); compare GC Exh. 7 (general foreman Ryan contacted Griffin at 9:48 a.m. on January 19 to direct that Griffin should work at the Zoll Medical job site on January 22).)

[12] During trial, Griffin explained that he did not have much planning (or other) work to do at the Zoll job site after January 22 because it was not clear what types of fixtures would be installed at the site (the type of fixture dictated the specifications and dimensions for rough-ins and pipes) and underground digging needed to be completed beforehand. (Tr. 58–61.)

foreman Matt Ryan instructed Griffin to return to the Zoll job site to "[u]se the time to properly plan and look at roughs, wall lay out, any questions or concerns you see that could come up during the install or further down the road." Griffin accordingly remained assigned to the Zoll Medical site. Respondent assigned plumber K.A. to work with Griffin at the Zoll Medical job site on January 25–26, and assigned apprentices C.C. and J.I. to work with Griffin on January 30–February 2 (C.C. only) and February 5–9 (C.C. and J.I.).[13] Work at the Prima Care site also was ongoing in that timeframe because additional work was required to bring the project to completion.[14] (GC Exhs. 7–9, 100–102, 111 (pp. 55, 66, 71); Tr. 54–63, 413–414; see also GC Exhs. 95–99 (showing that Griffin had been consistently working at the Prima Care job site since December 21, 2023, apart from a 1–day assignment to the Zoll Medical site on January 12).)

3. January 22: N.A. video

On about January 22, N.A. (a nonemployee contractor) posted a video on Instagram. N.A. stated as follows on the video:

> What's up guys it's [N.A.] from [A.] Services. Today we're going to talk about networking and how huge networking is, and there's a lot of positive and negative things from networking. So, number one, your network is everything. It helps you get work, it helps you grow, and it helps you sustain your growth, and it helps you continue to grow. We're going to just throw that out there. But the other thing that people forget about is when you build this network, you're building a huge team, so all of your subs, your friends, your family, your employees, your customers. So that goes into a double-edged sword, okay. If you fuck with our network you're not just fucking with one company, you're fucking with our entire company, our entire network. So I just want to make that known. [Uses both hands to point at baseball cap with Respondent's name.] You fuck with one of us [points again to baseball cap], you fuck with all of us.

(GC Exh. 113; see also Tr. 424 (explaining that [A.] Services is a general contractor that has hired Respondent in the past).) In response to N.A.'s video, Respondent's controller Kayla Leon posted a comment stating, "In my opinion, I really like your hat & your sweatshirt & your wall."[15] Respondent's general foreman Ryan also posted a comment, stating, "In my opinion, this guy knows what he's talking about!!! [three flame emojis]." During trial, Ryan agreed that through his post, he endorsed the message in N.A.'s video. (GC Exh. 112; Tr. 466–467, 520–522.) Employees in the proposed bargaining unit communicated with each other on the Brothers

[13] Consistent with my usual practice, I only use initials to refer to nonsupervisory employees and/or nonemployees who did not testify at the trial.

[14] Griffin does not appear on Respondent's timesheet records after February 9, and testified that his employment with Respondent ended in February 2024. (See GC Exhs. 102–103; Tr. 48.)

[15] N.A.'s sweatshirt and the wall in N.A.'s video relate to [A.] Services and do not refer to anything material to this case. (See GC Exh. 113.)

group chat about seeing N.A.'s video and the comments that Respondent and others posted in response to the video. (GC Exh. 111 (pp. 81–83).)

4. January 23: B.W. video

On about January 23, nonemployee B.W. posted an Instagram video. B.W. stated as follows in the video:

> I'm going to leave this here because it needs to be said and for some people it needs to be heard. Not everything that glitters is gold. And people that sell you will tell you what you want to hear and influence you to make decisions that otherwise you would never make. And sometimes people are good at selling you and telling you what you want to hear. Guys you need to look at things from all angles, and I'll tell you right now if somebody is selling you on the idea of tearing down what good men and women have worked very hard to build there's a chance you're being duped. Now the one thing that you have as a man or as a woman that nobody can ever take away is number one your word and number two your integrity. And if you're in this one life, this one life that you get, and you have an idea to tear down what someone has built, you don't have integrity. You don't have that. You have to walk around lesser of a man, you're not a man at all. Guys take that seriously. Take your word seriously. Take your integrity seriously. Rather than focusing on tearing down what good men and women have built, go build your own. If you don't like something, a good man will go build his own. But if you spend any amount of time trying to tear down something that a good man or a good woman has built, you're the scum of the earth.

(GC Exh. 110; see also Tr. 450–451, 575–576 (explaining that B.W. is owner Richard Leon's cousin, and that B.W. and Leon are both managers of a separate apparel and merchandise company).) Respondent's controller Kayla Leon responded to B.W.'s video by posting a comment stating, "In my opinion, your word is everything! Your loyalty is everything! I resonate with that!" In addition, Respondent's owner Mason, general foreman Ryan, and project manager Heon each posted a "like" in response to B.W.'s Instagram video. (GC Exh. 109; Tr. 424–426.) Employees in the proposed bargaining unit saw B.W.'s video and the accompanying posts and discussed them in the Brothers group chat. (GC Exh. 111 (pp. 75–76, 85).)

5. January 22–26: Respondent speaks with employees

On about January 22, some of Respondent's leadership team met with a representative from consultant Allen's office for a video conference training session about interacting with employees during a union organizing campaign. (Tr. 690–692, 719–720 (noting that owners Leon and Mason attended the meeting, as did controller Kayla Leon and human resources representative K.S.); R. Exh. 7 (handout distributed during the video session about "employer tips" to follow during a union organizing campaign).) Respondent did not give any direction to

general foreman Matt Ryan about how to communicate with employees about the Union. (Tr. 584–585.)

Starting on about January 22 or 23, Respondent spoke with various employees (consultant Allen was not present).[16] Those discussions included:

Jan. 22 or 23: Project manager Heon spoke to plumber Justin Reis at the Prima Care job site and asked what Reis thought of the January 19 meeting. Reis answered that he thought it was cool to see the company's growth and progression.[17] (Tr. 383–385; see also GC Exhs. 100 (showing that Reis worked at the Prima Care site on January 22-25), 111 (p. 73) (group chat discussion on January 23 referring to Heon's visit to the Prima Care site).)

Jan. 24: General foreman Matt Ryan came to the Delta Airlines job site and asked foreman Robert Coulstring what he thought about the January 19 meeting. Coulstring said he thought that it was a good meeting. Ryan then encouraged Coulstring to hang in there and that it was all going to be fine.[18] (Tr. 99–100, 585.)

Jan. 24: General foreman Ryan visited the Winter Street job site in Waltham, Massachusetts and spoke to apprentice/foreman Zachary Chen. Initially, Ryan asked Chen how the job was going. Ryan then asked what Chen thought of the January 19 meeting. Chen responded, "Yeah, I heard all that stuff. You don't have to worry about me." Next, Ryan mentioned that union organizers might be visiting Respondent's job sites, and that there were certain things that Respondent could and could not say. Towards the end of the discussion, Ryan told Chen that he (Chen) was a good worker and that Respondent liked him and tried to keep Chen at sites close to Chen's residence. Ryan then said, "Remember that when it comes time to vote. I didn't say that. Just kidding, I didn't say that."[19] (Tr. 239–241, 249, 591.)

Jan. 26: Owners Leon and Mason came to the Delbrook Achushnet job site (located in New Bedford) and spoke with Reis. During the discussion,

[16] Before the union organizing campaign, Respondent's managers periodically visited job sites to speak with employees and contractors about: how the job was going; how Respondent was performing; and (as to employees) what they thought about recent staff meetings. (Tr. 692–695.)

[17] Reis testified that he thought Heon was trying to get him to talk about plumber Griffin's question about the Union during the January 19 meeting. (Tr. 384.) I have given little weight to this testimony since, under the relevant legal standard, Reis' subjective impression of what Heon was asking about is not probative.

[18] Coulstring testified that Ryan also said that if Respondent was forced to unionize then there would not be raises for about 421 days while the Union and the company negotiated. Ryan denied making any such statement about raises and negotiations. (Compare Tr. 100 with Tr. 586–587.) Since I found Coulstring's and Ryan's testimony to be equally credible on this point, I have given the benefit of the doubt to Respondent and credited Ryan's testimony here.

[19] Ryan admitted to talking with Chen about where future job sites would be but testified that it was

Leon and Mason asked what Reis thought about the January 19 meeting. Reis responded that it was cool to see the company's growth and where it is headed. After Reis asked what it would mean if Respondent went union,[20] Leon and Mason said that they did not build Respondent to be a union company, and noted that they would be bringing in someone to help with campaign and that Reis would be informed on both sides and should not be afraid to ask them questions. (Tr. 385–386, 693–694, 827–828; GC Exh. 100).)

6. January 25: Respondent posts message about union campaign

On about January 25, Respondent posted the following message to its Facebook page about the union organizing campaign:

> RCL family, friends, and contractor network. [Y]ou may be aware that we have recently been petitioned by Local 12 union. We want to assure you that you are SAFE and always will be protected by us and all federal and state laws. We have been working around the clock preparing information to demonstrate the benefits for you and RCL Mechanical remaining a non-union organization.
>
> Your voice has always been, and will continue to be important to us. In our opinion it's in all of our best interest to stay a non union company. This is how we designed and built the organization for you and the companies growth. We recognize that there may be confusion, and we are committed to addressing this and providing you with the necessary information so that you can make the best decision for yourselves and your families. Our employees have always been our top priority, and this will never change. We consider our team in every decision we make. It's unfortunate that a few unhappy individuals could have such an impact on the company in this capacity.
>
> In the coming week, we will meet with you and provide all the documentation needed for you to make an informed decision. While we are on site next week please raise them and we will address. Please ask questions and, most importantly, please utilize your right to vote. You have the right to. We understand that this may be confusing, emotional, and stressful, but please TRUST that we will come together and be stronger, and better than before. Despite everything going on we are coming into 2024 strong we are prepared and ready to execute another successful year! [arm flex "strength" emoji]

(CP Exh. 4; Tr. 561.)

Chen who raised a question about that issue. Ryan denied telling Chen that Respondent liked Chen and would keep Chen at sites close to Chen's residence, and denied telling Chen to remember that when it was time to vote. (Tr. 591–592.) I do not credit Ryan's testimony here because Chen's version of events is corroborated by the fact that Ryan made a similar offer (regarding being assigned to work close to an employee's residence) to foreman Coulstring on February 5. (See FOF, sec. II(I)(3).)

[20] I have credited Leon's testimony that Reis asked this question. (See Tr. 694.) While Leon had the benefit of hearing Reis' testimony since he was present throughout the trial as Respondent's designee, I note that the General Counsel and Union did not recall Reis to rebut Leon's testimony on the point.

E. January 26: Union Meeting with Employees

On January 26, union organizer Messinger met with approximately 27 employees in a hotel conference room and described the benefits of joining the Union. Plumber Jadon Colon asked whether apprentices would have to start over with their apprentice levels if Respondent unionized, particularly if the Union determined that apprentices were at a lower level (or tier)[21] than where Respondent listed them. Apprentice Allen asked why Colon cared so much about apprentices all of a sudden, prompting Colon to reply that he just wanted to know the answer to his question. Messenger explained that an apprentice's level would only be affected if the Union found that the apprentice's school hours and work hours did not line up. Under that circumstance, the Union would align the apprentice's level with whichever was lower between the apprentice's school and work hours. (Tr. 39–40, 65, 136–139, 193–194, 199–200, 206–207, 214–216, 265–267, 353–354, 597, 599–601; see also GC Exh. 111 (pp. 122–123, 125–126) (group chat messages about which employees planned to attend the January 26 meeting, the meeting location); id. at 129–130 (Messenger observing that Colon "[h]andled himself like a gentleman" in the January 26 meeting).)

F. January 29 – February 2: Respondent and Consultant Visit Job Sites

Starting on about January 29, consultant Allen joined owners Leon and Mason in visiting job sites to talk to employees.[22] Allen planned to have Leon and Mason take the lead when speaking with employees and took on the role of: making sure that Leon and Mason did not break the rules that apply regarding communications during an organizing campaign; and providing information about the process and about unions. (Tr. 401–402, 613–614, 695; see also R. Exhs. 4 (examples of handouts that consultant Allen prepared for Respondent to distribute to employees in response to the union organizing campaign), 5 (newspaper article that contained statements by the head of the Department of Labor that Respondent relied on during the organizing campaign); Tr. 612–613, 615–616.) The site visits during the week of January 29 led to the following discussions:

Jan. 30: On about January 30, apprentice Shane Froio was working at the Elevate job site in Cambridge, Massachusetts. Although Froio was an apprentice, he was also serving as foreman at the site. Owners Leon and Mason, along with consultant Allen, visited the Elevate site and after walking with Froio around the site, explained that they were visiting job sites to make sure that employees were informed and answer any questions.[23] Leon and

[21] Apprentices in lower levels are generally (but not always) paid a lower hourly rate.

[22] Both the General Counsel and the Union challenged consultant Allen's credibility on the ground that, while he testified that he was admitted to practice law in Ohio in 2012, no records were available online to confirm that fact. (Compare Tr. 643 with CP Exh. 12 (printout of Ohio bar admission search results).) I have given little weight to this issue because it is too remote from the issues at hand in this case. I will assess Allen's credibility in the same manner that I will assess the credibility of any other witnesses who testified during the trial.

[23] Froio testified that as part of this explanation, Respondent said it wanted to answer employees' questions because Respondent did not know what employees had been told in union meetings. Leon denied saying anything about union meetings in this conversation with Froio. (Compare Tr. 272 with Tr. 699–700.) Since Froio and Leon were equally credible on this point, I have given the benefit of the doubt

Mason mentioned that another apprentice, S.S., had been a Union member and was required to restart school because his school and work hours did not line up. Leon and Mason suggested that Froio could be in a similar situation if Respondent unionized, since Froio had fewer work hours than school hours. Mason and Leon also: suggested that the Union would classify the Elevate project as a residential project (instead of a commercial one), which would result in Froio receiving a lower pay rate for his work on the project; mentioned that the Union expected companies to have a set ratio between plumbers and apprentices; and suggested that Froio, as an apprentice, would have less responsibility and flexibility to take initiative at work if Respondent unionized. Towards the end of the discussion, Leon asked Froio if they were good on the Instagram situation.[24] Leon added that he could put Froio in touch with a well-known plumbing content creator on Instagram, which could help Froio's Instagram page. (Tr. 267–272, 283–284, 331–333, 344–345, 401, 617–622, 695–700, 702–703, 829–830; GC Exh. 111 (p. 153) (group chat post on February 1, in which Froio mentioned a site visit by Leon "the other day")

Feb 1: On about February 1, owners Leon and Mason, along with consultant Allen, drove to the Delta Airlines job site and picked up foreman Coulstring to drive to a Starbucks nearby. Leon and Mason told Coulstring that if employees unionized, contract negotiations on average last 421 days.[25] Mason mentioned that members of a local electrical union (Local 103) were recently laid off and that members of the Union were applying for jobs with Respondent, and asked how the Union would have room for Respondent's employees under those circumstances. Leon or Mason also stated that since Respondent was "apprentice heavy," Respondent would have to have layoffs to accommodate the Union's requirement of a one-to-one ratio between plumbers and apprentices.[26]

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to Leon.

[24] In about November 2023, Leon and Froio exchanged text messages because Froio reported Respondent to Instagram for violating copyright rules because Respondent used one of Froio's plumbing videos (GC Exh. 49) for Respondent's own Instagram page without Froio's permission. Froio's report resulted in Instagram taking down the disputed video from Respondent's Instagram page. Leon and Froio subsequently spoke by phone about the issue, and Leon expressed his frustration with Froio's decision to report Respondent to Instagram, which resulted in Respondent being locked out of its Instagram account. (Tr. 278–282, 700–701; GC Exh. 50; R. Exh. 3 (p. 1); see also GC Exh. 49; Tr. 277.)

[25] I have not credited Coulstring's testimony that Respondent said employees would not receive raises or reviews during contract negotiations. Coulstring's testimony on that point was limited, as he asserted that Leon and Mason told him the same thing that general foreman Ryan told him about raises. (Tr. 101.) I do not find that this limited testimony outweighs the testimony that Leon and Allen provided to deny saying there would not be raises or reviews. (Tr. 623–624, 705.)

[26] Leon and Allen denied telling Coulstring that Respondent would have layoffs if the union prevailed in the election. (Tr. 624, 706.) Those denials, in response to closed questions seeking a yes or no response, do not undermine Coulstring's testimony because Coulstring did not say that Respondent linked layoffs to election results. In addition, Respondent admitted that it raised the issue of layoffs due to ratio requirements as something employees should question the Union about. (Tr. 624–625.)

(Tr. 100–102, 401, 622, 624–625, 704–707; see also GC Exh. 111 (p. 147) (group chat posts on February 1, noting that Leon and Mason visited the Delta job site and took Coulstring for breakfast and coffee).)

Feb. 1: Apprentice (and foreman) Zachary Chen and apprentice James Manduca were working at the Winter Street job site in Waltham when Leon, Mason, and consultant Allen visited the site. Allen stated that if the union won the election then employees could be stuck in contract negotiations for over a year and that negotiations last for an average of 400 days.[27] Mason said he was floored that this was happening and asked what Respondent could do better for employees or if there were any concerns. Allen then intervened and told Mason that he could not talk about that.[28] (Tr. 241–243, 356–358, 401, 625–626, 707.)

Feb. 2: General foreman Ryan spoke to apprentice Chen at the Winter Street job site in Waltham and, regarding the union, said that he (Ryan) thought that apprentice James Manduca was a strong union supporter.[29] Chen replied that he understood. Ryan then stated that he does the manpower concerning which job sites employees work on, and that Respondent was

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Coulstring's testimony is consistent with that admission. Accordingly, I have credited Coulstring's testimony on this point. To the extent that there is a question about whether Respondent said the Union's ratio requirements "would" or "could" lead to layoffs, I do not find that distinction to be material.

[27] Chen testified that Allen also said that the Union was "bad" and that "guys could get laid off and you can't get any raises, your pay is on hold until the negotiations are over." (Tr. 242.) I find that Chen's summary of Allen's remarks is most likely the product of remarks being lost in translation, particularly given other evidence in the record that Allen, Leon, and Mason tended to use more nuanced language than what Chen described regarding this conversation. I also note that Manduca did not corroborate Chen on these points, and Leon and Allen denied making such a statement. (Tr. 357–358, 626–628, 707–708.) To be sure, there were occasions when Respondent spoke more directly about its views (including Mason's remarks in the same conversation), but I do not find sufficient evidence to credit Chen's testimony about these aspects of Allen's remarks.

[28] I have credited Chen's and Manduca's testimony about what Mason said in this conversation before consultant Allen intervened. Mason, notably, testified at the hearing but was not asked about, and thus did not deny, making the remarks. Consultant Allen did not add much more, saying only that he did not "specifically remember" Mason asking Chen what Respondent could do better. (Tr. 627.) Leon, by contrast, denied that Mason asked what Respondent could do better for employees (see Tr. 708), but I find that his uncorroborated denial is outweighed by Chen and Manduca's corroborating testimony about what Mason said.

[29] On either January 30 or February 2 at the Winter Street job site, Ryan saw that there were union stickers on Manduca's hard hat and toolbox and told Chen that he (Ryan) wished he "could rip those effing things off." (Tr. 247–248; see also Tr. 355–356, 375 (noting that Manduca added union stickers to his hard hat, toolbox, and water bottle in the end of January and brought them to the job site every day); GC Exhs. 100–101 (showing that January 24, 30, and February 2 were the only dates that Chen, Manduca, and Ryan were present together at the Winter Street job site).) Due to Ryan's poor credibility regarding the content of his conversations with Chen (see, e.g., fn. 30, infra), I have credited Chen's testimony here despite Ryan's denial that he made comments about Manduca's union stickers. (See Tr. 518–519, 592–593 (Ryan's denial that he knew that Manduca had union stickers on his toolbox, water bottle, and vehicle, and denial that he made any remarks about ripping the stickers off).)

trying to keep the "maybe yeses away from the hard yeses" and put "the maybe yeses with the hard no's."[30] (Tr. 243–244, 249–250.)

Feb. 2: Plumber Reis was working at a job site in Walpole, Massachusetts when owners Leon and Mason and consultant Allen visited the site. Leon and Mason told Reis that he was doing a good job, and that it could take two years for the Union and Respondent to reach a contract agreement.[31] (Tr. 386–387, 708–709.)

G. January 29 – February 9: Respondent's Job Site Assignments

In about late January or early February, general foreman Ryan telephoned foreman Coulstring and advised that Respondent was strategically planning manpower to avoid employees potentially switching their votes. Ryan explained that, to accomplish that goal, Respondent was trying to keep employees that were voting "yes" separate from people who were voting "no," and putting anyone who was a "maybe" with someone voting "no."[32] (Tr. 102–103; see also Findings of Fact (FOF), sec. II(F), supra (noting that Ryan also told apprentice Chen about Respondent's plan for job site assignments).)

From at least October 30, 2023, through January 29, 2024, Respondent consistently assigned apprentice Allen to work at the Delta job site, apart from occasional brief assignments at other locations. (GC Exhs. 88–101; Tr. 412–413; see also GC Exh. 34.) In the afternoon on January 29, however, general foreman Ryan emailed Allen with the instruction to report to the Zoll Medical site in Rhode Island on January 30. After Allen notified Respondent that he was not yet licensed to work in Rhode Island, Respondent had Allen return to the Delta site on January 30–31, and then reassigned Allen to work at the following locations: Burbank apartments (February 1, with apprentice M.D.); Ultra Electronics (February 5, with apprentice Froio); and Elevate (February 6, with Froio) while work at the Delta site continued.[33] (GC Exhs.

[30] Ryan denied telling Chen that Respondent was keeping "maybes" away from "hard no's." (Tr. 592–593.) That denial does not address Chen's testimony, as Chen said that Ryan told him that Respondent was putting "maybe yeses" with "hard no's" and keeping the "maybes" away from "hard yeses." In addition, there is corroborating evidence that Ryan made a similar remark to foreman Coulstring, and that Respondent carried out this plan by moving employees to various job sites leading up to the election. (See Findings of Fact (FOF), sec. II(G), infra.) Accordingly, I do not credit Ryan's testimony about his February 2 conversation with Chen.

[31] Reis testified that Respondent also said that he should not be afraid to talk to management about a raise, and that if the union won the election, there could be no discretionary raises for up to two years. Owner Leon denied making these statements. (Compare Tr. 386–387 with Tr. 709–710.) Since Leon's testimony was as credible as Reis' on these details, I have credited Leon's testimony since the General Counsel bears the burden of proof.

[32] Ryan denied making these remarks to Coulstring (see Tr. 587, 594) but I do not credit Ryan's testimony because Coulstring's testimony (unlike Ryan's) is corroborated by other evidence. Specifically, Coulstring's testimony is corroborated by what Ryan said to foreman Chen regarding job site assignments leading up to the representation election (see FOF, sec. II(F), supra), and is also corroborated by the evidence (described in this section) that, during this time period, Respondent reassigned apprentice Allen away from job sites where he had been working for some time and instead sent him to other locations.

[33] Allen went on leave after February 6 due to an injury sustained on the job. (See FOF, sec. II(I)(4), infra.)

18, 101–102; Tr. 144–146, 152–154, 189, 413, 736–737; see also GC Exh. 111 (showing that Allen, M.D., and Froio were all part of the Brothers group chat).)

From January 5–27, apprentice George Tsimopoulos was on paid time off status and thus was not assigned to a job site. (GC Exhs. 97–100; Tr. 217–218.) When Tsimopoulos resumed working on January 29, Respondent generally assigned him to the Delta job site from January 29 through February 8 (usually alongside Allen (briefly) and foreman Coulstring).[34] On two occasions in that timeframe (January 31 and February 6), however, Respondent sent Tsimopoulos and foreman Coulstring to a St. James Avenue location for 1–day assignments.[35] (GC Exhs. 35–37, 101–102; Tr. 218–222.)

In early January, apprentice Manduca had the following job site assignments: January 2–5 (2 days paid time off; 1 day at Burbank Apartments; and 2 days at the Delta site); January 8–12 (Delta); January 15–19 (1 day at Delta; 1 day at Shoppers World; 2 days at Delbrook Achushnet; and 1 day of paid time off). (GC Exhs. 97–99.) From January 22 through February 8, Respondent assigned Manduca to the 950 Winter Street job site, primarily with apprentices Chen and J.C., and plumber Doucette.[36] (GC Exhs. 100–102.)

H. February 1: Respondent Issues Warning to Apprentice Allen

1. Events leading up to warning

On January 10, estimator S.R. emailed apprentice Allen to ask him to sign paperwork to complete his indentured apprentice application, which (among other purposes) Respondent could then use to apply for Allen to have apprentice status in Rhode Island. S.R. sent a reminder email and text message to Allen on January 25, noting that without Allen's signature Respondent would not be able to provide him with his indentured apprentice license. Allen emailed his signed apprenticeship form to S.R. on January 29. (R. Exh. 1;[37] GC Exhs. 24–25; Tr. 160–161, 188–189.)

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[34] Respondent generally did not assign any employees to work at a job site on February 9. Instead, all but one employees were assigned a 2–hour "shift" for an "RCL Meeting" to, I infer, participate in the representation election. (GC Exh. 102.)

[35] After the election, Respondent assigned Tsimopoulos as follows: February 12–16 (Delta job site and one day of paid time off); February 20–23 (Delta for 2 days; CVS Beverly for 2 days); (GC Exhs. 38–40, 103–104; Tr. 222–224.) Tsimopoulos is not listed on Respondent's timesheet records for the weeks of February 26–March 1 and March 4–8. By text message, however, Respondent assigned Tsimopoulos to the following job sites in that timeframe: February 26 (950 Winter Street); February 27 (Shoppers World); February 28 (Plymouth); March 1 (PIAB); March 5 (CVS Beverly); and March 6 (Bay State Vet). (GC Exhs. 41–46, 105–106; Tr. 225.)

[36] Respondent assigned Manduca as follows after the election: February 12–16 (3 days paid time off; Delta for 1 day; CVS Beverly for 1 day); and February 20–23 (CVS Beverly for 3 days; CVS Swampscott for 1 day). (GC Exhs. 103–104.) Manduca is not listed on Respondent's time sheet records for the weeks of February 26–March 1 and March 4–8. Other evidence, however, shows that Manduca took paid time off on February 26 after declining an assignment on Nantucket island, and that Respondent then assigned Manduca to work at the Bay Street Vet site from about February 27 through March 6. (FOF, sec. II(N)(1), (O)(1), (3), infra; GC Exhs. 105–106.)

[37] I did not give any weight to the handwriting on R. Exh. 1. (See Tr. 189–190.)

On about January 24, Allen and foreman Coulstring were both working at the Delta job site. General foreman Ryan visited the site and, after seeing Allen using his cell phone, told Coulstring that Allen needed to be written up for phone usage. Ryan accordingly told Coulstring to send an email to both Ryan and human resources so Respondent could write up Allen. Coulstring said that he would do so, but did not send an email because Ryan visited job sites previously when employees were using their phones and it never was a big deal, and Respondent had never before asked Coulstring to send an email about the issue. (Tr. 108–110; GC Exh. 100 (showing that Allen, Coulstring, and Ryan each worked at the Delta job site on January 24).)

A few days later, Ryan again asked Coulstring to send an email to initiate Allen being written up. Accordingly, at 6:21 a.m. on January 29, Coulstring sent an email to Ryan and human resources regarding Allen. Coulstring stated as follows in his email:

> Matt/HR
>
> I had a conversation in the field with Brad Allen last week regarding cell phone usage. Seems to have gone down since our conversation. I will let you know if it continues.

(GC Exh. 15; Tr. 110, 589–590.)

Later on January 29, Coulstring received a call from Ryan that Allen had been sleeping in his (Allen's) car at the jobsite (Allen fell asleep during his break and overslept). Ryan asserted that Allen's conduct was unacceptable and that Coulstring should be on top of things at the site and execute his job as foreman or Respondent would find someone else to replace Coulstring and execute the job as foreman. Ryan also asked Coulstring to send an email about the incident. Coulstring and owner Leon also communicated by text and by phone about Allen, including a text message in which Leon reminded Coulstring to "make sure you mention that [Allen] was sleeping in his truck."[38] (R. Exh. 8; Tr. 111, 113–114, 156–157, 195, 720–721.) Accordingly, at 3:07 p.m. on January 29, Coulstring sent another email concerning Allen, this time to owners Mason and Leon, as well as to Ryan:

> Good afternoon all,
>
> Appreciate you all taking the time to take my call earlier. I would like to see about swapping Brad Allen for another apprentice if possible. The production has fallen drastically, consistent phone usage, anytime I ask him to do a task it's like pulling teeth, late to work a few times a week, etc. The cherry on top was sleeping for an extra 30 mins in the car until 11 am, when break was scheduled to end at 10:30 am.

(GC Exh. 16; Tr. 111, 113–114, 195, 590, 724–725.) During trial, Coulstring testified that the content of his 3:07 p.m. email was not accurate, particularly as to Allen's productivity and willingness to do tasks, and as to the extent of Allen's cell phone use (Coulstring agreed that Allen sometimes arrived late to work; and Coulstring did not personally observe Allen sleeping

[38] I have given little weight to Leon's testimony about what Coulstring said to him in their phone call, as the testimony was hearsay and did not establish (as a nonhearsay purpose for the testimony) that Coulstring's remarks in the phone call induced Leon to take any particular action beyond asking Coulstring to send the second email and mention that Allen was sleeping in his car. (See Tr. 721–723.)

in his truck). Coulstring explained that out of fear for his job, he falsified information in the email to tell management what it wanted to hear about Allen.[39] (Tr. 112, 115–116.)

On January 30, Allen was expected to start work at the Delta job site at 6 a.m., but arrived late because he got stuck in traffic. General foreman Ryan was at the site and texted Allen at 6:16 a.m. to find out whether Allen was coming in. Allen called Ryan to advise that he was in traffic, and Ryan responded by advising Allen to get to the job site as soon as he could, and also to let owner Leon know about the situation. Allen ultimately arrived at the Delta site at 6:32 a.m., only to find that all employees at the site were dismissed from work a few minutes later because the roof was too icy to complete the work that was planned for the day. Later that morning, Ryan emailed human resources, controller Leon, and owner Leon an excerpt from Allen's timesheet showing that Allen arrived late. (Tr. 147–152, 190–191, 728; GC Exhs. 20–21, 101; R. Exhs. 2, 9–10; see also GC Exh. 21 (January 30 text message in which Leon asked Allen if he was late that day; Allen replied "yes" and explained that traffic was bad and that he spoke with Ryan on the way to the job site).)

2. February 1: warning issued to Allen

On February 1, owner Leon visited the Burbank Apartment job site where Allen was working and issued a warning to Allen.[40] The warning set forth the following rationale:

> The purpose of this warning is to address several concerns about your performance and to make clear the company's expectations going forward.
>
> 1. Excessive cell phone usage. Despite previous conversations regarding the appropriate use of cell phones during work hours, it has come to our attention that you continue to engage in excessive cell phone usage while on duty. Excessive cell phone usage, especially, in environments requiring focus and attention to detail, poses a direct risk to

[39] Ryan admitted to speaking with Coulstring about Allen's cell phone use "and things of that nature" but maintained that Coulstring was the one who raised the issues. Ryan denied warning Coulstring that there could be consequences if Coulstring did not notify owner Leon about the issues concerning Allen's performance, and denied telling Coulstring to falsify information in Coulstring's emails about Allen. (Tr. 587–590.) I do not credit Ryan's testimony on these points because Coulstring was more credible and his testimony was corroborated. During trial, Coulstring presented as a witness who was full of regret for giving in to the pressure to email concerns about Allen's job performance. Coulstring's testimony is corroborated by the emails that he sent. Specifically, in Coulstring's first email, he expressed little, if any, concern about Allen, saying essentially that Allen's cell phone use was a minor problem that appeared to have been resolved. In short, Coulstring attempted to comply with the directive to send an email about Allen while avoiding saying much that was negative about Allen. It was only after communicating with Ryan and Leon that Coulstring sent a second email to set forth an assortment of concerns about Allen, many of which Coulstring admitted were false.

[40] Respondent initially planned to meet with Allen on January 30, but postponed the meeting after Allen and other employees at the Delta job site were sent home early due to the icy conditions on the roof. (GC Exhs. 19, 21; Tr. 146–147, 152, 725–726, 738–739.)

your safety and the safety of your colleagues. Distractions can lead to accidents, injuries, and compromised job site safety for everyone on site.

2. Tardiness & Absenteeism. On January 29, 2024, you did not return to work after your scheduled break time. When you did not return on time, the foreman found you asleep in your vehicle at the job site, and you were 30 minutes late getting back to work. Additionally, you were more than 30 minutes late for your shift on Tuesday, January 30, 2024. Punctuality is crucial for maintaining an efficient workflow, and adherence to break schedules is essential for the smooth operation of the team.

3. Failure to provide necessary documentation despite multiple requests (written & in person). Despite multiple requests and reminders in 2023 in addition to reminders on January 10, 19 and 25 in 2024, you have not yet completed the necessary paperwork to obtain your indentured apprentice card. This is a crucial step to ensure compliance with legal and regulatory requirements and to allow you to perform work within the state of Rhode Island under the reciprocity rule with your Massachusetts apprentice card. Due to the increased nature of our contracts within the state of Rhode Island, this is necessary to ensure your ability to [be] placed on job sites. Multiple requests have been made to obtain your authorization on the necessary documentation which has been ignored.

These are serious concerns that, if not corrected, will result in additional corrective action up to and including termination of employment.

(GC Exh. 22; Tr. 152, 154–155, 736–740; see also Tr. 155–156 (Allen testimony disputing that he used his cell phone excessively at work and that he would only check his phone if he received a call, typically from general foreman Ryan).)

I. February 2–8: Developments In Final Week Before Election

1. Respondent obtains a copy of "Brothers" group chat

On February 2, a former manager emailed owner Leon a copy of the Brothers group chat. The version of the chat that Leon received included all messages that participants sent to each other and union organizer Messenger from January 18 through February 2. The following employees were among the participants in the group chat: Bradford Allen; Robert Coulstring; Shane Froio; Michael Griffin; James Manduca; Justin Reis; Jacob Tomasik; and George Tsimopoulos. (GC Exh. 111; Tr. 451–452, 552–554, 756, 820; see also Tr. 565–566 (noting that plumber Jadon Colon was not part of the Brothers group chat but obtained a printed copy of the chat), 816–817, 820 (explaining that Leon also received a printed excerpt of the Brothers group chat at some point before February 2).)

2. Union meeting

On about February 4, the Union held another meeting with employees at which union organizer Messinger described the benefits of joining the Union. Approximately 12–14 employees attended the meeting, which was over breakfast at a hotel or restaurant. Plumber Colon attended the meeting and argued with Messinger about what Colon viewed as the Union

bad-mouthing Respondent and owners Leon and Mason during the organizing campaign.[41] (Tr. 40–41, 66, 140–143, 214–217, 354–355, 389.)

3. Respondent has more conversations with employees about union campaign

From February 4–8, Respondent continued to communicate with employees in response to the union organizing campaign, leading to the following discussions:

Feb. 5: In about early February, foreman Coulstring posted on his Facebook page about a recent union meeting. Later that day or the day after the Facebook post, general foreman Ryan called Coulstring and asked if Coulstring was "switching up" on Respondent. Coulstring replied that he needed to do what was best for him and his family. Ryan said he respected Coulstring's decision, but went on to say that if Coulstring hung in there, Respondent had a job coming up that would be closer to Coulstring's home. (Tr. 103–104; see also Tr. 105 (noting that Coulstring and Ryan were Facebook "friends" at the time).)

Feb. 6: Owner Mason texted Coulstring to ask if Coulstring still did new construction work (as part of Coulstring's separate plumbing business). Mason also texted Coulstring plans for a group of eight duplexes that needed plumbing work in connection with a property development company that Mason owned, and subsequently Mason and Coulstring spoke by phone about the duplex project and the concept of Coulstring doing the work for one duplex, with additional duplexes to come to Coulstring if Mason liked the quality of Coulstring's work. (Tr. 105–106, 420–421, 847; GC Exh. 14; see also Tr. 105 (noting that Coulstring and Mason were Facebook "friends" at the time), 106–107 (Coulstring estimated that if he worked on all eight duplexes, it would be over $100,000 of work), 848 (Mason testimony that Coulstring did not actually perform work for Mason's property development business).)[42]

Feb. 6: Owners Leon and Mason and consultant Allen visited the Winter Street job site in Waltham where they spoke to apprentice Chen and another employee. During the conversation, Leon stated that Respondent was not built to be a union company. Leon added that Respondent was "apprentice heavy" and that the Union required

[41] Apprentice Tsimopoulos testified that Colon and Messinger argued during the first union meeting. (Tr. 214–217.) I have not credited that aspect of Tsimopoulos' testimony because it is against the weight of the evidence. (See FOF, sec. II(E), supra.)

[42] Mason testified that he also offered side work for his development business to other employees of Respondent, and named four examples of employees who did that type of side work for him (employees Jadon Colon, Matt Doucette, N.D., and B.O.). Matt Doucette confirmed that he did side work for Mason's development business in about 2018, specifically by hooking up a couple of kitchen sinks on a couple of jobs. (Tr. 847–848, 852–853.) Colon testified at trial but was not asked about this issue. I have given little weight to Mason's testimony on this point. Mason did not dispute Coulstring's testimony and Respondent offered little reliable or specific testimony or other evidence (e.g., contracts, payment records) to establish that Mason had a regular practice of offering side work to Respondent's employees. Doucette's testimony was the only specific example of side work provided and was too remote in time (6 years) from the relevant events here to be probative.

employers to have a one-to-one ratio between plumbers and apprentices, which could lead to layoffs. (Tr. 244, 627–628, 710–711.)

Feb. 7 Plumber Reis was working at a job site in Walpole, Massachusetts when Leon, Mason, and consultant Allen visited the site. While speaking to a group of employees, Leon and Mason mentioned a recent layoff in the region and Mason used his phone to show Reis that several plumbers with the Union had their resumes on Indeed. Leon also said that if Respondent came to an agreement with the Union that was different that the master agreement then the Union would have to apply that to all local contractors, and surmised (in response to his own question) that the Union absolutely would not make such an agreement. Union organizer Messinger approached and a somewhat heated argument arose between Messinger and Leon about the content of a union pamphlet. Toward the end of the argument, Leon stated "Don't worry, I don't need breakfast on Friday [the day of the upcoming representation election]."[43] (Tr. 42–43, 387–393, 401, 628–630, 664, 711–715, 717–718, 850–851; see also Tr. 717–718 (Leon testimony that he made the remark about not needing breakfast because "someone had heard that Matt Messinger intended to invite [Mason] and I to breakfast the day of the vote"); GC Exh. 6 (Art. 10 – favored nations clause in the Union's master agreement)[44].)

4. Apprentices Allen and Froio injured

Apprentices Allen and Froio were working at a job site in Wakefield, Massachusetts on February 6 when a cast iron section of pipe (called a quarterbend) fell and struck Allen on the head and then ricocheted and struck Froio on the hand. Both Allen and Froio received medical treatment at an urgent care facility and were temporarily removed from the work schedule until they were cleared to resume working without restrictions. (Tr. 162–164, 285–286, 288–291, 342, 345–346; GC Exh. 52 (photo of quarterbend); see also Tr. 162, 285–286 (noting that Allen and Froio worked at the Elevate job site for a couple of hours before going to the Wakefield site), 163 (Allen was wearing a hard hat when the quarterbend struck him).)

On February 7, Respondent (through warehouse manager Charles Boucher) emailed Froio the following message:

[43] The evidentiary record includes some testimony showing that Messinger and consultant Allen also argued during this encounter, and that Messinger called one of the employees present a "f-----" [offensive slur directed at members of the LGBTQ community]. Messinger denies using the slur. I have not gone into detail about these aspects of the discussion because they are not material to the legal and factual issues in this case. (Tr. 43, 630–631, 715–716, 850–851, 869.)

[44] In the Brothers group chat on January 31, employees were discussing the election day process when apprentice Allen suggested (perhaps as a joke) that Messenger could get breakfast with owners Leon and Mason while the election was in progress since they would not be allowed on site. Messinger responded that he was thinking about asking Leon and Mason to do something to that effect (i.e., get breakfast) to clear the air. (GC Exh. 111 (pp. 144–145).)

> Either my drivers or I will be by between 1 and 3pm to pick up the [company] van & company assets (tools). Tools/vehicle are needed to continue operations on sites while you are out.
>
> Can you please make sure your personal belongings are removed from the van prior to pick up.
>
> Please also make sure to leave the key for the new locks you installed on the company gang box, as we are not able to access company tools within the gang box currently.
>
> The company vehicle will be returned to you upon being cleared to return to work.

(GC Exh. 53; Tr. 291–292; see also Tr. 745–746 (explaining that Respondent assigned a company van to Froio because although Froio was an apprentice, he was taking on additional responsibility as the "lead" on some jobs and previously was using a personal vehicle to travel to the Elevate job site).)[45] Froio sent the following email response:

> Sure thing Charlie, for the record that is not my "personal lock" on that Gangbox. You ordered that box a while ago for me and told me that it came with a newer lock and the key only works for that one box. Just to get that straight don't appreciate being framed for that.

(GC Exh. 54; Tr. 292–293.) Project manager Heon subsequently sent an email stating "It was confirmed that this is a company lock, you received a different style of gang box which has a different lock." (GC Exh. 55; Tr. 294.)

5. The "Unbiased" group chat

On February 8, apprentice Allen started another group chat (the "Unbiased" group chat) that included both employees and supervisors/managers for Respondent. Several individuals immediately removed themselves from the Unbiased group chat without comment, including: project manager Heon; controller Leon; owner Leon; and general foreman Ryan. Plumber Colon did not leave the Unbiased group chat and posted excerpts of messages from the Brothers group chat that Colon was not a part of (Colon obtained excerpts from the Brothers group chat from employee J.T.). Although individuals who left the Unbiased group chat could no longer see messages in the chat, Respondent obtained a copy of messages and images posted on February 8–9 in the Unbiased group chat and produced them in response to a subpoena for this case. (Tr. 535, 555–560, 565–572, 805–806; CP Exh. 9.)

[45] Froio also had a company gas card to use for refueling the van. To keep track of gas card expenses, Respondent had employees send a photograph of each gas receipt when the employee used the gas card. At some point on or before January 23, Froio (as a joke of sorts) began filling the company van gas tank to $69 and submitting the same photograph of a gas receipt for each purchase. By January 23, either general foreman Ryan and/or controller Leon indicated to Froio that he should stop that practice. (Tr. 340–342, 348, 754–755; GC Exh. 111 (p. 70) (noting that controller Leon did not find Froio's practice with gas receipts to be amusing); see also Tr. 832–834 (owner Leon's testimony that he did not recall when he heard about Froio's gas receipt practice, and that it was possible he heard about the issue in 2023).) There is no evidence that Respondent took disciplinary action against Froio before February 23 based on the gas receipt conduct.

J. February 9: Representation Election

On February 9, employees voted in a representation election. Out of 45 valid votes cast, 14 employees voted for the Union and 31 employees voted against the Union. There were 10 challenged ballots, a number that was not sufficient to affect the results of the election. (GC Exh. 2(e); see also GC Exh. 2(c) (election agreement); Tr. 38, 231, 540.)

After the election results were announced, Respondent posted the following message on its Facebook page, in pertinent part:

> Exciting News from RCL Mechanical!
>
> Today is going down in RCL History – We're thrilled to share that our hard working employees have voted against unionization in a decisive vote of 31–14! This vote reaffirms our commitment to our core values and the positive culture we've fostered at RCL Mechanical. Thank you from the bottom of our hearts to our incredible team in the field and in the office for their trust and confidence in us. We also want to thank our vendors, contractors, friends, and family who have shown their incredible support. We look forward to the growth and future of our great company, united as a team. We are RCL Mechanical. . . .

(CP Exh. 5; Tr. 489–492.) In one of the comments in response to the post, individual G.C. stated "Congrats, that's great news. Looks like 14 spots just opened up [laughing and crying emoji]." Respondent posted a thumbs-up "like" symbol in response to the comment.[46] (CP Exh. 5; Tr. 491–492.)

K. February 16: Union Files Unfair Labor Practice Charge

On February 16, the Union filed an unfair labor practice charge, asserting that Respondent violated the Act by: making statements and engaging in conduct that had a reasonable tendency to coerce employees in the exercise of their Section 7 rights; making work assignments that discriminated against employees who supported the Union; issuing a disciplinary warning to apprentice Allen for discriminatory reasons; and failing and refusing to bargain with the Union. The Union emailed a copy of the charge to owners Leon and Mason, as well as to Respondent's attorney. (GC Exh. 85 (alleging that some of the unlawful statements and conduct occurred during the critical period between the filing of the petition for representation and the representation election); Tr. 402.)

L. February 22: Respondent Terminates Apprentice Allen

[46] It appears that 4 out of 5 of the comments in response to Respondent's post have at least one thumbs up "like." (CP Exh. 5.) The evidentiary record does not show which of the additional comments Respondent "liked."

1. Events leading up to termination

On February 21, foreman Matther Webster sent an email to general foreman Ryan. Webster stated as follows in the email regarding apprentices Allen and Manduca and their work at the CVS Beverly job site:

> I had to have a little chat with James [Manduca] this morning. Between Friday and after I had left Monday morning the production was, how do i say non existent. Brad [Allen] was out today but the two of them together is counter productive, they both seem to have a negative attitude about their employment here [with Respondent] [47]

(GC Exhs. 28–29; see also GC Exhs. 103 (p. 3) and 104 (p. 4) (showing that Manduca was assigned to the CVS Beverly job site on February 16, 20 and 21);[48] Tr. 170–172, 371, 857–858.)[49] Ryan forwarded a copy of Webster's email to owner Leon, project manager Heon, and the human resources department, and asked Webster to "please keep us updated if this continues." (GC Exh. 28.) During trial, both Allen and Manduca denied that Webster had spoken to them about having a negative attitude or poor production. (Tr. 172, 371.)

In the morning on February 22, owner Leon forwarded a copy of foreman Coulstring's January 29 email (the version that Coulstring admitted contained false information) to controller Leon. (GC Exh. 16; see also FOF, sec. II(H)(1), supra.) Thirteen minutes later, controller Leon emailed Allen to instruct him to come to the office that day for a 1 p.m. meeting. (GC Exh. 26; Tr. 165.)

2. Allen terminated

In the afternoon on February 22, Respondent terminated apprentice Allen, setting forth the following rationale on Allen's termination notice:

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[47] I do not find Webster's February 21 email or his testimony about Allen and Manduca's attitude and job performance to be credible. I also do not credit owner Leon's testimony that Webster called to express similar concerns about Allen as set forth in Webster's February 21 email. (See GC Exhs. 28–29; Tr. 741–743, 856–857.) First, the evidentiary record shows that Respondent encouraged foremen and certain other employees and contractors to fabricate complaints about union supporters' job performance, and then used the fabricated complaints as a basis for disciplinary action. (See, e.g., FOF, sec. II(H)(1), supra; id., sec. II(N)(1), infra.) Second, Webster specified inaccurate dates in his email, as he asserted that he, Allen, and Manduca were at the CVS Beverly job site on February 19 (the "Monday" Webster referenced in his February 21 email), when Respondent's records show that no employees worked that day because it was a holiday. (See GC Exh. 104.) Third, there is no evidence that Webster ever sent a similar email about an employee's work performance before the February emails at issue in this case. That additional fact supports the conclusion that Webster's February 21 email was not on the level. (Tr. 860–861.)

[48] February 19 was a holiday and thus employees did not work. (GC Exh. 104.)

[49] Although there is no dispute that Allen worked during the February 12–22 time period, Allen does not appear on some of Respondent's time records for that time period. (Compare R. Exh. 2 (showing Allen's clock-in and clock-out times, including February 14-16, 20, and 22) with GC Exhs. 103–104 (Allen not listed).)

> This confirms the termination of your employment due to your unsatisfactory performance and conduct despite prior warning and repeated discussions. Your productivity has been unacceptably low, and coworkers have asked for you to be taken off their projects because of your negative impact. You have been repeatedly uncooperative when asked to perform various tasks by different foremen. You have also repeatedly used your cell phone during working time and have been repeatedly late for work. For these reasons, you have not met [Respondent's] expectations, and your employment is therefore being terminated.

(GC Exh. 27 (p. 1); Tr. 166–168, 741, 743; see also Tr. 172–173 (noting that Allen received a copy of Coulstring's January 29 email as part of Allen's termination packet).

During trial, Allen denied that anyone had spoken to him about his productivity or about being uncooperative when asked to perform tasks. Allen admitted to arriving late to work on four occasions between January 5 and February 22 but denied ever being spoken to about that issue except for the warning that he received on February 1. (Tr. 168–170, 183–184, 190–192; R. Exh. 2 (showing that Allen's late arrivals in this timeframe were between 13–35 minutes); see also FOF, sec. II(H)(1)–(2), supra (discussing the February 1 warning and surrounding events).)

3. Union files unfair labor practice charge

On February 22, the Union filed another unfair labor practice charge, this time asserting that Respondent violated the Act by terminating apprentice Allen because he supported the Union and because he participated in the Union's previous filing of an unfair labor practice charge and objections concerning the representation election. The Union emailed a copy of the charge to owners Leon and Mason, as well as to Respondent's attorney. (GC Exh. 86; Tr. 403.)

M. February 23: Respondent Terminates Apprentice Froio

1. Events leading up to termination

On about February 13, Froio received clearance to return to work without restrictions. In connection with that development, Froio and owner Leon exchanged the following text messages:

> Froio: I was told upon my arrival back to work I would be receiving the [company] van back. Can you give me an update if this is still the case? If not I will likely need to do some service to my truck. Let me know.
>
> Leon: Originally when you started using the van, we gave it to you because you were going to be going out to job site carrying tools and materials. We let you use the van as a [courtesy] so that you wouldn't have to be carrying an excessive number of tools and materials in your personal vehicle. For the foreseeable future you will be working under Rob [Coulstring]. Rob has a company vehicle on site already so if you guys need anything you will be able to use Robs van to grab it. Permanent company vehicles are only assigned to designated foreman. In the event we need to use you on another project that requires a vehicle on site we will temporarily assign one to you.

(GC Exh. 56; Tr. 294–295, 757; see also Tr. 296–297 (noting that Froio previously attended Respondent's foremen meetings every couple of months).)

On February 21, project manager Heon sent an email to controller Leon and general foreman Ryan that stated as follows:

> This is a letter to write Shane Froio a written warning
>
> While Shane was the plumber on the Elevate project, he was responsible for proper housekeeping and storage of our materials. When another plumber was utilized to work during Shane's absence the site was littered with trash and company tools not securely locked within a gang box or secure location. The attached photo is the trash pile mixed in with all our finished stock. The excess materials were not properly returned or locked in a safe space to prevent theft.[50]

(GC Exh. 51 (including an attached photograph showing three or four unopened boxes next to a pile of open/empty boxes); Tr. 495–496, 502–503, 749–751, 837–838; see also Tr. 285–288 (noting that Froio did not work at the Elevate job site after February 6, was never contacted about the issues raised in Heon's February 21 email, and denies leaving the boxes as shown in the photograph attached to Heon's email).)[51]

[50] Owner Leon attempted to corroborate Heon's February 21 email by testifying that no one else worked for Respondent at the Elevate job site between February 6 (Froio's last day at the site) and February 21 (the date of Heon's email about the condition of the site). (Tr. 837–838.) I do not credit Leon's testimony on this point because it directly conflicts with Respondent's records that show that foreman Webster and employee M.L. both worked at the Elevate job site on February 14. (GC Exh. 103 (pp. 3–4).)

On the other hand, Froio denied (in his affidavit) leaving the boxes in the condition that they appear in GC Exh. 51, but also stated that "even so, I left the job site abruptly when I got injured, so I did not leave [the site] the I normally would if I had not been injured." (Tr. 343–344.) The second explanation that Froio provided in his affidavit about the condition of the Elevate job site undercuts his credibility on the point, because Froio did not leave the Elevate job site due to injury (instead, he left the Elevate job site to go to another job site, see FOF, sec. II(I)(4), supra).

What ultimately tips the balance in the General Counsel's favor concerning Heon's February 21 email is Heon's poor credibility. The General Counsel established during trial that Heon actively participated in soliciting false and/or exaggerated reports that certain union supporters had poor job performance; thus, even if the shortcomings in Leon's and Froio's testimony cancel each other out, Heon's poor credibility undermines his February 21 email about Froio's job performance at the Elevate job site (as does Froio's track record for doing excellent work and maintaining clean and organized job sites). (See FOF, sec. II(M)(3), (N)(1), infra.)

[51] Owner Leon testified that project manager Heon reported that there were additional problems with Froio's work at the Elevate job site insofar as an ejector pump and another item were installed incorrectly. (Tr. 751–753.) I do not credit this testimony because it is not corroborated by any documentation, by Heon's testimony, or by Heon's February 21 email.

Also on about February 21, Respondent received the following email from project manager Andy Ashton about Froio. Ashton's email, directed to human resources, stated as follows:

> When speaking with my foreman on the [D]elta project on 2-20-2024 he brought to my attention that Shane Froio was underperforming in areas when given tasks and was very argumentized when the foreman tried to have a conversation about this. Ultimately the Foreman requested that Shane be swapped out for another apprentice. The decision was made to move Shane to another job site.[52]

(GC Exh. 61; Tr. 307–308, 748–749; see also GC Exhs. 61, 63, 103 (showing that Froio worked at the Delta job site on February 14–16, 20–21);[53] Tr. 299–300 (Respondent assigned Froio from the Delta site to the Prima Care job site in Rhode Island).)

2. Froio terminated

At 11:26 a.m. on February 23, owner Leon texted Froio and asked him to come to the office for a meeting at 1:30 p.m.. Leon texted Froio again at 12:23 p.m. to advise that he (Leon) was running behind and would meet with Froio at 1:45 p.m.. (GC Exhs. 50, 57; Tr. 300–301.)

At 12:45 p.m., owner Leon sent an email to controller Leon to state as follows regarding Froio's work at the Prima Care job site:

> I received a phone call from [K.] today. He expressed to me that Shane [Froio] has been extremely insubordinate these past 2 days at Prima care. Shane's productivity has been extremely lacking. He is refusing to perform basic tasks. He also has been speaking negatively about [Respondent] to the General Contractor, other Subcontractors, and the building owner. Please issue a write up and give it to Shane.

(GC Exh. 59; Tr. 753–754; see also Tr. 299–300, 305–306 (Froio denied refusing to do tasks at the Prima Care site; as for speaking negatively about Respondent to the general contractor, Froio admitted to saying, in response to a contractor's remark about not being able to get Heon to answer questions about a project, that this was a "common thing" for Heon; Froio denied making negative remarks to subcontractors or to the building owner).)

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[52] Froio denied having a conversation with foreman Doucette (the foreman at the Delta site) about Froio underperforming, and denied being negative about the work at the site. (Tr. 308.) Doucette, meanwhile, testified that he requested a different apprentice because Froio was not completing tasks that Doucette gave to him (Doucette did not testify that Froio was argumentative). (Tr. 851–852.)

Owner Leon attempted to corroborate Ashton's email by testifying that Ashton called Leon to complain that Froio was not performing job tasks and was bashing Respondent in conversations with subcontractors at the job site. (Tr. 748.) I do not credit owner Leon's testimony that Froio was bashing Respondent in conversations at the Delta site because it is not corroborated by Ashton's email or Doucette's testimony.

[53] Froio does not appear on Respondents timesheet records for the week of February 18–24 (see GC Exh. 104) even though there is no dispute that Froio worked part of that week.

At around 1:45 p.m. on February 23, Respondent terminated apprentice Froio, setting forth the following rationale:

> This confirms the termination of your employment due to insubordinate behavior by disregarding directives from various [foremen] and failing to follow company policies and procedures. Your work performance has consistently fallen below the acceptable standards expected of your position. Your negative attitude and demeanor have adversely impacted workplace morale and productivity. Your interactions with colleagues, customers and trade partners have been consistently disruptive and unprofessional. Your lack of effective jobsite management has resulted in delays as a result of your inability to keep a clean and orderly working area. You have failed to adhere to company policies regarding the proper storage of waste, tools, equipment, and materials on the jobsite. There have been instances of inaccurate reporting of company-related purchases, which is a violation of company policies and procedures. For these reasons, you have not met [Respondent's] expectations, and your employment is therefore being terminated.

(GC Exh. 58; Tr. 300–303, 331; see also Tr. 305 (Froio testimony that no one had previously spoken to him about insubordination or low productivity before he was terminated;).)

After being terminated, Froio called Heon and asked about Heon's February 21 email concerning the Elevate job site. Heon responded that his hands were tied and that he did not really have a choice. (Tr. 308–309.)

3. Previous assessments of Froio's job performance

During trial, owner Leon testified that Froio, although an apprentice, was "excelling" in his work for Respondent. (Tr. 696, 698, 746; see also Tr. 312 (noting that owner Leon often praised Froio for the work that he was doing).) Consistent with that testimony, project manager Heon and general foreman Ryan sent multiple text messages in 2023 and 2024 to compliment Froio about his work and thank Froio for taking on various tasks, including tasks on short notice. (GC Exhs. 66–71, 73–77; see also GC Exh. 71 (text message from junior project manager J.C. to thank Froio for "getting [a task] done as always"); GC Exhs. 78–79 (photographs of job sites that Froio submitted to Respondent for a contest for best work in the field; Froio won the contest); GC Exh. 116 (screen shot of a video of one of Froio's job sites [GC Exh. 47]; Respondent posted the video to its Instagram page and commented, in about August 2023, "Organized job site goes a long way"); Tr. 273–274, 312–321, 323–331.) Similarly, Ryan indicated that Froio earned a rating of 4 (out of 1–5) on Froio's May 23, 2023 evaluation, reflecting that Froio "Frequently performs above expectations."[54] (GC Exh. 115; Tr. 517–518.)

[54] It appears that Ryan was meant to complete Froio's 1–year review in November 2023, but no such evaluation was produced pursuant to subpoena or introduced into the evidentiary record. (See CP Exh. 8 (November 10, 2023 email exchange between Froio, human resources, and Ryan about completing the 1–year review); Tr. 549–550.)

N. February 26: Respondent Issues Warning to Apprentice Manduca

1. Events leading up to warning

On February 23, general foreman Ryan telephoned apprentice Manduca (who had been working at the CVS Beverly job site) and advised that work was slowing down in the area. Ryan asked Manduca if he would be interested in working at a job site on Nantucket island but Manduca declined because the time involved with going to Nantucket would interfere with Manduca's childcare responsibilities. Two days later, Ryan emailed Manduca and advised him to stay home on February 26 (and take a vacation day if Manduca wished) due to lack of available work. Manduca accordingly took a vacation day for February 26. Two other employees continued to work at the CVS Beverly job site. (Tr. 358–360; GC Exhs. 80, 104 (p. 4); see also GC Exhs. 105–107 (showing that foreman Webster and/or apprentice M.L worked at the CVS Beverly job site on February 26–27 and March 1, 5–7, 11–12, 15.)

Also on February 23, project manager Heon attempted to telephone T.A., the vice president of the general contractor for the CVS Beverly job site, to ask for a favor that Heon did not want to put in writing. Since Heon was unable to reach T.A. by phone, Heon sent the following email to T.A. at 5:05 p.m.:

> T.A., Thank you for building a good relationship. I have a favor to ask.
>
> After talking with my site team and [J.M.] they have been unhappy with one of our workers. With everything going on, we have written him up previously for work-related things. I would like your email requesting that he not be returned to your job site. If you are agreeable to this it would be very helpful in us removing toxicity from our job sites. Feel free to rewrite the next email in your own words. I will owe you one.

(GC Exh. 11; Tr. 79–84.)

Moments later (also at 5:05 p.m.), Heon sent T.A. a draft email complaining about Manduca's work at the CVS Beverly job site and asking that Manduca be removed from the site. The draft email stated as follows:

> Good evening Devon,
>
> I am sending this email to formally request your employee James [Manduca] not be returned to my job site in Beverly or any of [our] construction projects in the future. The reports back from my Site Superintendent that the workmanship, attitude, and progress while on site have been subpar at best. We do not have time with these fast-moving projects to deal with people standing around and having to rework everything they complete due to poor workmanship. Please call me on this as soon as possible.

(GC Exh. 12; Tr. 82; see also Tr. 362 (identifying the site superintendent as [J.].)[55]

[55] Owner Leon testified that Heon reported having a telephone call with T.A., who asked that Manduca be removed from the CVS Beverly job site, and that Leon instructed Heon to obtain a written

At 6:48 p.m. on February 23, T.A. sent an email to Heon with the subject "CVS # 915 Beverly, MA Job Complaint." The text of T.A.'s email was identical to the draft email that Heon provided about removing Manduca from the CVS Beverly job site. Three minutes later, Heon forwarded T.A.'s email to owner Leon. (GC Exhs. 10, 81 (p. 2); Tr. 80, 82–83.)

That same day, at 6:37 p.m., foreman Webster also emailed Heon and general foreman Ryan about Manduca (Heon subsequently thanked Webster for bringing the issues in the email to "our attention" and copied owner Leon, and human resources). Webster's email stated:

> Good afternoon, once again [we're] having problems with productivity and quality. James [Manduca] again, once I left the job site basically stopped working. [Redacted name] was left to clean up entire job site by himself. While [redacted name] was cleaning up after everybody he noticed James pulling out of job site at about 12:40-12:45 (he might claim he was there at 4:40 but he did not [enter] the building with his tools til 5 on the dot).[56] Lastly the quality of workmanship lately is disgusting, basically everything he has done needs to be fixed. I will attach a few pics. [J.] from [general contractor] doesn't want him on job and neither do I.[57]

(GC Exh. 81 (p. 3); Tr. 760–761, 858–859, 861–862; see also GC Exh. 81 (p. 4) (photograph of work done at CVS Beverly job site); Tr. 85 (Heon testimony that he also received a call from the site superintendent asking that Manduca be removed from the job site), 861 (noting that Webster did not send emails about any other employees except for apprentices Allen and Manduca).)[58]

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complaint from T.A.. (Tr. 762–763, 835.) I do not find Leon's testimony on this point to be credible. First, Heon admitted that he was not able to reach T.A. by phone. In short, there was no phone call between Heon and T.A. about Manduca in this time period. Second, Heon's behavior does not track with Leon's testimony. If this was a simple matter of asking T.A. to put a prior verbal complaint in writing (as Leon testified), then there would have been no reason for Heon's attempt to avoid creating a paper trail with T.A. about the "favor" that Heon would owe T.A. for submitting a written complaint about Manduca.

[56] Manduca testified that he worked a complete shift from 5 a.m. to 1 p.m. on February 23. Manduca also noted that at the end of his shift, he cleaned up the job site, loaded his tools into his car, and drove his car to the other side of the parking lot to close a storage bin where Respondent's materials were kept on the site. (Tr. 363–365.) On the other hand, owner Leon testified that after receiving Webster's email, Respondent looked at its timecard system and saw that Manduca's vehicle was down the street (off the job site) when Manduca clocked out. (Tr. 760–761.) The evidentiary record does not include any time records showing where Manduca was located when he clocked out on February 23.

[57] Owner Leon testified that Webster called him to express similar concerns about Manduca's work and attitude. (Tr. 758–760.) I do not give weight to that testimony (which Webster did not corroborate, see Tr. 856–862) because at best, it is cumulative since Webster's emails about Manduca are in the evidentiary record.

[58] Manduca disputes the proposition that his work at the CVS Beverly job site was of poor quality. Manduca explained during trial that when he was installing pipes at the site, he had to maneuver around various obstacles (e.g., air ducts, a sprinkler line, and a steel beam) and thus could not install the pipe in a straight line or above a certain height. Manduca also noted that Respondent did not have the preferred sized fittings on site. Manduca discussed these issues beforehand with Webster, who instructed Manduca to proceed with what Respondent had available. (Tr. 365–368 (discussing photograph at GC Exh. 81 (p. 4); compare Tr. 761–762, 858–859 (same, but with owner Leon and foreman Webster criticizing Manduca's pipe installation work as crooked and sloppy).)

2. Manduca receives warning

On February 26, Respondent sent an email to Manduca to issue a formal written warning that set forth the following rationale:

> This serves as a formal written warning regarding your performance and conduct in the workplace. Your performance and your behavior negatively impact our operations and reputation. There have been numerous reports of your lack of productivity at work, resulting in delays and inefficiencies in project completion.
>
> Your workmanship has been consistently subpar, with multiple instances of poor quality and work that fails to meet our standards and expectations. You have demonstrated a lack of attention to detail in performing tasks, leading to errors, rework, and dissatisfaction among clients.
>
> Your negative attitude and demeanor have been noted by colleagues, trade partners and general contractors, creating a toxic work environment and affecting team morale. Several general contractors have raised concerns about your performance, attitude, and behavior on job sites, resulting in requests to exclude you from our jobsites.
>
> It is essential to understand that your performance and conduct are unacceptable and do not align with the expectations and standards of our company. We value professionalism, quality, and teamwork, and your actions have undermined these core principles.

(GC Exh. 81 (attaching and relying on T.A's and foreman Webster's emails about Manduca's work at the CVS Beverly job site); Tr. 361–362, 763–764; FOF, sec. II(L)(1) (discussing Webster's February 21 email about apprentices Allen and Manduca); see also Tr. 350, 371 (Manduca testimony that he began working for Respondent in September 2023, and that foreman Webster never spoke to him about his attitude), 758 (owner Leon testimony that he did not hear anything good or bad about Manduca's performance before February 2024).)

O. March 6: Respondent Lays Off Apprentices Manduca, Tomasik, and Tsimopoulos

1. Events leading up to layoffs

On about February 27, Respondent assigned apprentice Manduca to work at the Bay State Vet job site. Towards the end of that week, on about March 1, general foreman Ryan told apprentice Chen that some people working at the Bay State Vet site did not want to be there, and indicated that apprentice Manduca was definitely one of those employees, and that he thought apprentice Georgios Tsimopoulos might also be such an employee. In a subsequent conversation, Ryan encouraged Chen to anonymously report Manduca for using a cell phone or coming back late from a break or lunchtime so that could be used against Manduca. (Tr. 245–247, 360–361; see also GC Exh. 105 (showing that Chen and Ryan worked together at the Bay State Vet job site on February 27–29 and March 1).)[59]

[59] Respondent's time records for the week of February 26 – March 1 do not include entries for Manduca. (See GC Exh. 105.)

On about March 4, apprentice Jacob Tomasik was working at the Delta job site when he spoke with general foreman Ryan. During the conversation, Tomasik stated that it was unfortunate that plumber Griffin no longer worked for Respondent because they were friends. Ryan responded that a guy like Tomasik would do great in the Union. (Tr. 202–203; see also GC Exh.106 (showing that Ryan was at the Delta job site on March 4).)[60]

2. Plumber-to-apprentice ratios

Witnesses who testified at trial agreed that the Commonwealth of Massachusetts requires a one-to-one ratio of plumbers and apprentices on certain work projects. (Tr. 376, 436–437, 717, 825; see also GC Exh. 6 (art. IX) (showing that the contract between the Union and the Greater Boston Plumbing Contractors Association requires a ratio of at least two plumbers per one apprentice); Tr. 231–232.)

By March, Respondent became increasingly concerned that it might be penalized (e.g., based on an inspector's report) for not having a one-to-one ratio of plumbers to apprentices. Respondent had four or five plumbers leave the company in the preceding weeks, and on March 4 Leon received a phone call from an inspector who, according to Leon, had questions about employee licenses and ratios at one of Respondent's job sites in Rhode Island. (Tr. 232, 376–377, 764–767, 839–840; see also R. Exh. 11 (Feb. 16 text message from an inspector advising Respondent to "tighten things up" because of a recent inquiry about Respondent's truck licenses and ratios on jobs); Tr. 765 (discussing R. Exh. 11); Tr. 716–717 (owner Leon testimony that on about February 7, union organizer Messinger commented "just wait until the board finds out how many apprentices you have," which Leon interpreted as a threat to report Respondent for not having a one-to-one plumber/apprentice ratio).)

3. Respondent completes layoffs

On March 6, apprentices Manduca, Tomasik, and Tsimopoulos were each working at the Bay Street Vet job site as directed by general foreman Ryan. Owner Leon came to the site and handed Manduca, Tomasik, and Tsimopoulos envelopes that he explained contained their final paychecks and paperwork about their apprentice work hours. Leon did not provide an explanation for why Manduca, Tomasik, and Tsimopoulos were being let go. Later in the afternoon, Tomasik emailed owners Leon and Mason (among others) to ask why he was abruptly terminated despite having a good employee review, doing the company a favor with certain recent work, and not having any prior discipline on his record. Respondent did not reply to Tomasik's email. No other employees were laid off in this time period.[61] (GC Exhs. 33, 46; Tr. 202–205, 207, 209–210, 226–229, 372–374, 797; see also GC Exhs. 106–107 (showing that 9–10 other employees continued to work at the Bay State Vet job site on March 7–8 and 11–16; the evidentiary record does not include time records after March 16); Tr. 228 (noting that

[60] Respondent's time records for the week of March 4–9 do not include entries for Tomasik. (See GC Exh. 106.)

[61] Leon testified that since the March 2024 time period, Respondent has laid off close to a dozen employees due to a lack of work. (Tr. 797.) On the other hand, Respondent hired at least four apprentices between March 25 and July 1. (Tr. 418–419.)

Tsimopoulos did not have any prior discipline on his record or any complaints about the quality of his work).)

During trial, owner Leon testified that due to the developing concerns about whether Respondent was meeting the one-to-one ratio between plumbers, he conducted an audit and determined that layoffs were necessary because Respondent had too many apprentices, particularly on commercial projects (as opposed to service projects that typically were staffed by one plumber and one apprentice). (Tr. 767–769, 838.) To select which apprentices would be laid off from Respondent's commercial work, Leon testified that he considered several factors, including but not limited to: apprentice tier/level (as an indicator of experience and eligibility to become a licensed plumber); license status in Massachusetts and Rhode Island; hourly wage rate; apprentice certifications to do specialized work; disciplinary history; and whether the apprentice was working at a job site that would be ending soon (a factor that weighed in favor of that apprentice being laid off). There is no evidence that Leon considered seniority as a factor for deciding which employees to lay off. (Tr. 772–773, 775–778, 790; R. Exh. 12;[62] see also Tr. 776 (explaining that higher tier apprentices are more valuable to Respondent than lower tier apprentices because higher tier apprentices are closer to becoming licensed plumbers), 783 (noting that Respondent did not consider co-op students when making layoff decisions), 419 and 798 (Respondent does not have a practice of recalling workers who have been laid off).)

Leon testified that he selected Manduca for layoff because Manduca was only a tier 1 apprentice and was being paid $21 per hour, which Leon stated was considerably more than some other apprentices at that level. Manduca's prior discipline (i.e., the February 26 warning) was also a factor in Leon's decision to selection Manduca for layoff, as was the fact that Manduca's project was wrapping up[63] and the fact that Manduca declined the request to work on a project on Nantucket. (Tr. 790, 793 (noting that Manduca did have an OSHA–10 certification).)[64]

[62] The General Counsel and Union raised valid questions during trial about R. Exh. 12, which Leon relied on when he testified about the March layoffs. Exhibit 12 is a printout of a table or spreadsheet listing, for each employee: name; hire date; termination date (if any); license type; and a "reasoning" column with notes about pay rate, license status, and certifications. The parties and I elicited testimony from owner Leon showing that the exhibit includes entries and information well after the March layoffs, and that Leon was not aware of how the table was created or maintained (though Leon did testify that human resources provided the information for the table). (Tr. 769–774, 798.) On the other hand, R. Exh. 12 appears to include some accurate information. Accordingly, I will give appropriate but limited weight to the exhibit.

[63] Leon did not specify which project was wrapping up, but the evidentiary record shows that Manduca worked at the Winter Street job site from January 22 through February 9, and then worked at the CVS Beverly job site from February 16–23. (GC Exhs. 100–104.) Other employees worked at the Winter Street job site from February 12 through at least March 15, though the work at that site in the final few weeks of that time period was sporadic. (GC Exhs. 103–107.) Work at the CVS Beverly job site continued from February 26 through at least March 15. (GC Exhs. 105–107.) As previously noted, the evidentiary record does not include time records after March 16.

[64] The following employees were also tier 1 apprentices: J.D. ($20 per hour;); M.D. ($31 per hour; licensed in Massachusetts and Rhode Island; 20 years of experience); and J.I. ($17 per hour). None of those employees had an OSHA–10 or other certifications. (R. Exh. 12.)

Leon testified that he selected Tomasik for layoff because Tomasik was a tier 3 apprentice and was earning $30 per hour, which (according to Leon) was a higher rate than some other employees with more experience received. Leon added that Tomasik did not have an OSHA–10 certification. Leon noted that Tomasik's job performance was not a factor in the layoff decision, as Respondent had not had any issues with Tomasik's work. (Tr. 784–785.)

As for Tsimopoulos, Leon testified that Tsimopoulos was a tier 3 apprentice, was earning $28 per hour, and had an OSHA–10 certification. Respondent selected Tsimopoulos for layoff because he had spent the majority of his time with Respondent working at the Delta job site, which was winding down. Leon noted that Respondent did assign Tsimopoulos work at the Bay State Vet project (one of Respondent's largest) after his time at the Delta site,[65] but said that it did so to try to keep Tsimopoulos busy until either another project arose or a layoff was necessary. (Tr. 791–792; see also GC Exhs. 38–46 (text messages from general foreman Ryan and project manager Heon assigning Tsimopoulos to work at seven different job sites between February 12 and March 6); Tr. 222–226, 230–231.)[66]

DISCUSSION AND ANALYSIS

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, 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. 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. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

[65] Leon's testimony about assigning Tsimopoulos to the Bay State Vet job site was not fully accurate. Respondent assigned Tsimopoulos to various job sites in February and March; the Bay State Vet assignment was one of those sites, but only for March 6. (See GC Exh. 46 (assignment to Bay State Vet project for March 6); see also GC Exhs. 38–45 (assignments to other job sites).)

[66] The following employees were also tier 3 apprentices (along with Tomasik and Tsimopoulos): J.C. ($29 per hour; licensed in Massachusetts and Rhode Island; OSHA–10 and three other certifications); A.G. ($20 per hour; OSHA–10 certification); M.L. ($24 per hour; OSHA–10 and two other certifications); T.O. ($24 per hour; licensed in Massachusetts and Rhode Island). Respondent also had one tier 2 apprentice: T.F. ($18 per hour; OSHA–10 certification; licensed in Massachusetts and Rhode Island). (R. Exh. 12.)

B. Were General Foreman Ryan and Project Manager Heon Respondent's Supervisors and/or Agents Under the Act?

1. Applicable legal standard

Individuals are statutory supervisors if: (1) they hold the authority to engage in any one of the supervisory functions listed in Section 2(11) of the Act (i.e., the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust grievances of other employees); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. To exercise independent judgment, an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. A judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. The party asserting supervisory status has the burden of establishing such status by a preponderance of the evidence. Conclusory evidence does not satisfy that burden. *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 888–889 (2014); see also *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687, 693 (2006).

The Board's test for determining whether an employee is an agent under Section 2(13) of the Act "is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Pan-Oston, Co.*, 336 NLRB 305, 305–306 (2001). "It is well established that where an employee places a rank-and-file employee in a position in which employees would reasonably believe that the employee speaks on behalf of management, the employer has vested that employee with apparent authority to act as the employer's agent, and the employee's actions are attributable to the employer." *Mid-South Drywall Co.*, 339 NLRB 480, 480 (2003). When applying this standard, the Board will consider the position and duties of the employee alleged to be an agent, as well as the context in which the behavior occurred. Accordingly, the Board may find agency where the type of conduct that is alleged to be unlawful is related to the duties of the employee, and may decline to find agency where the employee acts outside the scope of their duties. The party that asserts that an individual acted with apparent authority bears the burden of establishing the agency relationship. *Pan-Oston Co.*, 336 NLRB at 306.

2. Analysis – general foreman Ryan

The General Counsel and Union contend that general foreman Ryan was both a supervisor and an agent under the Act. (GC Posttrial Br. at 72–73; CP Posttrial Br. at 40–44.) I agree only as to Ryan's status as an agent. On the question of whether Ryan was a statutory supervisor, the General Counsel and Union maintain that Ryan qualifies as a supervisor because of his authority to assign employees to specific job sites and work assignments (or, in some instances, not assign work). (GC Posttrial Br. at 73 fn. 55; CP Posttrial Br. at 43–44.) The General Counsel fell short with its proof on this point, however, because while the evidentiary record shows that Ryan routinely notified employees about job assignments (see, e.g., FOF, sec. II(D)(2), (G), (O)(3)), the record does not show that Ryan exercised independent judgment in connection with job assignments. To the contrary, Ryan testified that owner Leon made all job

assignment decisions and merely relied on Ryan to communicate them. (See Tr. 508, 532–533, 587, 592.) In the absence of other evidence in the record to refute that testimony or establish that Ryan had the authority to exercise independent judgment in any other supervisory functions, the General Counsel did not meet its burden of proving that Ryan was a supervisor under Section 2(11) of the Act.

As previously noted, I find that general foreman Ryan was Respondent's agent under Section 2(13) of the Act. The evidentiary record shows that Ryan's job duties as general foreman included (in addition to plumbing work) communicating with employees about job assignments, visiting job sites to speak with employees and monitor how the work at the site was progressing, communicating with owner Leon or other members of management about any important issues in the field, and advising employees about the results of their performance evaluations. (See FOF, sec. II(D)(2), (5), (F)–(G), (I)(3), (M)(3), (O)(3); Tr. 507–508, 517, 532–533, 585–586, 591.) In short, Respondent gave Ryan job duties that placed Ryan in a position where employees could reasonably believe that Ryan was reflecting company policy and speaking and acting for management. That qualifies Ryan as Respondent's agent under the Act. *Facchina Construction Co.*, 343 NLRB 886, 887 (2004) (finding that an employer's foreman was the employer's agent because the foreman served as a conduit for communications between employees and management, including communications about job assignments, time off, and personnel issues), enfd. 180 Fed. Appx. 178 (D.C. Cir. 2006); see also *RHCG Safety Corp.*, 365 NLRB 852, 854 (2017) (agent status demonstrated by the fact that the employer relied on the agent to relay information to employees and communicate separation notices).

3. Analysis – project manager Heon

The General Counsel also contends that project manager Heon was Respondent's supervisor and/or agent under the Act. (GC Posttrial Br. at 73–74; CP Posttrial Br. at 44–46.) Regarding whether Heon was a supervisor under Section 2(11) of the Act, the General Counsel and the Union contend that Heon was a supervisor because he had the authority to effectively recommend discipline.[67] In support of that argument, the General Counsel points to: Heon's February 21 email to controller Leon and general foreman Ryan to state that they should write a written warning to apprentice Froio for not cleaning and storing materials properly at the Elevate job site; and controller Leon's testimony that she did not visit the Elevate job site or speak to Froio before Respondent relied on Heon's recommendation as part of the basis for terminating Froio. (GC Posttrial Br. at 74 fn. 56; see also FOF, sec. II(M)(1)–(2); Tr. 495–496, 502–503.) I do not find that this evidence establishes that Heon had the authority to effectively recommend discipline. First, Respondent did not issue a written warning to Froio as Heon recommended. To the contrary, Respondent decided to terminate Froio based on several factors, one of which was Heon's February 21 email about the Elevate job site. Second, and perhaps more important, the evidentiary record does not show that Heon recommended discipline on a regular basis; instead, the record shows that Heon recommended that Froio be disciplined as part of Respondent's effort to paper the files of certain union supporters with complaints that could

[67] The Union also contends that Heon qualifies as a supervisor because he had the authority to responsibly direct the work of other employees. (CP Posttrial Br. at 44–45.) I do not find merit to that argument because there is insufficient evidence that Heon directed employees' work on a regular basis, or that he exercised independent judgment in that context.

serve as a basis for discipline and/or termination.[68] (See, e.g., FOF, sec. II(H)(1)–(2), (L)(1)–(2), (N)(1)–(2).) Since the example recommendation of discipline that the General Counsel relies on was not followed and was an aberration from Heon's usual duties, and since there is no other evidence that Heon held authority to carry out other supervisory functions with independent judgement, I find that the General Counsel fell short of demonstrating that Heon was a supervisor under the Act. See *DIRECTV*, 357 NLRB 1747, 1748–1749 (2011) (finding that an employee was not a supervisor under Section 2(11) of the Act under an "authority to effectively recommend discipline" theory, in part because the employee's recommendations were subject to three levels of review).

I agree with the General Counsel and find, however, that Heon was Respondent's agent under Section 2(13) of the Act. Like general foreman Ryan, Heon communicated with employees about job assignments and about how employees' work at job sites was going. In the process, Heon evaluated employees' job performance and notified owner Leon or other members of management of his assessment so management could use it when making personnel decisions. Heon also served as a liaison between general contractors and owner Leon about ongoing work at job sites and issues related thereto. (See FOF, sec. II(D)(5), (M)(1), (N)(1); Tr. 78, 86.) By giving those duties to Heon, Respondent placed Heon in a position where employees could reasonably believe that he was reflecting company policy and speaking and acting for management, and thus established Heon as an agent under the Act. *Facchina Construction Co.*, 343 NLRB at 887; see also *RHCG Safety Corp.*, 365 NLRB at 854.

C. Did Respondent Make any Statements or Engage in Conduct that Violated Section 8(a)(1) of the Act?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by making the following statements and/or engaging in the following conduct:

(a) on about January 22, by telephone, interrogating its employees by telephone about their union membership, activities, and sympathies by soliciting their response to employee Michael Griffin's statements made at a January 19 meeting;

(b) on about January 22, interrogating employees at its Prima Care job site regarding their support for the Union, including by soliciting their response to employee Michael Griffin's statements made at a January 19 meeting;

(c) on about January 23, threatening its employees with unspecified reprisals by endorsing a video posted to Instagram that implied that the employees' organizing activities would impair the employees' and Respondent's ability to secure work in the industry and would bring about unspecified reprisals from contractors in Respondent's network;

[68] This is consistent with Froio's testimony that, in a conversation with Heon about Heon's February 21 email about the Elevate job site, Heon said that his hands were tied and that he did not really have a choice. (FOF, sec. II(M)(2).)

(d) on about January 23, threatening its employees with unspecified reprisals and discharge by endorsing a video posted to Instagram which included disparagement of the Union's supporters and their Section 7 activity, and demanded that they leave their jobs at Respondent rather than exercise their Section 7 rights;

(e) on about January 23, through a comment on a video posted to Instagram, threatened to discharge its employees and told them that their support for the Union was incompatible with their continued employment at Respondent by commenting "in my opinion, your word is everything! Your loyalty is everything!";

(f) on about January 24, interrogating its employees at its Waltham job site regarding their union membership, activities, and sympathies by soliciting their response to employee Michael Griffin's statements made at a January 19 meeting;

(g) on about January 24, threatening employees at its Delta Airlines job site with the loss of benefits by stating that if the Union was to be voted in, they would not get a raise for up to two years;

(h) on about January 24, at its Waltham job site, promising its employees benefits relating to preferential job site assignments and/or threatening to revoke such benefits by informing employees that Respondent likes to keep employees on job sites close to where they live and that employees should remember that when they vote in the union election;

(i) on about January 26, at its New Bedford job site, interrogating employees regarding their support for the Union by soliciting their response to Michael Griffin's statements made during a January 19 meeting;

(j) on about January 26, at its New Bedford job site, by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment by telling them that they could go into management's office and talk to them any time;

(k) on about January 29, at its Cambridge job site, creating an impression among employees that their union activities were under surveillance by Respondent, including by telling employees that they probably heard a lot of things at union meetings;

(l) on about January 29, at its Cambridge job site, by promising to help its employees expand their Instagram following for plumbing-related content, promised its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity;

(m) in about the first week of February, by telephone, creating an impression among employees that their union activities were under surveillance by Respondent, including by telling employees that Respondent was assigning workers so as to keep Union supporters away from non-Union supporters;

(n) on about February 1, at its Waltham job site, by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment;

(o) on about February 1, near its Delta Airlines job site, threatening its employees with a two-year wage freeze if they selected the Union as their bargaining representative;

(p) on about February 1, near its Delta Airlines job site, threatening its employees with layoffs if they selected the Union as their bargaining representative;

(q) on about February 2, at its Walpole job site, threatening its employees with a two-year wage freeze if they selected the Union as their bargaining representative;

(r) on about February 2, at its Walpole job site, by telling employees that certain employees were strong Union supporters and that management was reassigning employees to different job sites based on their Union support, creating an impression among employees that their Union activities were under surveillance by Respondent;

(s) on about February 6, by message and telephone, promising its employees the possibility of work as an independent contractor for an unrelated company of one of Respondent's owners if employees rejected the Union as their bargaining representative;

(t) on about February 7, by telephone, interrogating its employees about their union membership, activities, and sympathies by asking about their Facebook posts;

(u) on about February 7, by telephone, by telling employees that Respondent could assign them work closer to home, promised them preferred job site assignments if they rejected the Union as their bargaining representative, and/or threatened to revoke their preferred job site assignments if they selected the Union as their bargaining representative;

(v) on about February 7, at its Walpole job site, creating an impression among employees that their union activities were under surveillance by Respondent by telling a union representative in the presence of employees, after employees participated in a Union-organized breakfast meeting, that one of Respondent's owners did not need any breakfast;

(w) on about February 7, at its Walpole job site, threatening its employees with layoff if they selected the Union as their bargaining representative; and

(x) on about February 7, at its Walpole job site, by misrepresenting the Union's collective-bargaining agreement with other employers and telling employees that Respondent would not accept an agreement that is lower or different than the "master contract," informed its employees that it would be futile to select the Union as their bargaining representative.

(GC Exh. 1(p) (pars. 8–30, 32–33).)

2. Applicable legal standard

"The Board has long held that the standard to be used in analyzing statements alleged to violate Section 8(a)(1) is whether they have a reasonable tendency to coerce employees in the exercise of their Section 7 rights. Intent is immaterial. The Board considers the totality of circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. Whether or not the employee changed their behavior in response is not dispositive, nor is the employee's subjective interpretation of the statement. The Board therefore considers the total context of the alleged unlawful conduct from the viewpoint of its impact on employees' free exercise of their rights under the Act." *Lush Cosmetics, LLC*, 372 NLRB No. 54, slip op. at 3 (2023) (quotation marks and citations omitted); see also *NCRNC, LLC d/b/a Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 10 (2022) (explaining that when analyzing alleged threats, the Board asks whether the threat would reasonably tend to interfere with, restrain, or coerce an employee in the exercise of the employee's Section 7 rights, and noting that the test is an objective one, not based on subjective coerciveness), enfd. 94 F.4th 67 (D.C. Cir. 2024).

3. Analysis – Heon's January 19 phone call to Froio

As set forth in the Findings of Fact, on about January 19 after the staff meeting, project manager Heon telephoned apprentice Shane Froio. Heon and Froio initially spoke about a few work-related matters, and then Heon asked if Froio knew that Griffin was going to speak out at the staff meeting. Froio denied knowing that Griffin was going to speak at the meeting.[69] (FOF, sec. II(C).)

The Board applies a totality of the circumstances analysis in determining whether an interrogation was coercive. That analysis includes consideration of the following factors: whether the employer has a history of hostility toward or discrimination against union or protected concerted activity; the nature of the information sought; the identity of the interrogator and the interrogator's placement in the employer's hierarchy; the place and method of the questioning; and the truthfulness of the employee's reply to the questioning. *Garten Trucking LC*, 373 NLRB No. 94, slip op. at 1 (2024); see also *Rossmore House*, 269 NLRB 1176, 1178 & fn. 20 (1984), affd. sub nom *HERE, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

I find that Respondent violated Section 8(a)(1) of the Act by, through Heon, interrogating Froio about his union activities and those of other employees (specifically, Griffin). Heon sought information about whether Froio had advance notice that Griffin would speak out about the Union and organizing campaign. I find that line of questioning to be coercive even though the other factors were somewhat neutral (Heon being a mid-level official; the place and method of questioning being unremarkable; and the record not establishing whether Froio's reply was truthful). The January 19 meeting had just happened earlier in the day, and Heon zeroed in on whether Froio knew about another employee's union activities. By questioning Froio in that manner, Respondent ran afoul of the Act as alleged in paragraph 8 of the complaint.

[69] I find that Heon was acting in his capacity as Respondent's agent during this conversation, which began with a discussion of work-related matters and thus was within the scope of Heon's authority.

4. Analysis – conversations solely following up on January 19 meeting

The evidentiary record shows that on the following occasions, Respondent asked employees what they thought about the January 19 staff meeting: (a) January 22 or 23, when project manager Heon spoke with plumber Justin Reis at the Prima Care job site; and (b) January 24, when general foreman Ryan spoke to foreman Coulstring at the Delta Airlines job site. (FOF, sec. II(D)(5).)

As a preliminary matter, I have not given weight to employees' testimony that they subjectively believed Respondent was asking for their thoughts on the remarks that plumber Michael Griffin made about the union organizing campaign at the end of the January 19 meeting. As noted above, the test for whether a statement violates Section 8(a)(1) of the Act is an objective one, and is not based on subjective coerciveness. I also did not find that the General Counsel met its burden of proving that Ryan, during the January 24 discussion with Coulstring, threatened employees with a loss of benefits by stating that if Respondent was forced to unionize then there would not be raises for about 421 days while the Union and Respondent negotiated. (See FOF, sec. II(D)(5).) I accordingly recommend that paragraph 15 of the complaint be dismissed. (See GC Exh. 1(p) (par. 15).)

Turning to the merits of whether Respondent unlawfully interrogated employees in the two conversations noted above, and having considered the totality of circumstances (including the factors the Board considers when determining whether an interrogation was coercive), I do not find that Respondent violated the Act by asking Reis and Coulstring what they thought about the January 19 meeting. The information that Respondent sought was benign. Indeed, Respondent only asked a general, open-ended question about what Reis and Coulstring thought about a lengthy staff meeting in which Respondent did not speak about the Union or the organizing campaign. (See FOF, sec. II(C).) To be sure, Griffin spoke about the Union and organizing campaign at the end of the meeting, but Respondent did not ask Reis or Coulstring about Griffin's remarks. As for the remaining factors, they are, at most, neutral, as: it was too early in the campaign to say that Respondent had a history of hostility toward or discrimination (though some early signs of hostility were arguably present); Ryan and Heon are Respondent's agents and are mid-level in the company hierarchy; and the place and method of the questioning and the employees' replies to the questioning were not remarkable. Accordingly, I recommend that the unlawful interrogation allegations in the complaint concerning these conversations be dismissed. (See GC Exh. 1(p) (pars. 9, 14).)

5. Analysis – January 22 comments in response to N.A.'s Instagram video

On about January 22, contractor (and non-employee) N.A. posted an Instagram video that, in essence, warned that "fucking with" Respondent was akin to fucking with all other members of a network of contractors, subcontractors, family, friends, employees, and customers. Controller Kayla Leon posted a comment in response to the video, stating, "In my opinion, I really like your hat [a baseball cap with Respondent's name] & your sweatshirt & your wall." General foreman Ryan also posted a comment, stating, "In my opinion, this guy knows what he's

talking about!!! [three flame emojis]," and admitted that through his comment he endorsed the message in the video. Employees saw the video and comments. (FOF, sec. II(D)(3).)

The General Counsel alleges that through the comments that Kayla Leon and Ryan posted, Respondent endorsed the entirety of N.A.'s Instagram video, and thus made unspecified threats of reprisal and discharge. (See GC Posttrial Br. at 77–80.) I disagree. Kayla Leon's comment is, at best, ambiguous. She explicitly stated that she liked the hat N.A. was wearing in the video. It does not follow, from that limited comment, that Kayla Leon endorsed every single aspect of what N.A. said in the video. I therefore decline to find a violation based on Kayla Leon's comment.

Ryan, on the other hand, went further, saying (with emphasis) that N.A. "knows what he's talking about." While that comment comes closer to qualifying as an endorsement (and indeed, Ryan admitted that his comment was an endorsement), the General Counsel's argument still falls short because the General Counsel did not show that Ryan was acting as Respondent's agent when Ryan made the comment. There is no evidence that Ryan had actual or apparent authority to make Instagram comments on Respondent's behalf. Ryan's job duties do not include making social media postings, and there is no evidentiary basis for me to find that any employee reasonably may have believed that Ryan's authority extended to that context. Thus, even if Ryan "endorsed" the content of N.A.'s Instagram video, the endorsement was beyond the scope of Ryan's authority and I cannot find that Ryan's comment should be imputed to Respondent based on Ryan's status as an agent in other circumstances. I therefore recommend that the allegation in paragraph 10 of the complaint be dismissed.[70]

6. Analysis – January 23 comments in response to B.W.'s Instagram video

On about January 23, B.W., a non-employee who managed another company alongside Respondent's owner Richard Leon, posted an Instagram video that, in essence, stated that employees who spent time tearing down what good men and women have built were "scum of the earth" and should instead "go build [their] own" if they did not like something. Owner Mason, general foreman Ryan, and project manager Heon each posted "likes" in response to B.W.'s video. Controller Kayla Leon, meanwhile, posted "In my opinion, your word is everything! Your loyalty is everything! I resonate with that!" Employees saw the video and comments. (FOF, sec. II(D)(4).)

The General Counsel alleges that through the likes that Mason, Ryan, and Heon posted,[71] Respondent endorsed the entirety of B.W.'s Instagram video, and thus made unspecified threats of reprisal and discharge. (See GC Posttrial Br. at 80–82; CP Posttrial Br. at 58–60.) I disagree.

[70] Although I have recommended that this complaint allegation be dismissed, I observe that Ryan's written (and public) comment in response to N.A.'s video serves as further corroboration for other remarks that Ryan made during the relevant time period that violated the Act and/or supported a finding of animus.

[71] The General Counsel also asserted that Respondent endorsed the video because junior project manager and plumber Jaylene Colon also posted a "like." (See GC Posttrial Br. at 81.) I do not find merit to this argument because the General Counsel did not allege this theory in paragraph 11 of the complaint, and also did not allege or demonstrate that Jaylene Colon was Respondent's supervisor or agent under the Act. (See GC Exh. 2(d) (listing Jaylene Colon's job titles).)

B.W.'s Instagram video was somewhat lengthy, and I cannot conclude that, by posting a "like" in response to the video, Respondent endorsed everything that B.W. stated in the video.[72]

Kayla Leon's comment in response to B.W.'s video, however, is another matter. With her comment about loyalty, made in response to a video that disparaged union supporters as "scum of the earth" and implicitly (through the "go build your own" remark) asserted that union supporters should work elsewhere instead of engaging in union organizing while employed with Respondent, I find that Kayla Leon did endorse critical aspects of the video that threatened employees with unspecified reprisals and invited employees to quit rather than trying to improve working conditions through union activities. *Starbucks Corp.*, 373 NLRB No. 123, slip op. at 1–2 (2024) (an employer violates the Act when it states that employees who are dissatisfied with their working conditions should quit rather than trying to improve working conditions through protected concerted activity). Further, by responding to B.W.'s video with a comment indicating that union supporters were not "loyal," Respondent (through Kayla Leon) communicated the message that union supporters' organizing activities were not consistent with continued employment with Respondent. *E.L.C. Electric, Inc.*, 344 NLRB 1200, 1200 fn. 3 (2005) (finding that an employer violated Section 8(a)(1) of the Act by stating that it would try to keep its "loyal employees" during upcoming layoffs). I therefore find that Respondent violated Section 8(a)(1) of the Act by, on about January 23: endorsing B.W.'s Instagram video and thereby threatening employees with unspecified reprisals and inviting employees to quit their jobs rather than exercise their Section 7 rights; and telling employees that their support for the Union was incompatible with their continued employment with Respondent.[73]

7. Analysis – January 24 communication with apprentice Chen

The evidentiary record establishes that on about January 24, general foreman Ryan visited a job site in Waltham and spoke to apprentice Chen. When Ryan asked for Chen's thoughts on the January 19 meeting, Chen responded that he had heard "all that stuff" and that Respondent did not have to worry about him. Ryan then mentioned that union organizers might be visiting job sites, and later stated that: Chen was a good worker; Respondent liked Chen and tried to keep Chen at job sites close to Chen's residence; and that Chen should remember that when it comes time to vote (Ryan then said he was just kidding as this last remark). (FOF, sec. II(D)(5).)

The General Counsel contends that Respondent, through Ryan,[74] unlawfully interrogated Chen during this discussion, but I disagree. For the reasons stated above, I do not find that Ryan's general question to Chen about the January 19 meeting was unlawful.[75] (See Discussion

[72] I also note that the General Counsel did not show that Ryan or Heon were acting as Respondent's agents when they posted their "likes." There is no evidence that either of them had apparent authority to make social media postings as part of their job duties with Respondent.

[73] To the extent that complaint pars. 11 and 12 set forth additional allegations beyond what I have stated here, I recommend that those additional allegations be dismissed.

[74] I find that Ryan was acting as Respondent's agent during this interaction with Chen. At a minimum, Ryan had apparent authority to visit job sites to speak with employees and apparent authority to make job assignments.

[75] I have considered the fact that the alleged unlawful interrogation was coupled with an unlawful threat regarding Chen's job assignments. While there is Board case law that evidence of other unlawful

and Analysis, sec. C(4).) I accordingly recommend that the allegations in paragraph 13 of the complaint be dismissed.

I do, however, agree with the General Counsel that Respondent, through Ryan, ran afoul of Section 8(a)(1) of the Act by promising Chen benefits in the form of preferential job assignments and implicitly threatening to revoke those benefits if Chen supported the Union. It is well established that an employer may not promise or grant benefits to employees for the purpose of discouraging union support. Notably, while the employer's motive is typically irrelevant to the merits of 8(a)(1) allegations, employer motive is relevant to promises or conferral of benefits because the Board evaluates whether the record evidence as a whole, including any proffered legitimate reasons for the benefit, supports an inference that the offer was motivated by an unlawful purpose to coerce or interfere with the employee's protected union activity. *NLRB v. Exchange Parts*, 375 U.S. 405, 409–410 (1964); see also *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007); *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545, 545 (2002). Here, Ryan communicated to Chen that the benefit of receiving job assignments convenient to Chen's home hung in the balance depending on how the union vote played out. Ryan amplified the threat by prompting Chen to keep that fact (future job assignments that were up to Respondent) in mind when Chen cast his vote.[76] I find that Ryan's statements were motivated by an intent to coerce or interfere with Chen's union activities, and therefore were unlawful as alleged in paragraph 16 of the complaint.

8. Analysis – January 26 communication with plumber Reis

Regarding January 26, the Findings of Fact show that owners Leon and Mason visited the Delbrook Achushnet job site in New Bedford and spoke to plumber Reis. Leon and Mason asked Reis what he thought about the January 19 meeting, and Reis answered that it was cool to see the company's growth. Reis then asked what it would mean if Respondent unionized, and Leon/Mason replied that: they did not build Respondent to be a union company; Respondent

threats during an interrogation supports a finding that the interrogation itself was unlawful (see, e.g., *Starbucks Corp.*, 373 NLRB No. 53, slip op. at 3 (2024)), I do not find that such case law fits here. The alleged interrogation was, as noted above, limited to a brief, open-ended question that did not specifically reference the Union or the union organizing campaign. From there, the questioning (such as it was) ended and Ryan transitioned to making an unlawful threat concerning Chen's job assignments.

[76] To the extent that Ryan tried to retract his statement by saying that he was just kidding, I do not find the retraction to be effective. An employer may repudiate, or cure, unlawful conduct, generally if the repudiation is: timely; unambiguous; specific in nature to the coercive conduct; free from other proscribed illegal conduct; adequately publicized to the employees involved; not followed by other unlawful conduct after the publication; and accompanied by assurances that the employer will not interfere with Section 7 rights in the future. The elements that an employer must meet to repudiate unlawful conduct may depend on the nature of the violation. See *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978). Here, Respondent did not assert a repudiation defense. Even if I considered such a defense, however, Ryan's "just kidding" remark was insufficient to meet the repudiation standard because, among other shortcomings, it lacked detail, lacked specificity about the unlawful conduct, did not include any assurances that Respondent would not interfere with Section 7 rights in the future, and was followed by other unlawful conduct.

would be bringing in someone to help with the union organizing campaign; and that Reis would be informed on both sides and should not be afraid to ask them questions. (FOF, sec. II(D)(5).)

The General Counsel contends that Respondent unlawfully interrogated Reis during this discussion, but for the reasons stated above, I do not find that Leon's and Mason's general question to Reis about the January 19 meeting was unlawful. (See Discussion and Analysis, sec. C(4).) I accordingly recommend that the allegations in paragraph 17 of the complaint be dismissed.

The General Counsel also contends in paragraph 18 of the complaint that Respondent violated the Act by soliciting employee complaints and grievances and promising increased benefits and improved terms and conditions of employment, specifically by telling Reis "that [he] could go into their office and talk to them any time." (See GC Exh. 1(p) (par. 18).) The General Counsel, however, did not prove that Respondent made such a statement. To the contrary, Respondent advised Reis that the company was bringing in someone to help with the organizing campaign, Reis would be informed on both sides, and that Reis should not be afraid to ask them[77] questions. Viewed in context, I do not find that Respondent solicited employee complaints or grievances or promised improved benefits or terms and conditions of employment; instead, Respondent lawfully advised Reis that conversations on both sides would be forthcoming about the organizing campaign and that Reis should feel comfortable asking questions in those circumstances. I therefore recommend that paragraph 18 of the complaint be dismissed.

9. Analysis – January 30 conversation with apprentice Froio

The evidentiary record shows that during a visit to the Elevate job site in Cambridge, Massachusetts, on about January 30, owners Leon and Mason spoke to apprentice Froio about the organizing campaign (consultant Allen was also present). Towards the end of the conversation, Leon asked Froio if they were good regarding an earlier issue with Froio's Instagram page/videos. Leon then said that he could put Froio in touch with a well-known plumbing content creator Instagram, which could help Froio's Instagram page. (FOF, sec. II(F).)

As an initial matter, I recommend dismissing the General Counsel's complaint allegation that Leon unlawfully created an impression of surveillance by telling Froio that he (Froio) probably heard a lot of things at union meetings. (GC Exh. 1(p) (par. 19).) I did not find that Leon made this statement (see FOF, sec. II(F)), and thus the General Counsel's proof on this allegation fails.

Concerning the allegation that Respondent, through Leon, promised increased benefits to Froio (in the form of an opportunity for Froio to expand his Instagram following for plumbing-related content) if Froio refrained from union activity (see GC Exh. 1(p) (par. 20)), I find that Respondent unlawfully promised a benefit to Froio for the purpose of discouraging Froio's union support. At the tail end of speaking with Froio about the union organizing campaign, Leon offered to connect Froio with a popular Instagram content creator. Given that context, a

[77] The "them" is ambiguous, insofar as it is not clear whether Respondent was telling Reis he could pose questions to Respondent's owners, Respondent's labor consultant, or both.

reasonable employee would interpret Leon's remarks as offering a promotional opportunity if Froio refrained from supporting the union. Indeed, Leon's offer to assist Froio with his Instagram page was not part of any established company program, and the timing of the offer was connected to a discussion about the organizing campaign, which supports a finding that the offer was motivated by an intent to coerce or interfere with Froio's union activities. It does not matter that Leon did not spell out the quid pro quo more explicitly; it was sufficiently implied that if Froio refrained from supporting the Union, then Respondent would return the favor by helping Froio with his Instagram page. In promising the benefit of assisting with Froio's Instagram page as a way to coerce union activity, Respondent violated Section 8(a)(1) of the Act. Cf. *Cintas Corp. No. 2*, 372 NLRB No. 34, slip op. at 3–5 (2022) (finding that a threat of loss of promotional opportunities violated the Act).

10. Analysis – late January or early February phone call to foreman Coulstring

As established in the record, in about late January or early February, general foreman Ryan telephoned foreman Coulstring and said that Respondent was strategically planning manpower to avoid having employees switch their votes. Specifically, Respondent planned to keep employees that were voting "yes" separate from people voting "no," and by putting anyone who was a "maybe" with someone voting "no." (FOF, sec. II(G).)

The Board's test for determining whether an employer has unlawfully created an impression of surveillance is whether, under all the relevant circumstances, reasonable employees would assume from the statement or conduct in question that their union or other protected activities have been placed under surveillance. The standard is an objective one, based on the rationale that employees should be free to participate in union activities without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. *Metro One Loss Prevention Services*, 356 NLRB 89, 102 (2010).

I agree with the General Counsel that Respondent, through Ryan's phone call to Coulstring,[78] violated the Act by unlawfully creating an impression among employees that Respondent had employees' union activities under surveillance. In the call with Coulstring, Ryan indicated that Respondent knew which employees supported unionizing, opposed unionizing, or were still undecided. Through that assertion, Ryan indicated that Respondent had information about employees' union activities and union support through unspecified sources. By telling Coulstring that the company had suspicions about who did or did not support the union, Respondent unlawfully created the impression of surveillance and violated Section 8(a)(1) of the Act as alleged in paragraph 21 of the complaint. See *Flexsteel Industries*, 311 NLRB 257, 257–258 (1993) (questioning an employee about rumors that the employee was engaging in union activity violated the Act by creating an impression of surveillance).

[78] I find that Ryan was acting as Respondent's agent in this phone call with Coulstring, as Ryan's duties included notifying employees about job assignments.

11. Analysis – February 1 conversation with foreman Coulstring

The evidentiary record establishes that on about February 1, owners Leon and Mason, along with consultant Allen, picked up foreman Coulstring from the Delta airline job site and went to a nearby Starbucks to talk. During the discussion, Leon and Mason stated that if employees unionized, contract negotiations lasted an average of 421 days. Either Leon or Mason noted that Respondent was apprentice-heavy, and that Respondent would[79] have to have layoffs to accommodate the Union's requirement of a one-to-one ratio between plumbers and apprentices. (FOF, sec. II(F).)

The General Counsel alleges that Respondent threatened a 2–year wage freeze if employees selected the Union as their collective-bargaining representative. Since I did not find that Respondent made such a statement in the discussion with Coulstring, I recommend that the allegation in paragraph 23 of the complaint be dismissed.

The General Counsel also alleged that Respondent threatened employees with layoffs if employees selected the Union as their bargaining representative. (See GC Exh. 1(p) (par. 24.) As indicated above, I found that Respondent did make a statement to that effect by maintaining that layoffs would be necessary to meet the Union's one-to-one ratio requirement for plumbers/apprentices. Regarding whether that statement was coercive, I note that the Board had explained that an employer may lawfully communicate to its employees carefully phrased predictions about "demonstrably probable consequences beyond [the employer's] control" that unionization will have on the company, provided that the predictions are based on objective facts. However, if the employer predicts, without any supporting objective facts, that it may or may not take action solely on its own initiative for reasons unrelated to economic necessities and known only by the employer, then the employer's prediction is a threat of retaliation that violates Section 8(a)(1) of the Act. *Daikichi Sushi*, 335 NLRB 622, 623–624 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003).

Here, I do not find that Respondent's prediction of layoffs was sufficiently based on objective facts. While the evidentiary record indicates that both the Union and the Commonwealth of Massachusetts require a one-to-one ratio between plumbers and apprentices, it does not follow that Respondent would have to resort to layoffs to meet the ratios. To the contrary, Respondent's staffing was not set in stone, and thus Respondent might be able to meet the ratio requirements through lawful employee departures, lawful employee hiring, or other

[79] As I noted in the Findings of Fact, it is not material whether Respondent said it "would" or "could" have to lay off employees. The Board has held that tentative language about adverse consequences can nonetheless be coercive, particularly where the employer's prediction is not based on objective facts or the nature of the collective-bargaining process. *Daikichi Sushi*, 335 NLRB 622, 623–624 (2001) (holding that it was not a defense that the employer phrased its prediction that the plant could close if employees unionized "as a possibility rather than a certainty"), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Holy Cross Health d/b/a Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 1 fn. 3 (2020) (employer unlawfully threatened that if employees unionized the employer's leave policies might become less generous and its shift scheduling might become less flexible); *Metro One Loss Prevention Services Group*, 356 NLRB at 89 (employer unlawfully threatened that an employee's pay rate could get worse if the union came in); compare *Jefferson Smurfit Corp.*, 325 NLRB 280, 280 fn. 3 (1998) (employer's statement that benefits "could go either way as a result of collective bargaining" was lawful).

developments besides layoffs. The prediction that layoffs would be necessary if employees unionized was therefore an unlawful threat that had a reasonable tendency to coerce employees in the exercise of their rights under the Act. See, e.g., *Poly-America*, 328 NLRB 667, 669 (1999) (employer violated the Act by warning that union activity would cause the employer to lower wages, hours, and overtime), enfd. in pertinent part, 260 F.3d 465 (5th Cir. 2001)

12. Analysis – February 1 conversation with apprentices Chen and Manduca

As set forth in the Findings of Fact, during a discussion on about February 1 about the union organizing campaign with apprentices Chen and Manduca at the Winter Street job site in Waltham, owner Mason said that he was floored that this was happening and asked what Respondent could do better for employees or if there were any concerns. Consultant Allen then intervened and told Mason he could not talk about that. (FOF, sec. II(F).)

The Board has held that absent a previous practice of doing so, an employer violates the Act by soliciting grievances during an organizational campaign when the solicitation is accompanied by a promise, expressed or implied, to remedy the grievances. The solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances, but an employer may rebut the inference of an implied promise by, for example, establishing that it had a past practice of soliciting grievances in a like manner before the critical period, or by clearly establishing that the statements at issue were not promises. *Mek Arden, LLC d/b/a Post Acute Rehab*, 365 NLRB 1065, 1066 (2017) (collecting cases), enfd. 755 Fed. Appx. 12 (D.C. Cir. 2018).

The General Counsel maintains that Respondent, through Mason's remarks, unlawfully solicited employee complaints and grievances and thereby promised employees increased benefits and improved terms and conditions of employment. (See GC Exh. 1(p) (par. 22).) I agree. Although there is some evidence that Respondent's owners visited job sites to check in on how the work was going, Mason's remark was different in kind than any past practice Respondent had when managers visited job sites. Mason referenced the ongoing union organizing campaign, and then asked what Respondent could do better or if there were any concerns; there is no evidence that Respondent had a past practice of soliciting that type of input from employees during job site visits, and thus I do not find that Respondent rebutted the inference that it was making an implied promise to remedy the employee complaints and grievances that Mason asked about. I accordingly find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 22 of the complaint.[80]

[80] I do not find that consultant Allen's repudiated the misconduct on Respondent's behalf when Allen intervened and told Mason that he (Mason) could not talk about employee concerns or what Respondent could do better. Respondent did not present a repudiation defense. If I were to reach the merits of such a defense, however, the repudiation was not effective because, among other deficiencies, Allen's intervention lacked detail, was not specific, did not include any assurances that Respondent would not interfere with Section 7 rights in the future, and was followed by other unlawful conduct. See *Passavant Memorial Area Hospital*, 237 NLRB at 138–139 (describing the factors that the Board considers when evaluating whether an employer has repudiated a violation of the Act).

13. Analysis – February 2 conversation with apprentice Chen

In a February 2 discussion with apprentice Chen at the Winter Street job site in Waltham, general foreman Ryan said that he thought apprentice Manduca was a strong union supporter, and also said that Respondent was trying to make job assignments that would keep "maybe yeses away from hard yeses" and put "maybe yeses with hard no's." (FOF, sec. II(F).)

I agree with the General Counsel that, through Ryan's remarks,[81] Respondent unlawfully created an impression among employees that Respondent had employees' Union activities under surveillance. (See GC Exh. 1(p) (par. 26); see also Discussion and Analysis, sec. C(10), supra (describing the legal standard for whether an employer has unlawfully created an impression of surveillance).) Ryan explicitly spoke about his belief that Manduca was a strong union supporter, and also indicated that Respondent (based on unspecified sources of information) knew which employees supported unionizing, opposed unionizing, or were still undecided. By telling Chen about the company's suspicions about who supported the union, Respondent unlawfully created the impression of surveillance and violated Section 8(a)(1) of the Act. See *Flexsteel Industries*, 311 NLRB at 257–258.

14. Analysis – February 2 conversation with plumber Reis

The evidentiary record shows that on February 2, owners Leon and Mason, and consultant Allen visited a job site in Walpole and spoke to plumber Reis. During the discussion, Leon and/or Mason said that it could take 2 years for the Union and Respondent to reach a contract agreement. (FOF, sec. II(F).)

The General Counsel alleges that Respondent threatened employees (Reis) with a 2–year wage freeze if employees selected the Union as their bargaining representative. I did not find that Respondent made such a statement in the February 2 discussion with Reis; to the contrary, Respondent expressed the standard uncertainty that comes with contract negotiations, including the possibility that it could take some time (even 2 years or more) to reach an agreement. I do not find that statement to be unlawful, and I accordingly recommend that paragraph 25 of the complaint be dismissed.

15. Analysis – February 5 and 6 communications with Coulstring

The record shows that in about early February, foreman Coulstring posted on his Facebook page about a recent union meeting. On about February 5, general foreman Ryan called Coulstring and asked if Coulstring was "switching up" on Respondent. When Coulstring said he needed to do what was best for him and his family, Ryan said that if Coulstring "hung in there" Respondent had an upcoming job that would be closer to Coulstring's home. On about February 6, owner Mason sent a text to ask if Coulstring still did new construction work, and texted plans for eight new duplexes that needed plumbing work. In a subsequent phone call, Mason and Coulstring discussed the possibility of Coulstring doing the plumbing work for the duplexes (as a side project separate from Respondent's business). Both Ryan and Mason were friends with Coulstring on Facebook in this time period. (FOF, sec II(I)(3).)

[81] I find that Ryan was acting as Respondent's agent in this conversation since Ryan's duties included visiting (and working at) job sites, and also included advising employees of job assignments.

Both Ryan and Mason unlawfully promised benefits to Coulstring.[82] First, both Ryan and Mason reached out to Coulstring within 1 day or 2 of Coulstring posting on Facebook in a manner that suggested that he was at least considering supporting the Union. Ryan voiced concern about Coulstring's possible union support explicitly, asking if Coulstring was "switching up." Then, as an incentive to oppose the Union, Ryan promised the benefit of a future job assignment that would be closer to Coulstring's home. Mason, meanwhile, contacted Coulstring shortly after the Facebook post and offered Coulstring the opportunity to take on a potentially lucrative side project of doing the plumbing work for eight duplexes. I find that, as with Ryan's offer of a favorable job assignment, Mason's offer of the duplex project plumbing work (made shortly after Coulstring's Facebook post about the union meeting) was also intended as an incentive for Coulstring to refrain from supporting the Union. Since both benefits were offered to Coulstring for the purpose of discouraging his union support, I find that Respondent violated Section 8(a)(1) of the Act with each offer.[83] (See GC Exh. 1(p) (pars. 27, 29).)

I also find that Respondent, through Ryan, unlawfully interrogated Coulstring during the February 5 telephone call. (See GC Exh. 1(p) (par. 28).) By this point, Respondent had already begun demonstrating its hostility towards union activity. More important, Ryan sought information from Coulstring about where Coulstring stood on the union organizing effort, and coupled that inquiry with an unlawfully coercive offer to provide Coulstring the benefit of a future job assignment convenient to Coulstring's home if Coulstring "hung in there" with the company. Thus, even though Ryan was only a mid-level agent of Respondent and there was nothing remarkable about the place and method of the questioning or Coulstring's reply to the questioning, I find under the totality of circumstances (including the unlawful benefit that Ryan offered during the questioning) that Respondent subjected Coulstring to unlawfully coercive interrogation on February 5. See *Starbucks Corp.*, 373 NLRB No. 53, slip op. at 3 (2024) (explaining that evidence of other unlawful threats during an interrogation supports a finding that the interrogation itself was coercive).

16. Analysis – February 7 visit to Walpole job site

In a visit to a job site in Walpole on about February 7, owners Leon and Mason spoke to employees and mentioned a recent layoff in the region and noted that several plumbers with the Union had their resumes on Indeed. Leon then spoke about the Union's master agreement and stated that the Union absolutely would not reach a different agreement with Respondent because that would obligate the Union to apply the same terms to all local contractors. After a somewhat heated argument arose after union organizer Messinger joined the conversation, Leon told Messinger, "Don't worry, I don't need breakfast on Friday [the day of the representation election]." (FOF, sec. II(I)(3).)

[82] I find that Ryan was acting as Respondent's agent during the February 5 call. During the call, Ryan invoked his apparent authority over job assignments, which lended weight to Ryan's offer that Coulstring could receive a favorable future job assignment if he did not support the Union.

[83] I do not find that Respondent, through Ryan, threatened to revoke Coulstring's preferred job site assignments if Coulstring supported the Union. (See GC Exh. 1(p) (par. 29) (proposing this alternative theory).) The evidentiary record does not support that alternative theory, but rather shows (as described herein) that Ryan offered the benefit of a favorable job assignment to entice Coulstring to oppose the Union.

The General Counsel contends that Respondent threatened employees with layoffs in the February 7 discussion. (GC Exh. 1(p) (par. 32).) I do not find that the General Counsel met its burden of proving that Respondent made such a threat. To the contrary, I found that Respondent only noted that another company in the area had layoffs, and that several plumbers who were members of the Union were apparently looking for work. Based on the evidentiary record, those statements were sufficiently based on objective facts, and Respondent did not say that it would have layoffs if employees selected the Union as their bargaining representative. Since the General Counsel did not prove that Respondent made a statement about layoffs that had a reasonable tendency to coerce employees in the exercise of their statutory rights, I recommend that the allegation in paragraph 32 of the complaint be dismissed.

The General Counsel also contends that Respondent's statements about the Union's collective-bargaining agreement were unlawful because Respondent said that it would not accept an agreement that was lower or different from the Union's master agreement, and thereby indicated that it would be futile for employees to select the Union as their bargaining representative. (GC Posttrial Br. at 95–96.) As a preliminary matter regarding this allegation, Leon did not say that Respondent would not accept contract terms that were lower or different from the Union's master agreement. Instead, Leon said that the Union would not agree to contract terms that departed from the Union's master agreement. With that clarified, I agree that Leon communicated that it would be futile for employees to unionize because the Union would not (or could not) be flexible during contract negotiations and Respondent, as implied in Leon's assertion, would not simply agree to the terms in the Union's master agreement.[84] By indicating that it would not be possible for the Union and Respondent to agree on contract terms in negotiations after employees unionized, Respondent unlawfully communicated that it would be futile for employees to unionize as alleged in paragraph 33 of the complaint. See *Tesla, Inc.*, 370 NLRB No. 101, slip op. at 7 (2021) (explaining that an unlawful threat of utility is established when an employer states or implies that it will ensure its nonunion status by unlawful means, or that employees' attempt to organize would be futile for any other reason), enf. denied on other grounds, 120 F.4th 433 (5th Cir. 2024).

I also find that Respondent ran afoul of the Act when Leon told union organizer Messenger that he (Leon) would not need breakfast on the day of the representation election. The record shows that Leon was referring to Messenger's idea of inviting Respondent's owners to breakfast while the election was in progress. The problem for Respondent, of course, is that Messenger's breakfast invitation plan was not public knowledge, and instead was only discussed between Messenger and union supporters on the Brothers group chat. (See FOF, sec. II(I)(1), (3) (showing that Respondent obtained a copy of the Brother's group chat on about February 2, and that the chat included a discussion about inviting Leon and Mason to breakfast).) Leon's statement, therefore, unlawfully created the impression that employees' union activities were under surveillance, because Leon indicated through his statement that he had a source who was providing information about union supporters' communications. I therefore find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 30 of the complaint.

[84] As a point of fact, under the terms of the Union's master agreement, the Union does not have to extend favorable terms and conditions to all parties to the agreement if the favorable terms result from union organizing activities. (GC Exh. 6 (Art. 10).) That exception could have enabled the Union (and Respondent) to be flexible with terms during negotiations for an initial contract.

D. Did Respondent Unlawfully Reassign Employees to Different Job Sites?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by, since about January 20, reassigning employees, including Michael Griffin, Bradford Allen, Georgios Tsimopoulos, and James Manduca, to different job sites because they assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

2. Applicable legal standard

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that the employee's union or other protected activity was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus against union or other protected activity on the part of the employer. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 6 (2023), enfd. 2024 WL 2764160 (6th Cir. 2024). 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. Circumstantial evidence of discriminatory motivation may include, among other factors: the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee. Id., slip op. at 6–7; *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

If the General Counsel makes the required initial showing, then the burden of persuasion shifts to the employer to establish, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. In order to meet that burden in circumstances where the employer maintains that the employee engaged in misconduct, the employer need not prove that the disciplined employee committed the misconduct alleged. Instead, the employer only needs to show that it had a reasonable belief that the employee committed the alleged offense and that it acted on that belief when it took the disciplinary action against the employee. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 7; *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002); see also *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. When the employer's stated reasons for its decision are found to be pretextual – that is, either false or not in fact relied upon – discriminatory motive may be inferred but such an inference is not compelled. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019) (noting that the Board may infer from the pretextual nature of an employer's proffered justification that the employer acted out of union

animus where the surrounding facts tend to reinforce that inference). A respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 861.[85]

3. Analysis – Griffin reassignment

As set forth in the Findings of Fact, on January 19, plumber Griffin spoke out at the end of a staff meeting to ask why Respondent did not say anything about the representation petition that the Union filed. Based on an assignment that he received on January 19 before the staff meeting, Griffin reported to the Zoll Medical job site in Rhode Island on January 22. At the end of the day on January 22, Griffin asked whether he should continue working at the Zoll Medical job site because, in his view, there was not much more work to do there. Respondent instructed Griffin to continue working at the site to properly plan for the upcoming installation, and subsequently assigned three employees to work alongside Griffin at different times between January 25 and February 9. (FOF, sec. II(C), (D)(2).)

I find that the General Counsel fell short of making an initial showing that Respondent reassigned Griffin to the Zoll Medical job site because he engaged in union or protected concerted activities. While there no dispute that Respondent was aware that Griffin engaged in union activities by speaking out at the January 19 staff meeting, the evidentiary record shows that Respondent assigned Griffin to the Zoll Medical job site before the staff meeting. The General Counsel therefore cannot show that Respondent made that job assignment based on anti-union animus, and thus fails with its argument that Griffin's reassignment was unlawful.[86]

4. Analysis – Allen reassignments

On about January 19, apprentice Allen spoke with general foreman Ryan about why employees were interested in unionizing. On January 29, Ryan advised Allen that instead of working at the Delta Airlines job site where Allen had been since October 30, 2023, Allen should report to the Zoll Medical site starting on January 30. Since Allen was not yet licensed in Rhode Island, however, Respondent had Allen continue working at the Delta Airlines site on January 30–31, and then reassigned Allen to work at three different locations on February 1, 5, and 6 while others continued working at the Delta Airlines job site. The apprentices that Allen worked

[85] I do not find merit to Respondent's suggestion that the General Counsel needed to establish a causal relationship between employees' protected activities and the employer's adverse employment actions (see, e.g., R. Posttrial Br. at 19–20), as the Board rejected that proposition in *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 6–13.

[86] There is no contention that Respondent unlawfully kept Griffin at the Zoll Medical job site after the initial (lawful) reassignment on January 19. (See, e.g., GC Posttrial Br. at 120 (arguing that Griffin's reassignment to the Zoll Medical job site was unlawful).) I therefore decline to rule on that ground as an alternative legal theory. I do note, however, that there is some evidentiary support for Respondent's directive that Griffin continue working at the Zoll Medical job site after January 22 even though Griffin thought there was limited work to be done, as general foreman Ryan directed Griffin to continue at the Zoll Medical job site to plan for the installation work ahead, and subsequently (by January 25) assigned other employees to work alongside Griffin at the Zoll Medical job site.

with on February 1, 5, and 6 (M.D. and Froio), were all part of the Brothers group chat used by union supporters. (FOF, sec. II(C), (G).)

I find that the General Counsel made an initial showing that Respondent reassigned Allen to different job sites because he engaged in union and protected concerted activities. Allen engaged in union activities by starting the union organizing campaign and the Brothers group chat, and Respondent was aware of Allen's union support based on (among other things) Allen's January 19 conversation with Ryan and Respondent's receipt of a copy of the Brothers group chat in about late January or early February (and certainly by February 2). As for animus, Respondent developed a plan in about late January or early February to use job assignments to keep union supporters away from employees who were "maybes." Allen's reassignments on February 1, 5, and 6 were consistent with that plan, as Respondent paired Allen with M.D. and Froio on those dates, each of whom Respondent knew were union supporters who participated on the Brothers group chat.[87] (See Discussion and Analysis, sec. (C)(10), (13), supra; FOF, sec. II(G), (I)(1).)

Respondent did not contend, as an affirmative defense, that it would have reassigned Allen to other job sites even absent his protected concerted activities. Respondent did, however, assert that no one replaced Allen at the Delta Airlines job site after Allen was reassigned. (R. Posttrial Br. at 13.) As a preliminary matter, that assertion is not accurate, as Respondent assigned apprentice Tsimopoulos to the Delta job site starting on January 29, which made it possible to send Allen elsewhere while maintaining three employees at the Delta site. (See GC Exhs. 101–102; see also GC Exhs. 99–100 (showing that Tsimopoulos was on a period of leave before he was assigned to the Delta Airlines job site on January 29). More important, Respondent's argument does not undermine the evidence that Respondent had a strategy of using reassignments to keep union supporters away from "maybes" and reassigned Allen in a manner consistent with that strategy. Thus, I am not persuaded by Respondent's affirmative defense.

Since the General Counsel made an initial showing of discrimination and Respondent's defense failed, I find that Respondent violated Section 8(a)(3) and (1) of the Act by reassigning apprentice Allen to different job sites on February 1, 5, and 6, because he engaged in union and protected concerted activities. (See GC Exh. 1(p) (pars. 34, 41).)

5. Analysis – Tsimopoulos reassignments

Between late January and February 9 (the day of the election), Respondent generally assigned apprentice Tsimopoulos to work at the Delta Airlines job site. Respondent did send Tsimopoulos to work at another location on two occasions in that timeframe; foreman Coulstring, who was also usually at the Delta site, accompanied Tsimopoulos on each of those 1–day assignments. After the election, Tsimopoulos worked at several different job sites, but Respondent explained that this occurred in part because the work at the Delta site was winding

[87] Respondent's attempt to assign Allen to the Zoll Medical job site was arguably also consistent with this plan, as he would have been paired with plumber Griffin, who was also a union supporter. (See FOF, sec. II(C), (D)(2).) It is not clear if Respondent would have also assigned C.C. to work at the Zoll Medical site if Allen's reassignment there had not fallen through due to Allen not being licensed in Rhode Island, but there is some suggestion in the evidentiary record that C.C. was not a "maybe," but rather opposed unionizing.

down and Respondent was trying to find other assignments to keep Tsimopoulos busy. (FOF, sec. II(G), (O)(3).)

I find that the General Counsel did not make an initial showing that Respondent reassigned Allen to different job sites because he engaged in union and protected concerted activities. While there is no dispute that Tsimopoulos engaged in union and protected concerted activities (including participating in the Brothers group chat), the evidentiary record does not show that Respondent was aware of Tsimopoulos' activities before it assigned him to work at the Delta Airlines job site. I also cannot find that Respondent was motivated by animus when it assigned Tsimopoulos to the Delta site or briefly sent him (and Coulstring) to another site before the election. Specifically, since Coulstring and Tsimopoulos were already working together at the Delta site before Respondent received a copy of the group chat and learned of Tsimopoulos' (and Coulstring's) union activities, I cannot find that their temporary assignment to another location was part of Respondent's plan to keep union supporters away from employees who were undecided (indeed, Tsimopoulos and Coulstring returned to the Delta site after each 1–day stint elsewhere). Finally, to the extent that Respondent assigned Tsimopoulos to several different job sites after the election, I do not find that those assignments were motivated by animus. To the contrary, after the election Respondent no longer had a motive to keep union supporters separate from undecided employees, and the General Counsel did not show that some other intervening unlawful motive prompted Respondent's explanation to reassign Tsimopoulos to different job sites after the election. I therefore recommend that the complaint allegation be dismissed to the extent that the complaint alleged that Tsimopoulos' job reassignments were unlawful.

6. Analysis – Manduca reassignments

The evidentiary record shows that after assigning apprentice Manduca to work at various job sites in early January, Respondent assigned Manduca to work at the Winter Street job site from January 22 through February 8. After the election, Respondent assigned Manduca to work at four different locations. Notably, Respondent reassigned Manduca from the CVS Beverly job site to the Bay Street Vet job site on about February 23 based in part on a false complaint that project manager Heon solicited from the general contractor. (FOF, sec. II(G), (N)(1).)

The General Counsel did not make an initial showing that Respondent reassigned Manduca to different job sites before the election because he engaged in union and protected concerted activities. While there is evidence that Manduca engaged in union activities, including by displaying union stickers and participating in the Brothers group chat, Respondent was not aware of those activities when (on January 22) it assigned Manduca to the Winter Street job site, where Manduca stayed through the day of the election. I therefore cannot find that animus tainted the Winter Street job site assignment.

I do, however, find that the General Counsel made an initial showing that Respondent unlawfully reassigned Manduca from the CVS Beverly job site on about February 23. By that point, Respondent was aware of Manduca's union activities, and its decision to reassign Manduca was tainted because Respondent relied on a bogus complaint that it sought and obtained from the general contractor seeking Manduca's reassignment. Since Respondent does not dispute that it relied on the general contractor's complaint as part of the basis for reassigning Manduca (see R. Posttrial Br. at 14), and the general contractor's complaint was part of an effort

to discipline and discharge Manduca because he engaged in union and protected activities, Respondent's affirmative defense fails and I find that the February 23 reassignment violated Section 8(a)(3) and (1) of the Act.[88]

E. Did Respondent Unlawfully Issue a Written Warning to Bradford Allen?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3), (4), and (1) of the Act by, on about January 31, issuing a written warning to Bradford Allen because he assisted the Union and engaged in concerted activities, and because he cooperated in the filing and investigation of NLRB charges that the Union filed against Respondent, and to discourage employees from engaging in those activities.

2. Applicable legal standard

The applicable legal standard for this complaint allegation is the same as what is set forth above in Discussion and Analysis Section D(2).

Under Section 8(a)(4) of the Act, an employer may not discriminate against an employee for participating in the Board's processes, including filing charges, testifying, or being subpoenaed to testify at a Board proceeding. The Board applies the same legal framework for 8(a)(3) allegations (i.e., the *Wright Line* standard described above for purposes of this case) to determine whether an adverse employment action was for reasons that are prohibited by Section 8(a)(4). *S. Freedman & Sons, Inc.*, 364 NLRB 1203, 1205–1206 (2016) (overruled on other grounds in *McLaren McComb*, 372 NLRB No. 58, slip op. at 9 fn. 48 (2023), enfd. 713 Fed. Appx. 152 (4th Cir. 2017).

3. Analysis

On February 1, Respondent issued a written warning to apprentice Allen, citing: excessive phone use; tardiness based on Allen oversleeping in his vehicle during a break on January 29 and arriving late to work on January 30; and failure to provide documentation needed for his apprentice card in Rhode Island. (FOF, sec. II(H)(2).)

I recommend dismissal of the allegation that Respondent issued the warning to Allen because he cooperated in the investigation and filing of unfair labor practice charges. The Union did not file unfair labor practice charges until February 16 (see FOF, sec. II(K)), and there is no evidence that Respondent knew about Allen cooperating with any investigation of those charges on or before February 1, the date that Respondent issued Allen's warning. Accordingly, there is no support in the record for this aspect of the complaint allegations.

[88] I do not find that any other reassignments for Manduca violated the Act. The record does not include sufficient evidence that Respondent acted with animus in making any other reassignments for Manduca after the election.

I do find that the General Counsel made an initial showing that Respondent issued the February 1 warning to Allen because he engaged in union and protected concerted activities. By February 1, Respondent was aware that Allen was engaging in those activities. Specifically, on January 19, Allen told general foreman Ryan why Allen started the union organizing campaign. In addition, by early February, Respondent had obtained at least an excerpt of the Brothers group chat that Allen started to communicate with other union supporters and union organizer Messinger. As for animus, on January 29, Respondent attempted to reassign Allen to another job site as part of the company's plan to keep union supporters away from "maybes," and actually reassigned Allen under that plan starting on February 1. And perhaps most important, Respondent successfully pressured foreman Coulstring to email a complaint on January 29 about Allen's job performance that was based at least in part on alleged misconduct that was false or exaggerated, and then relied on that complaint as a basis for the warning that Respondent issued. (FOF, sec. II(C), (H)(1)–(2), (I)(1); see also Discussion and Analysis, sec. (D)(4), supra.)

As its affirmative defense, Respondent maintains that it lawfully issued the warning to Allen because of Allen's poor performance and inappropriate conduct on the job. (R. Posttrial Br. at 18–21.) That defense fails because I did not find Respondent's proffered rationale for Allen's warning to be credible. Before the union organizing campaign, Respondent tolerated Allen's (and indeed all employees') occasional cell phone use on the job, presumably because employees used their cell phones to receive work-related calls. Similarly, Respondent took no action against Allen for arriving late to work in early January before the union organizing campaign started. And of course most important, the evidentiary record establishes that Coulstring's complaint about Allen, which was the basis for some of Allen's alleged performance issues, contained falsehoods and exaggerations. The evidentiary record therefore does not support Respondent's defense, and I accordingly reject it.

Having found that the General Counsel made an initial showing of discrimination and that Respondent's affirmative defense fails, I find that Respondent violated Section 8(a)(3) and (1) of the Act when it issued Allen's February 1 written warning.

F. Did Respondent Unlawfully Terminate Bradford Allen?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3), (4), and (1) of the Act by, on about February 22, terminating Bradford Allen because he assisted the Union and engaged in concerted activities, and because he cooperated in the filing and investigation of NLRB charges that the Union filed against Respondent, and to discourage employees from engaging in those activities.

2. Applicable legal standard

The applicable legal standard for this complaint allegation is the same as what is set forth above in Discussion and Analysis Section (E)(2).

3. Analysis

On about February 22, Respondent terminated apprentice Allen. In making that decision, Respondent asserted that Allen's performance was unsatisfactory despite having previously received a warning and despite repeated discussions. In particular, Respondent asserted that Allen: had low productivity; was uncooperative when asked to perform work tasks; repeatedly used his cell phone during work time; and was repeatedly late for work. (FOF, sec. II(L)(2).)

As a preliminary matter, I do not find merit to the allegation that Respondent terminated Allen because he cooperated in the filing and investigation of unfair labor practice charges. The General Counsel's primary basis for asserting that Respondent terminated Allen based on animus against those activities is suspicious timing, insofar as the Union filed an unfair labor practice charge on February 16 to contest, among other things, the written warning that Respondent issued to Allen on February 1. (See FOF, sec. II(K).) On the facts of this case, I do not find that evidence to be sufficient for an initial showing of discrimination. There is no evidence that Respondent was motivated to take action against Allen based on any cooperation or support that he provided to the Union in filing the charge, and in any event, dismissing this allegation will not affect the remedy since, as set forth below, I find that Respondent unlawfully terminated Allen based on his union and protected concerted activities.

Turning to that issue, I find that the General Counsel made an initial showing that Respondent terminated Allen because of Allen's union and protected concerted activities. As previously noted, Respondent was aware that Allen engaged in union and protected concerted activities, including starting the union organizing campaign and the Brothers group chat that union supporters used to communicate with each other and union organizer Messinger. Respondent's animus towards those activities, meanwhile, is demonstrated by the fact that Respondent (among other evidence of animus): issued a written warning to Allen on February 1 that was, at least in part, based on false or exaggerated claims in an email that Respondent cajoled foreman Coulstring to send about Allen's job performance; and reassigned Allen to different job sites on February 1, 5, and 6, to keep him away from employees who were undecided (or "maybes") about whether to support the Union in the election. (See Discussion and Analysis, sec. (D)(4), (E)(3), supra.)

Since Respondent relied on the unlawful February 1 warning when it terminated Allen, the termination is tainted and is also unlawful. See *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995) (explaining that a decision to discipline or terminate an employee is tainted if the decision relies on prior discipline that was unlawful); *Dynamics Corp.*, 296 NLRB 1252, 1253–1254 (1989) (same), enfd. 928 F.2d 609 (2d Cir. 1991).

I also find, however, that Respondent failed to prove, as an affirmative defense, that it would have terminated Allen even in the absence of his union and protected concerted activities. (R. Posttrial Br. at 18–21.) First, for the reasons set forth above and in the Findings of Fact, the misconduct that Respondent relied upon is dubious, since Coulstring admitted that his email complaint about Allen's performance contained falsehoods, and since Webster's email about Allen was out of the ordinary (Webster had never before sent an email complaining about an employee's performance) and contained inaccuracies that undermine its reliability. Second, to the extent that Allen admitted to some alleged performance issues, such as occasionally arriving

late to work, occasionally using his cell phone (albeit to receive work-related calls), and not promptly submitting paperwork that Respondent requested, Respondent tolerated that conduct, as demonstrated by Respondent taking no disciplinary action based on that conduct when it occurred in or before mid–January. It was only after Respondent became aware of Allen's union activities that Respondent began to take issue with Allen arriving late, using his cell phone, and not submitting paperwork more promptly. (FOF, sec. II(H)(1)–(2), (L)(1)–(2).)

Based on the foregoing discussion, I find that Respondent's affirmative defense falls short, and I find that violated Section 8(a)(3) and (1) of the Act by terminating Allen on February 22 because he engaged in union and protected concerted activities.

G. Did Respondent Unlawfully Terminate Shane Froio?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3), (4), and (1) of the Act by, on about February 23, terminating Shane Froio because he assisted the Union and engaged in concerted activities, and because he cooperated in the filing and investigation of NLRB charges that the Union filed against Respondent, and to discourage employees from engaging in those activities.

2. Applicable legal standard

The applicable legal standard for this complaint allegation is the same as what is set forth above in Discussion and Analysis Section (E)(2).

3. Analysis

Respondent terminated apprentice Froio on February 23, citing the rationale that Froio: was insubordinate and disregarded instructions; had poor work performance; had a negative attitude and demeanor; failed to keep a clean and orderly working area; failed to properly store waste, tools, equipment and materials; and inaccurately reported company-related purchases. Before the union organizing campaign, Respondent commended Froio on various occasions for taking on work-related tasks and maintaining an organized job site. (FOF, sec. II(M)(2)–(3).)

The General Counsel made an initial showing that Respondent terminated Froio because he engaged in union and protected concerted activities. Respondent was aware that Froio engaged in union activities insofar as project manager Heon confronted Froio on January 19 about whether Froio knew that plumber Griffin was going to speak out about the Union at the staff meeting that day. Further, Respondent knew that Froio participated on the Brothers group chat for union supporters. As for animus, Respondent (through Heon) unlawfully interrogated Froio about his union activities on January 19, and also, through owner Leon on January 30, unlawfully promised Froio the benefit of assistance with his Instagram page if Froio refrained from supporting the union. (Discussion and Analysis, sec. (C)(3), (9); FOF, sec. II(I)(1).) Respondent's contention that Froio had a "negative attitude" also supports a finding of animus, as that terminology is a common codeword for prounion activity. *Intercon I (Zercom)*, 333 NLRB 223, 224 (2001); *James Julian Inc. of Delaware*, 325 NLRB 1109, 1109 (1998).

As its affirmative defense, Respondent maintains that it reasonably terminated Froio for nondiscriminatory reasons based on the reports that it received regarding Froio's poor performance. (R. Posttrial Br. at 21–23.) I do not find merit to Respondent's defense. First, as set forth in the Findings of Fact, I found that many of the reports that Respondent relied on were not credible, and Respondent was aware of that fact. Indeed, the evidentiary record shows a pattern of Respondent soliciting certain employees to submit false or exaggerated claims that union supporters engaged in work-related misconduct. I find that Heon's February 21 report about the Elevate job site is an example of such false/exaggerated claims, as Heon's report that Froio left the worksite in disarray conflicts with Froio's long track record of maintaining a clean and orderly worksite (something Respondent previously commended Froio for) and disregarded the fact that two other employees worked at the site after Froio went on leave on February 6 to recover from a work-related injury. (FOF, sec. II(M)(1), (3); Discussion and Analysis, sec. F(3), supra).) Second, to the extent that Respondent faulted Froio for inaccurately reporting company-related purchases (a reference to Froio's admitted practice of, in and before mid-January submitting a duplicate gas receipt to document purchases on the company gas card), that was proverbial "old news" that Respondent previously addressed in January with a conversation and no disciplinary action. (FOF, sec. II(I)(4).) By relying on that stale incident as a basis for terminating Froio, Respondent further undermined the credibility of the termination decision. See *Smyrna Ready Mix Concrete, LLC*, 371 NLRB No. 73 (2022), slip op. at 3–4 (2022) (finding that the employer's explanation for an employee's termination were pretexts for discrimination in part because the employer did not consider the infractions worthy of discipline until after the employer learned of the employee's union activities).

In sum, since Respondent's decision to terminate Froio is tainted by its reliance on reports and incidents that are not credible as support for terminating Froio, Respondent's affirmative defense falls short. I therefore find that Respondent violated Section 8(a)(3) and (1) of the Act by terminating Froio on February 23 because he engaged in union and protected concerted activities.[89]

H. Did Respondent Unlawfully Take Adverse Employment Action against James Manduca?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3), (4), and (1) of the Act by taking the following adverse employment actions against apprentice James Manduca because he assisted the Union and engaged in concerted activities and cooperated in the filing and investigation of NLRB charges against Respondent, and to discourage employees from engaging in those activities: laying off Manduca on about February 26; issuing a written warning to Manduca on about February 27; and terminating Manduca on about March 6.

[89] As with Allen, I do not find that Respondent terminated Froio because Froio cooperated in the filing and investigation of unfair labor practice charges against Respondent. There is insufficient evidence in the record to support a finding that Respondent took action against Froio for that reason (suspicious timing alone is not sufficient based on the facts of this case), and therefore I recommend that the Section 8(a)(4) allegations in the complaint concerning Froio be dismissed.

2. Applicable legal standard

The applicable legal standard for this complaint allegation is the same as what is set forth above in Discussion and Analysis Section (E)(2).

3. Analysis

On February 16, 20–21, and 23, apprentice Manduca worked at the CVS Beverly job site. (GC Exhs. 103–104.) In the evening on February 23, however, project manager Heon contacted T.A., the vice president of the general contractor for the CVS Beverly site, and asked T.A. a favor in the form of T.A. sending an email to Respondent to request that Manduca be removed from the CVS Beverly job site. T.A. agreed and sent the email, which was a verbatim version of a draft complaint email that Heon provided.[90] Relying in part on T.A.'s email, Respondent: reassigned Manduca from the CVS Beverly job site on about February 23; did not assign Manduca work on February 26; and issued a written warning to Manduca on February 26. (FOF, sec. II(N)(1)–(2).) Subsequently, on about March 6, Respondent terminated Manduca as part of what it described as layoffs needed to comply with one-to-one ratio requirements for apprentices and plumbers. Respondent relied on Manduca's February 26 warning as a factor for selecting him for layoff. (FOF, sec. II(O)(2)–(3); Discussion and Analysis sec. (D)(6) (finding that Respondent unlawfully reassigned Manduca from the CVS Beverly job site on February 23).)

I find that the General Counsel made an initial showing that Respondent took each of the adverse employment actions against Manduca because he engaged in union and protected concerted activities.[91] Respondent was aware that Manduca was a union supporter, in that Manduca participated in the Brothers group chat for union supporters, and Respondent received a copy of the group chat by February 2 (if not sooner). In addition, general foreman Ryan visited the job site where Manduca was working and observed that Manduca had union stickers on his tool box and hard hat. Regarding animus, in late January/early February Ryan identified Manduca as a strong union supporter and stated that he wished he could rip Manduca's union stickers off. On about March 1, Ryan told apprentice Chen that Manduca did not want to be at the job site and encouraged Chen to anonymously report Manduca for a workplace infraction so that could be used against Manduca. (FOF, sec. II(F), (I)(1), (O)(1).) Respondent's contention that Manduca had a negative attitude (as part of the basis for issuing the February 26 warning, see FOF, sec. II(N)(2)) also supports a finding of animus, as that terminology is a common codeword for prounion activity. *Intercon I (Zercom),* 333 NLRB at 224; *James Julian Inc. of Delaware,* 325 NLRB at 1109.

[90] I find that Heon was acting as Respondent's agent when he communicated with T.A. about Manduca. Heon's job duties as a project manager included speaking to contractors about how jobs were going. I also observe that Respondent accepted and relied on T.A.'s complaint in taking subsequent adverse employment action against Manduca, so there is no question that Heon was acting within the scope of his job duties when Heon secured the complaint about Manduca that Respondent wanted from T.A..

[91] I do not find that Respondent took adverse employment action against Manduca because he cooperated in the filing and investigation of unfair labor practice charges against Respondent. There is insufficient evidence in the record to support a finding that Respondent took action against Manduca for that reason (suspicious timing alone is not sufficient based on the facts of this case), and therefore I recommend that the Section 8(a)(4) allegations in the complaint concerning Manduca be dismissed.

Respondent did not articulate an affirmative defense for not assigning Manduca to work on February 26. For that reason alone, any affirmative defense about that adverse employment action fails. I note, however, that I considered the fact that Respondent offered Manduca a job assignment on Nantucket that Manduca declined because it was too far away for him to keep up with childcare responsibilities. (FOF, sec. II(N)(1).) That fact, however, does not establish an affirmative defense. It was only necessary to offer Manduca a different job assignment because Respondent relied on a trumped up complaint to remove Manduca from the CVS Beverly job site, where work was still ongoing. Manduca's reassignment from the CVS Beverly job site was unlawful (see Discussion and Analysis, sec. (D)(6), supra), and Manduca's loss of work on February 26 was also unlawful and is chargeable to Respondent because the loss of work was a result of the unlawful reassignment. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) of the Act by not assigning work to Manduca on February 26 because he engaged in union and protected concerted activities.

Regarding the written warning that Respondent emailed to Manduca on February 26, Respondent contends as its affirmative defense that based on the information that it received about Manduca's performance, Respondent had legitimate, nondiscriminatory reasons to issue the warning. Respondent, however, admits that it relied on the complaint that Heon obtained from T.A. as part of the basis for issuing the warning. (R. Posttrial Br. at 23–24.) Since Respondent relied on that tainted complaint (as well as additional complaints that are also suspect), the warning itself is tainted and Respondent's affirmative defense fails. I therefore find that Respondent violated Section 8(a)(3) and (1) of the Act by issuing the February 26 written warning to Manduca on February 26 because he engaged in union and protected concerted activities.

Last, Respondent maintains that it terminated Manduca on March 6 as part of layoffs that were necessary to comply with the required ratios between apprentices and plumbers. Respondent admits, however, that Manduca's (unlawful) February 26 warning was a factor in Respondent deciding to select Manduca for the layoff. (R. Posttrial Br. at 24–26.) Respondent's admission that it selected Manduca for layoff in part because of the unlawful February 26 warning is fatal to Respondent's affirmative defense, because Respondent's reliance on that prior unlawful action in turn made the layoff decision unlawful. See *Care Manor of Farmington, Inc.*, 318 NLRB at 726; *Dynamics Corp.*, 296 NLRB at 1253–1254. I therefore find that Respondent violated Section 8(a)(3) and (1) of the Act by terminating Manduca on March 6 because he engaged in union and protected concerted activities.

I. Did Respondent Unlawfully Terminate Jacob Tomasik and/or Georgios Tsimopoulos?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3), (4), and (1) of the Act by, on about March 6, terminating Jacob Tomasik and Georgios Tsimopoulos because they assisted the Union and engaged in concerted activities and cooperated in the filing and investigation of NLRB charges against Respondent.

2. Applicable legal standard

The applicable legal standard for this complaint allegation is the same as what is set forth above in Discussion and Analysis Section (E)(2).

3. Analysis

The evidentiary record shows that on March 6, Respondent terminated apprentices Jacob Tomasik and Georgios Tsimopoulos (and James Manduca). Owner Leon explained during trial that the terminations were essentially layoffs that Respondent completed to comply with Massachusetts legal requirements that there be a one-to-one ratio between plumbers and apprentices. (FOF, sec. II(O)(3).)

The General Counsel made an initial showing that Respondent terminated Tomasik and Tsimopoulos because they engaged in union and protected concerted activities. Respondent knew that both Tomasik and Tsimopoulos engaged in union activities, including communicating with other union supporters on the Brothers group chat. There is also evidence of animus, as by March 6, Respondent had already unlawfully taken adverse employment action against union supporters Allen, Froio, and Manduca. Given that backdrop, animus is further supported by general foreman Ryan's comment in late February that he thought Tsimopoulos (like Manduca) did not want to be at the job site, and Ryan's comment in early March that Tomasik was the kind of guy who would do great in the Union.[92] (FOF, sec. II(I)(1), (O)(1); Discussion and Analysis, sec. (D)(4), (D)(6), (E)(3), (F)(3), (G)(3), (H)(3).)

As its affirmative defense, Respondent contends that it laid off Tomasik and Tsimopoulos for lawful reasons to comply with the one-to-one ratio for apprentices and plumbers. Owner Leon testified that he considered several factors to select which apprentices to lay off, including apprentice level, license status in Massachusetts and Rhode Island, hourly wage rate, certifications, and whether the apprentice was working at a job site where the work would end soon. Leon identified Tomasik as a layoff candidate because his hourly rate was higher than some other apprentices, and because he did not have an OSHA–10 certification. Regarding Tsimopoulos, Leon identified him as a layoff candidate because he had been working at the Delta Airlines job site and the work at that site was winding down, prompting Respondent to move Tsimopoulos to various job sites to keep him busy. (FOF, sec. II(O)(3).)

Leon's explanations for why Respondent laid off Tomasik and Tsimopoulos have a superficial appeal because the evidentiary record shows that Respondent had reason to be concerned about complying with plumber/apprentice ratios. I find, however, that Respondent's explanations for laying off Tomasik and Tsimopoulos are not sufficiently credible. First, Leon's credibility is suspect, as he demonstrated a tendency during trial towards offering plausible-sounding explanations for Respondent's actions that foundered when subjected to scrutiny. (See,

[92] I do not find that the General Counsel made an initial showing that Respondent terminated Tomasik and Tsimopoulos they cooperated in the filing and investigation of unfair labor practice charges against Respondent. There is insufficient evidence in the record to support a finding that Respondent took action against Tomasik and/or Tsimopoulos on that basis (suspicious timing alone is not sufficient based on the facts of this case), and therefore I recommend that the Section 8(a)(4) allegations in the complaint concerning Tomasik and Tsimopoulos be dismissed.

e.g., FOF, sec. II(M)(1), (N)(1).) Second, when testifying about the rationale for layoffs, Leon relied heavily on an exhibit that was unreliable. Specifically, Leon relied on a printed spreadsheet that he asserted came from Respondent's human resources department. (See R. Exh. 12.) The spreadsheet, however, included multiple termination dates well after March 6 (such that Respondent could not possibly have relied on the exhibit when it decided to lay off Tomasik and Tsimopoulos), and also included a "reasoning" column that provided inconsistent types of information about each of the company's apprentices.[93] As such, the exhibit that Leon relied on was not a business record, but rather a document that Respondent created to justify its March 6 layoff decisions. Third, it is apparent that Respondent did not apply its layoff criteria (such as they are) consistently. For example, although Leon testified Respondent preferred apprentices with higher tier levels and lower hourly rates, Respondent did not lay off apprentices M.D., P.F., or Webster, each of whom who had a higher hourly rate and a lower (or unspecified) apprentice level when compared to Tomasik and Tsimopoulos. Fourth, even if the plumber/apprentice ratios were a valid concern, it is not at all clear that Respondent addressed that concern by laying off three apprentices who were also union supporters (Manduca, Tomasik, and Tsimopoulos). Even after laying off Manduca, Tomasik, and Tsimopoulos, Respondent still employed 18 apprentices and only 12 plumbers in its commercial department. Additionally, Respondent hired four new apprentices between March 25 and July 1, 2024, undermining its premise that layoffs were needed to comply with ratio requirements and/or because work at certain projects was winding down. (R. Exh. 12; Tr. 418–419 (owner Mason admitting that Respondent hired apprentices on March 25, June 3, June 17, and July 1).) For the foregoing reasons, I find that: Respondent's explanations for laying off Tomasik and Tsimopoulos were pretexts for discrimination; Respondent fell short with its affirmative defense; and that Respondent violated Section 8(a)(3) and (1) of the Act by terminating Tomasik and Tsimopoulos on March 6 because they engaged in union and protected concerted activities.[94]

J. Did Respondent Engage in Conduct that Warrants Setting Aside the Results of the Representation Election?

1. The Union's objections to the election

In Case 01–RC–333862, the Union filed 17 timely objections to the representation election held on February 9. Based on Discussion and Analysis set forth above, I sustain the following objections, either in whole or in part as indicated:[95]

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[93] For example, the spreadsheet sets forth the tier level for most apprentices, but omits that information for apprentices P.F. and Matthew Webster. As for the reasoning column, for some apprentices the spreadsheet lists their certifications and hourly wage, but for others it selectively adds information about: awards received; years of experience; administrative issues with the licensing board that the apprentice is working on clearing up; service as a foreman for Respondent; and whether the apprentice worked on Nantucket and/or in the service department. (R. Exh. 12.)

[94] As with other allegations, I recommend dismissal of the allegation that Respondent terminated Tomasik and Tsimopoulos because they cooperated in the filing and investigation of unfair labor practice charges against Respondent. I also note that although I have already found that Respondent unlawfully terminated Manduca, the analysis in this section serves as an alternate ground for finding that Manduca's termination was unlawful.

[95] Some of the objections listed below alleged that misconduct occurred on multiple dates. I have only listed the dates for which I have found a corresponding violation.

Objection 2: On about January 23, B.W. posted a video to his public Instagram account wherein he disparaged union supporters and demanded that they leave the employ of Respondent rather than exercise their Section 7 rights (see Discussion and Analysis, sec. (C)(6), supra (finding that Respondent, through controller Kayla Leon's comments in response to the video, unlawfully: threatened employees with unspecified reprisals and invited employees to quit their jobs rather than exercise their Section 7 rights; and told employees that their support for the Union was incompatible with their continued employment with Respondent);[96]

Objection 3: On about February 7, general foreman Ryan unlawfully interrogated employees about their support for the union organizing campaign (see Discussion and Analysis, sec. (C)(14), supra (finding that Respondent violated the Act as alleged via a phone call on about February 5));

Objection 6: On or about January 24 and February 7, general foreman Ryan unlawfully made implied promises of benefits regarding preferential job site assignments in connection with the union organizing campaign (see Discussion and Analysis, sec. (C)(7), (14), supra (finding that Respondent violated the Act as alleged in conversations on about January 24 and February 5));

Objection 9: On about February 1, owners Mason and Leon unlawfully solicited grievances from unit employees (see Discussion and Analysis, sec. (C)(12), supra (finding that Respondent violated the Act as alleged in a conversation on about February 1);

Objection 11: During the first week of February, general foreman Ryan unlawfully created the impression that employees' protected activities were under surveillance (see Discussion and Analysis, sec. (C)(10), supra (finding that Respondent violated the Act as alleged in a conversation in about late January or early February);

Objection 12: During the critical period following the filing of the representation petition, Respondent assigned perceived or known union supporters to isolate them from employees perceived or known to be undecided (see Discussion and Analysis, sec. (D)(4), supra (finding that Respondent violated the Act as alleged by reassigning apprentice Allen to different job sites on about February 1, 5, and 6);

[96] Although Objection 2 does not precisely match the violation that I found, it is well established that "the Board may consider allegations of objectionable conduct that do not exactly coincide with the precise wording of the objections so long as the allegations are sufficiently related to the timely filed objections." *Union Tank Car Co.*, 369 NLRB No. 120, slip op. at 3 (2020). That standard is satisfied here.

Objection 13: On or about February 1, Respondent threatened employees with layoffs if they voted in the Union (see Discussion and Analysis, sec. (C)(11), supra (finding that Respondent violated the Act as alleged in a conversation on about February 1);

Objection 14: On about February 7, Respondent gave the impression that employees' protected activities were under surveillance (see Discussion and Analysis, sec. (C)(16), supra (finding that Respondent violated the Act as alleged in a conversation on about February 7);

Objection 15: On about February 7, Respondent implied that organizing and collective bargaining would be futile (see Discussion and Analysis, sec. (C)(16), supra (finding that Respondent violated the Act as alleged in a conversation on about February 7);

Objection 16: On about January 29 and February 6, Respondent impliedly promised benefits to employees to dissuade them from supporting the union organizing campaign (see Discussion and Analysis, sec. (C)(9), (15), supra (finding that Respondent violated the Act as alleged in communications on about January 30 and February 6); and

Objection 17: On about January 31, Respondent issued a pretextual written warning to Bradford Allen because of his support for the union organizing campaign (see Discussion and Analysis, sec. (E)(3), supra (finding that Respondent violated the Act as alleged by issuing a written warning to Allen on about February 1).

I overrule objections 1, 4–5, 7–8, and 10 because I did not find that Respondent violated the Act as alleged in the complaint allegations that correspond to the Union's objections to the election. (See Discussion and Analysis, sec. (C), supra; fn. 3, supra (noting that the General Counsel withdrew the allegations in paragraph 7 of the complaint, which overlap with Objection 7).)

2. Applicable legal standard

It is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period between the filing of the representation petition and the election since conduct that violates Section 8(a)(1) of the Act is conduct that interferes with the exercise of a free and untrammeled choice in an election. The only exception to that policy is where the misconduct is de minimis, such that it is virtually impossible to conclude that the election outcome has been affected. In determining whether misconduct could have affected the results of the election, the Board has considered the number of violations, their severity, the extent of dissemination, the size of the unit, the margin of the vote, the proximity of the conduct to the election date, and the number of unit employees affected. *Union Tank Car. Co.*, 369 NLRB No. 120, slip op. at 3 (2020); *Bon Appetit Mgmt. Co.*, 334 NLRB 1042, 1044 (2001). The party

seeking to set aside an election has the burden of proof. *Crown Bolt, Inc.*, 343 NLRB 776, 779 (2004).

3. Analysis

As summarized above, Respondent committed multiple unfair labor practices during the critical period between the January 19 representation petition and the February 9 election, including unlawfully: threatening employees with unspecified reprisals; inviting employees to quit their jobs instead of asserting their Section 7 rights; interrogating employees about their union and protected concerted activities; promising employees benefits with the intent to discourage union support; threatening employees with layoffs if employees selected the Union as their bargaining representative; soliciting employee grievances; creating the impression that employees' union activities were under surveillance; telling employees that it would be futile to unionize; reassigning an employee to different job sites to keep him away from other employees who were undecided about whether to support the union; and disciplining an employee because he engaged in union and protected concerted activities. That collection of misconduct directly affected a wide range of employees, was widely disseminated, and was sufficiently severe to affect the results of the election even though employees voted against unionizing by a vote of 31 to 14. I therefore find that Respondent's objectionable conduct warrants setting aside the February 9 election. See *Cemex Construction Materials Pacific LLC*, 372 NLRB No. 130, slip op. at 15 (2023) (observing that the discipline and discharge of an employee who was active in the organizing campaign would have served as an enduring warning to other employees who learned of the adverse employment actions); *Union Tank Car Co.*, 369 NLRB No. 120, slip op. at 3–4 (setting aside election results based on the employer's maintenance of unlawful nondisparagement and cell phone use rules and confiscation of union literature during the critical period); see also *Garten Trucking LC*, 373 NLRB No. 94, slip op. at 6 (explaining that the coercive and lasting effect of the employer's unlawful conduct is magnified when the misconduct was communicated by the employer's owners or other high ranking members of management). The General Counsel and the Union have requested that I issue a bargaining order instead of remanding the representation case for a new election. I will address that issue in the remedy section of this decision.

K. Did Respondent Unlawfully Fail and Refuse to Recognize and Bargain with the Union?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since about January 19, failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit.

2. Applicable legal standard

An employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate bargaining unit unless the employer promptly files a petition under Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness

of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A). *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at 25.

3. Analysis

The evidentiary record shows that on about January 17, the Union asked Respondent to recognize it as the exclusive bargaining representative of employees in the following appropriate bargaining unit:

> All full time and regular part-time plumbers, HVAC technicians, and apprentices working in Respondent's Commercial department, HVAC service and install experts, plumbing install and service experts, HVAC apprentices, and plumbing apprentices employed by Respondent from its Raynham, MA location.

The Union reiterated its request for recognition in a January 19 letter to Respondent, noting that a majority of employees in the bargaining unit at the time had signed authorization cards (29 employees out of 57 potential employees in the unit depending on the outcome of challenges) to designate the Union to serve as their exclusive bargaining representative. Respondent did not agree to recognize or bargain with the Union, and thus later on January 19, the Union filed a representation petition. (FOF, sec II(B).)

Based on those facts, the General Counsel demonstrated that Respondent refused the Union's request for recognition at a time when a majority of Respondent's employees in an appropriate bargaining unit had designated the Union as their collective-bargaining representative. There is no evidence that Respondent filed an RM petition for an election to test the Union's majority status, and to the extent that Respondent might argue that it did not have an opportunity to do so because the Union filed a petition, the point is moot because, as noted above, Respondent committed unfair labor practices that require the results of the election to be set aside. (See Discussion and Analysis, sec. (J), supra.) That collection of facts establishes, and I find, that Respondent violated Section 8(a)(5) and (1) of the Act by, since about January 19, failing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit. See *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at 25–26, 29.

CONCLUSIONS OF LAW

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

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

3. By, since about January 19, 2024, failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the following appropriate bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act:

> All full time and regular part-time plumbers, HVAC technicians, and apprentices working in Respondent's Commercial department, HVAC service and install

experts, plumbing install and service experts, HVAC apprentices, and plumbing apprentices employed by Respondent from its Raynham, MA location.

4. By, on about January 19, 2024, interrogating employees about their union and protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

5. By, on about January 23, 2024, threatening employees with unspecified reprisals, inviting employees to quit rather than exercise their Section 7 rights, and telling employees that their support for the Union was incompatible with continued employment with Respondent, Respondent violated Section 8(a)(1) of the Act.

6. By, on about January 24, 2024, promising employees benefits in the form of preferential job assignments if they refrain from supporting the Union and implicitly threatening to revoke those benefits if employees supported the Union, Respondent violated Section 8(a)(1) of the Act.

7. By, on about January 30, 2024, promising employees the benefit of assistance with their Instagram page if the employees refrained from supporting the Union, Respondent violated Section 8(a)(1) of the Act.

8. By, in about late January or early February 2024, creating the impression among employees that Respondent had employees' union activities under surveillance, Respondent violated Section 8(a)(1) of the Act.

9. By, on about February 1, 2024, threatening that employees with layoffs if employees selected the Union as their bargaining representative, Respondent violated Section 8(a)(1) of the Act.

10. By, on about February 1, 2024, soliciting employee complaints and grievances and thereby implicitly promising increased benefits and improved working conditions, Respondent violated Section 8(a)(1) of the Act.

11. By, on about February 1, 2024, issuing a written warning to apprentice Bradford Allen because he engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

12. By, on about February1, 5, and 6, 2024, reassigning apprentice Bradford Allen to different job sites because he engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

13. By, on about February 2, 2024, creating the impression among employees that Respondent had employees' union activities under surveillance, Respondent violated Section 8(a)(1) of the Act.

14. By, on about February 5, 2024, interrogating employees about their union and protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

15. By, on about February 5, 2024, promising employees the benefit of more convenient job assignments in the future if employees refrained from supporting the Union, Respondent violated Section 8(a)(1) of the Act.

16. By, on about February 6, 2024, promising employees the benefit of an opportunity to do plumbing work for a separate construction project if employees refrained from supporting the Union, July 2, Respondent violated Section 8(a)(1) of the Act.

17. By, on about February 7, 2024, creating the impression among employees that Respondent had employees' union activities under surveillance, Respondent violated Section 8(a)(1) of the Act.

18. By, on about February 7, 2024, telling employees that it would be futile to select the Union as their bargaining representative, Respondent violated Section 8(a)(1) of the Act.

19. By, on or about February 22, 2024, terminating apprentice Bradford Allen because he engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

20. By, on about February 23, 2024, terminating apprentice Shane Froio because he engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

21. By, on about February 23, 2024, reassigning apprentice James Manduca to a different job site because he engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

22. By, on about February 26, 2024, failing to assign work to apprentice James Manduca because he engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

23. By, on about February 27, 2024, issuing a written warning to apprentice James Manduca because he engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

24. By, on about March 6, 2024, terminating apprentices James Manduca, Jacob Tomasik, and Georgios Tsimopoulos because they engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

25. The unfair labor practices stated in Conclusions of Law 3–24, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

A. Standard Remedies

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Regarding Respondent's violation of Section 8(a)(3) and (1) of the Act through its terminations of Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos, I shall require Respondent to offer to reinstate them to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges they would have enjoyed absent the discrimination against them. Respondent must also make Allen, Froio, Manduca, Tomasik, and Tsimopoulos whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Consistent with *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 14 (2022), enf. denied in part on other grounds 102 F.4th 727 (5th Cir. 2024), Respondent shall also compensate Allen, Froio, Manduca, Tomasik, and Tsimopoulos for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful terminations, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for those harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Regarding Respondent's violation of Section 8(a)(3) and (1) of the Act through its failure to assign work to James Manduca, I shall require Respondent to make Manduca whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Consistent with *Thryv, Inc.*, supra, Respondent shall also compensate Manduca for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful failure to assign work, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for those harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Regarding Respondent's violation of Section 8(a)(3) and (1) of the Act through its reassignments of Allen and Manduca, I shall require Respondent to make Allen and Manduca whole for any loss of earnings and other benefits associated with these adverse employment actions. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Consistent with *Thryv, Inc.*, supra, Respondent shall also compensate Allen and Manduca for any other direct or foreseeable pecuniary harms incurred as a result of these unlawful adverse employment actions, including reasonable search-for-work and interim employment expenses, if any,

regardless of whether these expenses exceed interim earnings. Compensation for those harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Respondent shall also be required to remove from its files any references to the unlawful disciplines, reassignments, failures to assign work, and/or terminations of Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos, and to notify them in writing that this has been done and that the unlawful adverse employment actions will not be used against them in any way.

In addition, I shall require Respondent to compensate Allen, Froio, Manduca, Tomasik, and Tsimopoulos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In accordance with *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), Respondent shall also be required to file with the Regional Director for Region 1 a copy of each backpay recipient's corresponding W–2 form reflecting the backpay award.

B. Bargaining Order

Under the Board's decision in *Cemex Construction Materials Pacific, LLC*, "if an employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order." Elaborating, the Board explained that "[i]f the employer commits unfair labor practices that invalidate the election, then the election necessarily fails to reflect the uncoerced choice of a majority of employees. In that situation, the Board will, instead, rely on the prior designation of a representative by the majority of employees by nonelection means, as expressly permitted by Section 9(a), and will issue an order requiring the employer to recognize and bargain with the union, from the date that the union demanded recognition from the employer." 372 NLRB No. 130, slip op. at 26.

Applying *Cemex*, I find that a bargaining order is warranted. As previously noted, I have found that Respondent committed several unfair labor practices that require setting aside the election. The evidentiary record demonstrates that the bargaining unit is appropriate and that a majority of employees signed authorization cards by January 19 to designate the Union as their bargaining representative. Given those circumstances, and relying on bargaining unit employees' prior designation of the Union as their bargaining representative, I will issue an order requiring Respondent to recognize and, on request, bargain with the Union from January 19, 2024.

As an alternative ground for issuing a bargaining order, the General Counsel maintains that such an order is warranted under *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). Under *Gissel*, where a union has achieved majority support and an employer engages in unfair labor practices that have the tendency to undermine majority strength and impede the election processes, the Board should issue an order for the employer to bargain with the union without an

election if "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." When determining whether a bargaining order is warranted, it is appropriate to consider an employer's entire course of conduct, both before and after the election, as well as the following factors: the seriousness of the violations and their pervasive nature; the number of employees directly affected; the identity and position of the individuals committing the unfair labor practices; and the size of the unit and extent of dissemination of knowledge of the respondent's coercive conduct among unit employees. *Gissel Packing Co.*, 395 U.S. at 614–615; see also *Garten Trucking LC*, 373 NLRB No. 94, slip op. at 3–4; *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at 12, 24.

I agree that a bargaining order is also warranted under *Gissel* (i.e., irrespective of the Board's decision in *Cemex*). As noted above, the Union achieved majority support in an appropriate bargaining unit as of January 19 based on employee authorization cards. Respondent then committed multiple unfair labor practices that warranted setting aside the representation election. Some of the unfair labor practices that Respondent committed (e.g., threats of layoffs and that employees' union activities were incompatible with continued employment) were hallmark violations for which a bargaining order is warranted without extensive explication. *Garten Trucking LC*, 373 NLRB No. 94, slip op. at 5. But even if we put that aside, all of the relevant factors weigh in favor of issuing a bargaining order under the circumstances present here. First, Respondent committed serious and pervasive unfair labor practices, including multiple violations during the critical period. After the election, Respondent went to great lengths to fabricate complaints about three union supporters (apprentices Allen, Froio, and Manduca) so it could terminate them on job-performance-related grounds that had a veneer of credibility, and also unlawfully terminated apprentices Tomasik and Tsimopoulos. Second, the bargaining unit was relatively small (at most, 57 employees as of January 19), and a large number of employees in the bargaining unit were involved insofar as many of Respondent's threats would directly affect any bargaining unit employee who learned of them.[97] Third, information about Respondent's coercive conduct was widely disseminated, including on the Brothers group chat that union supporters regularly used to communicate with each other during the organizing campaign. And fourth, Respondent's owners Leon and Mason and controller Leon committed many of the unfair labor practices, demonstrating that the opposition to the union organizing effort went to the highest levels of the company. Based on those circumstances, the chances of traditional remedies erasing the effects of Respondent's unfair labor practices is exceedingly slight, and thus a bargaining order is warranted. See *Garten Trucking LC*, 373 NLRB No. 94, slip op. at 6 (bargaining order under *Gissel* supported by unlawful interrogation, creating an unlawful impression of surveillance, unlawful discipline of two employees, and post-election unfair labor practices that revealed continued hostility towards employee rights); *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at

[97] While some threats were directed towards individual employees (e.g., interrogation and/or promises of benefits specific to Chen, Coulstring, and Froio), other threats were directed at the entire bargaining unit (e.g., threats of layoffs and unspecified reprisals, threat that union activities were incompatible with continued work for Respondent, creation of the impression that union activities were under surveillance, threat that it would be futile for employees to unionize, and adverse employment actions against employees because they engaged in union and protected concerted activities). See *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at 12.

13 (bargaining order under *Gissel* was warranted where the employer's unlawful misconduct stemmed from "a carefully crafted corporate strategy designed to skirt as closely as possible the fine line between lawful persuasion and unlawful coercion," which strongly suggested that the employer "would likely meet a rerun election with a similarly aggressive union-avoidance strategy, similarly prone to stray into unlawful coercion").

In sum, I will dismiss the representation petition and issue a bargaining order since that remedy is warranted under both the *Cemex* and *Gissel* legal standards.

C. Special Remedies

1. Notice reading and distribution

The General Counsel has requested, as a special remedy, that I require Respondent to have a responsible management official read the notice aloud to employees at a meeting or meetings in the presence of a Board agent.

The Board has found a notice-reading remedy appropriate where the employer's violations are sufficiently numerous and serious that a reading of the notice is warranted to dissipate the chilling effect of the violations on employees' willingness to exercise their Section 7 rights. *Amerinox Processing, Inc.*, 371 NLRB No. 105, slip op. at 2 (2022), enfd. 2023 WL 2818503 (D.C. Cir. 2023); *Gavilon Grain, LLC*, 371 NLRB No. 79, slip op. at 1 (2022).

I agree that a notice reading is warranted to reassure employees that their rights under the Act will not be violated. In particular, I find that a notice reading is appropriate because high-ranking management officials, including but not limited to owner Leon, participated in violating the Act, and the assorted unfair labor practices effectively warned employees that they risked reprisal or termination if they engaged in union and/or protected concerted activities. A public reading of the remedial notice is necessary in these circumstances "to allow the employees to fully perceive that the Respondent and its managers are bound by the requirements of the Act" and to ensure that if employees contemplate engaging in union and/or protected concerted activities in the future, they will be able to exercise a free choice. Respondent's owner Leon shall read the notice or, at Respondent's option, be present for its reading by an agent of the Board. *Hiran Mgmt, Inc.*, 373 NLRB No. 130, slip op. at 1–2 (2024); *Gavilon Grain, LLC*, 371 NLRB No. 79, slip op. at 1–2.

Regarding distributing the notice, I will follow the Board's customary practice of requiring Respondent to (among other standard distribution methods) distribute the notice electronically by any methods that Respondent customarily uses/used to communicate with its employees, including by text message and email. If Respondent has gone out of business or closed the facility involved in this case, I will require Respondent to mail copies of the signed notice to each individual who was employed by Respondent at any time since January 19, 2024, the date that Respondent committed its first unfair labor practice. *Hiran Mgmt., Inc.*, 373 NLRB No. 130, slip op. at 2.

2. Additional special remedies

The General Counsel has also requested the following additional special remedies: that I require Respondent to write letters to Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos to apologize for the unlawful discharges and any hardship or distress those actions caused; that I order Respondent to read an "Explanation of Rights" document as part of the notice-reading remedy; that I order Respondent to instate a qualified applicant of the Union's choice if Allen, Froio, Manduca, Tomasik, and/or Tsimopoulos are unable to return to work; and that I require Respondent to provide the Union, upon request, with an alphabetized list of the names, addresses, shift assignments, job classifications, and other contact information of all current employees of Respondent.

I decline the General Counsel's requests for these additional special remedies, as they are not warranted at this time and the standard remedies, bargaining order, and notice reading/mailing remedy that I have set forth above are sufficient to address Respondent's unfair labor practices in this case. See *Hiran Mgmt., Inc.*, 373 NLRB No. 130, slip op. at 1–2 fn. 5 (denying a request for similar special remedies); *Starbucks Corp.*, 373 NLRB No. 44, slip op. at 1 fn. 4 (same); *Starbucks Corp.*, 373 NLRB No. 33, slip op. at 1 fn. 3 (2024) (same); *Starbucks Corp.*, 372 NLRB No. 122, slip op. at 1 fn. 3, 22–23 (same).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[98]

ORDER

Respondent, RCL Mechanical, Inc., Raynham, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union and protected concerted activities.

(b) Threatening employees with unspecified reprisals, inviting employees to quit rather than exercise their Section 7 rights, and telling employees that their support for the Union is incompatible with continued employment with the company.

(c) Promising employees benefits if they refrain from supporting the Union and implicitly threatening to revoke benefits if employees supported the Union.

(d) Creating an impression among employees that Respondent has employees' union activities are under surveillance.

[98] 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.

(e) Threatening employees with layoffs if employees selected the Union as their bargaining representative.

(f) Soliciting employee complaints and grievances and thereby implicitly promising increased benefits and improved working conditions.

(g) Telling employees that it would be futile to select the Union as their bargaining representative.

(h) Disciplining, reassigning, failing to assign work to, or terminating employees because they engaged in union and protected concerted activities.

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

(j) 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) Make Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos whole for any loss of earnings and other benefits and for any other direct or foreseeable pecuniary harms suffered as a result of Respondent's unlawful decisions to discipline, reassign, failure to assign work to, or terminate them, in the manner set forth in the remedy section of this decision.

(b) Within 14 days of the Board's order, offer Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos full reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(c) Within 14 days of the Board's Order, remove from its files any references to the unlawful discipline, reassignment, failure to assign work to, and terminations of Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful adverse employment actions will not be used against them in any way.

(d) Compensate Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

(e) File with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the W–2 forms reflecting the backpay awards for Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos.

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

(g) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part-time plumbers, HVAC technicians, and apprentices working in [Respondent's] Commercial department, HVAC service and install experts, plumbing install and service experts, HVAC apprentices, and plumbing apprentices employed by [Respondent] from its Raynham, MA location

(h) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[99] Copies of the notice, on forms provided by the Regional Director for Region 1, 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means (including text message), if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 the last known home addresses of all current employees and former employees employed by Respondent at the facility at any time since January 19, 2024.

(i) Hold a meeting or meetings during work hours at its facility, scheduled to ensure the widest possible attendance of employees, at which the attached notice marked "Appendix" will

[99] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]."

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

be read to employees by owner Richard Leon in the presence of a Board agent or, at Respondent's option, by a Board agent in the presence of owner Leon.

(o) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

IT IS FURTHER ORDERED that the election conducted in Case 01–RC–333862 on February 9, 2024, shall be set aside, and that the petition shall be dismissed.

Dated, Washington, D.C. , May 7, 2025

Geoffrey Carter
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT interrogate employees about their union and protected concerted activities.

WE WILL NOT threaten employees with unspecified reprisals, invite employees to quit rather than exercise their Section 7 rights, or tell employees that their support for the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Plumbers & Gasfitters Local 12, AFL-CIO (Union) is incompatible with continued employment with our company.

WE WILL NOT promise employees benefits if they refrain from supporting the Union or implicitly threaten to revoke benefits if employees support the Union.

WE WILL NOT create an impression among employees that we have their union activities under surveillance.

WE WILL NOT threaten employees with layoffs if employees select the Union as their bargaining representative.

WE WILL NOT solicit employee complaints and grievances and thereby implicitly promise increased benefits and improved working conditions.

WE WILL NOT tell employees that it would be futile to select the Union as their bargaining representative.

WE WILL NOT discipline, reassign, fail to assign work to, or terminate employees because they engage in union and protected concerted activities.

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

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

WE WILL make Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos whole for any loss of earnings and other benefits and for any other direct or foreseeable pecuniary harms suffered as a result of our unlawful decisions to demote, suspend, and/or discharge them.

WE WILL, within 14 days of the Board's order, offer Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos full reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL, within 14 days of the Board's Order, remove from our files any references to the unlawful disciplines, reassignments, failures to assign work to, and terminations of Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful adverse employment actions will not be used against them in any way.

WE WILL compensate Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the W–2 forms reflecting the backpay awards for Bradford Allen, Shane Froio, James Manduca, Jacob Tomasik, and Georgios Tsimopoulos.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part-time plumbers, HVAC technicians, and apprentices working in RCL Mechanical, Inc.'s Commercial department, HVAC service and install experts, plumbing install and service experts, HVAC apprentices, and plumbing apprentices employed by RCL Mechanical, Inc. from its Raynham, MA location.

WE WILL hold a meeting or meetings during work hours at our facility, scheduled to ensure the widest possible attendance of employees, have this notice read to you and your fellow employees by owner Richard Leon in the presence of a Board agent or, at our option, by a Board agent in the presence of Richard Leon.

RCL MECHANICAL, INC.

(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
10 Causeway Street, Room 1002, Boston MA 02222-1001
(617) 565-6700, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-336276 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 (857) 317-7816.