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

YAPP USA AUTOMOTIVE SYSTEMS, INC.

and **Cases 07–CA–320369**
07–CA–336485

LOCAL 174, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL–CIO

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for the General Counsel.
Tim K. Garrett, Robert W. Horton, and *Hunter K. Yoches, Esqs.,*
for the Respondent.
Kurt N. Koning, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

REBEKAH RAMIREZ, Administrative Law Judge. This case was tried in Detroit, Michigan from October 15 through 18, 2024. Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union) filed the initial charge in Case 07–CA–320369 on June 21, 2023, and amended the charge on September 29, 2023; and filed the charge in Case 07–CA–336485 on February 1, 2024. The General Counsel[1] issued a complaint on April 9, 2024, and a consolidated complaint on August 6, 2024. Respondent timely filed an answer in which it denied all alleged violations of the Act.[2]

In the complaint, as further amended during trial and by motion,[3] the General Counsel alleges that YAPP USA Automotive Systems, Inc. (Respondent or the Company) violated the

[1] On February 3, 2025, William B. Cowen was appointed Acting General Counsel of the National Labor Relations Board. For ease and consistency, I will refer to the Acting General Counsel, the former General Counsel, and counsels for the General Counsel collectively as the General Counsel.

[2] Respondent initially contends that the complaint should be dismissed in its entirety because the structure of the Board is unconstitutional, and Board members and administrative law judges are unconstitutionally insulated from removal. However, the Board has rejected such defenses. See *Commonwealth Flats Dev. Corp d/b/a Seaport Hotel Boston*, 373 NLRB No. 142, slip op. at 1 fn 1 (2024).

[3] The General Counsel amended the complaint at trial without objection to clarify the

National Labor Relations Act (the Act) by maintaining certain rules in its Employee Handbook, and by engaging in certain conduct in response to a union organizing campaign.

PROCEDURAL ISSUES

On April 9, 2025, the General Counsel moved to further amend the complaint to withdraw all references to an outside employment rule from complaint paragraph 7, and withdraw complaint paragraph 8, concerning a video surveillance system, paragraph 17(g), concerning a request for a bargaining order, certain paragraphs or references in the complaint's prayer for relief paragraph 2, and certain sections of the General Counsel's brief. On April 16, 2025, the Union filed a request that I deny the General Counsel's motion claiming, in relevant part, that it was not clear which complaint paragraphs were being withdrawn or the reasons for their withdrawal. On April 21, 2025, the General Counsel filed a reply to the Union's opposition, restating the complaint paragraphs and related remedial paragraphs he is seeking to withdraw, and asserting that the reason these paragraphs are being withdrawn is that the allegations and remedies are not supported by extant law but were initially pursued based on General Counsel directives that were rescinded on February 14, 2025.

The Board has held that after the opening of trial but before the receipt of evidence, the General Counsel has unreviewable discretion to withdraw the complaint. *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981, 981–982 (1992). However, "where . . . relevant evidence has been adduced at a hearing, the General Counsel no longer retains absolute control over the complaint; and a subsequent motion to dismiss the complaint or any portion thereof is within the [administrative law judge's] discretionary authority." Id. citing *General Maintenance Engineers*, 142 NLRB 295 (1963) (footnote omitted). Accord: *United Aircraft Corp.*, 91 NLRB 215 (1950).

On February 14, 2025, the General Counsel issued Memorandum GC 25–05 where he rescinded certain General Counsel memoranda, including GC 25–01, which concerned "remedying the harmful effects of non–compete and "stay–or–pay" provisions that violate the Act." GC 25–01's objective was to urge the Board to not only find certain non–compete provisions unlawful but also to remedy the financial harmful effects caused by workplace rules that restrict employees' job opportunities, including, for example, the maintenance of an anti–moonlighting provision that discourages employees from pursuing or accepting a second job. The General Counsel requests to withdraw the allegations in complaint paragraph 7 concerning Respondent's outside employment rules because they fall within the now rescinded GC 25–01's directives. I have not found any Board case finding a work rule, such as the one at issue here, that merely prohibits outside employment "if it interferes with [the employee's] job responsibilities with the Company or constitutes a conflict of interest" to be unlawful. Thus, I find it appropriate to grant the General Counsel's request to withdraw all references to outside employment rules

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allegations in pars. 7, 8, and 16. (Tr. 15, 687–688.) On October 30, 2024, and December 16, 2024, the General Counsel moved to withdraw complaint par. 13, concerning mandatory captive audience meetings, and par. 14, concerning Respondent's "vote no" shirts. The General Counsel's unopposed motions are granted.

from complaint paragraph 7.[4]

Memorandum GC 23–02 was also rescinded by the General Counsel, which concerned the "electronic monitoring and algorithmic management of employees interfering with the exercise of Section 7 rights." In GC 23–02, the General Counsel explained he would urge the Board apply settled labor–law principles in new ways to employers' practices of, among other things, closely monitoring employees by using security cameras and other technologies. Thus, GC 23–02 applied to the allegations in complaint paragraph 8 where the General Counsel alleged that Respondent violated the Act by merely maintaining a video surveillance system at its facility. As of the date that GC 23–02 was rescinded, the Board had not held in any decision that the mere maintenance of a surveillance system interferes with employees' Section 7 rights. Complaint paragraph 8 also alleged that Respondent engaged in the unlawful surveillance of employees' protected activity by means of its surveillance system. No witness testified and/or provided evidence that the video surveillance system was used in any way that was out of the ordinary, that it was used to surveil employees' protected activities, and/or that it gave employees the impression that their activities were under surveillance. Moreover, there is no dispute that the video surveillance system was in place prior to any union organizing activity. I, therefore, grant the General Counsel's request to withdraw complaint paragraph 8.

Memorandum GC 24–04, which provided guidance on "securing full remedies for all victims of unlawful conduct" and Memorandum GC 21–06, which concerned seeking "full remedies" were also rescinded by the General Counsel. In GC 24–04, the General Counsel explained he intended to seek remedies for employees harmed due to an unlawful work rule regardless of whether those employees were identified during the unfair labor practice investigation. The remedial paragraphs that the General Counsel is requesting to withdraw fall within this guidance and those found in GC 21–06. The special remedies sought in the rescinded GC memoranda are not standard Board remedies, and I find it appropriate to grant the General Counsel's request to withdraw the remedial paragraphs stated in his motion.

Finally, the General Counsel requests to withdraw complaint paragraph 17(g), which relates to the General Counsel's request that I order a *Gissel* bargaining order in this case. The General Counsel also requested to withdraw the related sections in his post–hearing brief arguing that the Board in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), overruled *sub silentio* the *Irving Air Chute*, 149 NLRB 627 (1964), holding that a bargaining order could not issue unless the election was set aside based on meritorious objections and/or that *Irving Air Chute* does not apply in cases in which the General Counsel is pursuing a *Cemex* bargaining order. The General Counsel is not requesting to withdraw the complaint's request for a *Cemex* bargaining order. The Union in this case did not file objections to the election, and the Board, to date, has not overruled *Irving Air Chute*. I am bound by extant Board case law. I, therefore, find it appropriate to grant the General Counsel's request to withdraw complaint paragraph 17(g).

Based on the complaint, as further amended, the General Counsel alleges that Respondent

[4] Even if analyzed under *Stericycle*, 372 NLRB No. 113 (2023), the outside employment rules here do not contain any language and/or overly broad or vague terms that could be reasonably interpreted to restrict or prohibit Sec. 7 activity.

violated the Act when it:

(a) Maintained and enforced certain rules in its Employee Handbook concerning confidentiality, conflicts of interest, general work rules, and workplace violence, against its employee Jesse Dowling and other unknown employees.

(b) On about May 4, 2023, suspended its employee Jesse Dowling, and on about May 5, 2023, discharged Dowling because he assisted the Union and engaged in concerted activities, and in the alternative, selectively and disparately applied its workplace violence rule against Dowling.

(c) On about May 2, 2023, created the impression among its employees that their union activities were under surveillance by telling them that they knew how many authorization cards they had or needed; and threatened employees by telling them to be careful and calm down regarding their activities on behalf of the Union.

(d) About early May 2023, threatened employees with discipline if they talked about the Union on the shop floor, engaged in surveillance of employees' union activities, promised to pay employees if they provided information about others' union activities, and interrogated employees about their union activities and that of others.

(e) About early June 2023, interrogated employees about their union sympathies and gave them the impression that their union activities were under surveillance.

(f) About late August 2023, interrogated employees about their union sympathies.

(g) About September 6 and 9, 2023, increased the benefits of its employees by providing them with a catered lunch and providing them with food and beverages at a bowling event.

The complaint further alleges that Respondent violated Section 8(a)(5) of the Act when it refused to recognize and bargain with the Union after being presented with evidence of the Union's majority support among its production and maintenance employees (the Unit) and then committed the above violations. As part of the remedy for these violations, the General Counsel seeks a bargaining order pursuant to *Cemex Construction Materials Pacific,* supra.

On the entire record,[5] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Union,[6] I make the following:

[5] The transcript and exhibits in this case are generally accurate. During my review of the record, I found transcript errors where corrections are warranted, although none are material: on pg. 22, line 17, "medial" should be "remedial" and on pg. 80, line 20, "Charter" should be "Charging."

[6] The transcript and exhibits in this decision are referenced as follows: "Tr." for transcript, "Jt. Exh." for joint exhibit, "GC Exh." for General Counsel's exhibit, and "R. Exh." for

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

At all material times, Respondent has been a corporation, with an office and place of business in Romulus, Michigan (the Romulus facility), and has been engaged in the business of manufacturing automotive parts. In conducting its operations during the calendar year ending December 31, 2023, Respondent purchased and received goods valued in excess of $50,000 from points outside of the State of Michigan. Accordingly, Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In addition, Respondent 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

Respondent manufactures automotive parts at its Romulus facility. It employs approximately 150 production and maintenance employees. Xiaolei Tang has been the operations manager at the facility since mid–2023. Tang reports to the President of YAPP USA. Tang's direct reports include Plant Manager Larry Pratt, and Maintenance Manager Oscar Chaires Agis. Ricardo Gomez, who was the process department manager, reported to Tang until Gomez' employment ended in March 2024. (Tr. 537, 592–593.) Terrance Davison is a senior group leader that reports to Pratt. (Tr. 560.) Respondent admits, and I find, that Tang, Pratt, Chaires, Gomez, and Davison have been supervisors and/or agents of Respondent for purposes of Section 2(11) and (13) of the Act. (GC Exh. 1(o).)

Rongxuan Li, who goes by Camilla Li, served as Respondent's international legal counsel and human resources (HR) legal manager from 2016 until September 2023. She worked remotely out of Tennessee. (Tr. 445–446, 448.)

There is no dispute that Respondent has maintained an employee handbook that includes several work rules which the General Counsel alleges in paragraph 7 of the complaint are overly broad. The work rules in dispute fall under the standards of conduct and safety policies in the handbook and include provisions regarding: (1) confidential and proprietary information; (2) conflict of interest; (3) general work rules numbers 3, 7, and 23; and (4) workplace violence. (Jt. Exh. 3.)

Respondent's exhibit. The posthearing briefs are referenced as "GC Br." for the General Counsel's brief, "CP Br." for the Charging Party's brief, and "R. Br." for Respondent's brief. Although I have included several citations in this decision to highlight particular facts or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record of the case.

B. Organizing Campaign and Election Results

There is no prior history of union organizing at the Romulus facility. Maintenance technician Jesse Dowling contacted Union Organizer Justine Cane on April 13, 2023,[7] to start a union organizing drive. (Tr. 51–54, 162, 206.) Dowling signed a union authorization card on April 18, along with other employees. Between April and August, the Union collected 114 authorization cards. (GC Exh. 14.)

On July 31, the Union filed a petition for an election with the Board to represent a bargaining unit of production and maintenance employees employed at the Romulus facility. On the same day, Cane sent an email to Plant Manager Larry Pratt with a copy of the petition. (GC Exh. 11; Tr. 216–217.)

On August 11, Respondent retained the services of the Labor Consulting Group, LLC (LCG) to perform labor relations services, including "conducting persuasive employee meetings, counseling [the Company], and performing other activities relevant to union prevention." (GC Exh. 20.) Respondent admits, and I find, that LCG consultants were agents of Respondent as defined by Section 1(13) of the Act. (GC Exh. 1(o).)

An election was held pursuant to the petition on September 14. Of the 150 eligible voters, 47 voted for the Union, and 84 voted against the Union. There were two challenged ballots. (GC Exhs. 12, 13.) On September 25, the Board issued a certification of results certifying that the Union was not selected as the employees' collective–bargaining representative. (GC Exh. 6.) The Union did not file objections to the election results.

C. April 12–14: Jesse Dowling's altercation With His Supervisor

1. Dowling and his supervisor, Oscar Chaires, had a poor work relationship

Dowling was hired on February 16, 2018, as a maintenance technician reporting to Maintenance Manager Oscar Chaires Agis (Chaires). Chaires has been the maintenance manager at the facility since 2016. (Tr. 334.) Chaires supervises a group of production maintenance technicians that include Ricardo Torres and Juan Antonio Mollado. (Tr. 88–89.)

Both Dowling and Chaires testified at the hearing that their work relationship was poor for years prior to the April 13 altercation that is relevant in this matter. Dowling stated that his work relationship with Chaires was good for his first 3 years of employment, but there came a time when they had a "falling out." At some point during the last few years, Dowling accused Chaires of stealing money from the Company. (Tr. 90–91.) Chaires testified that the Company investigated Dowling's accusations against him and cleared him of any wrongdoing. (Tr. 342.) Chaires testified that his work relationship with Dowling was difficult during the last 3 or 4 years during which he received numerous complaints from his direct reports that Dowling was difficult to work with, rude, and aggressive. (Tr. 335–336, 373.) At some point in the last several years, Chaires, who is Mexican, confronted and accused Dowling of writing inappropriate comments on a Company whiteboard that included homophobic and anti–Mexican remarks, specifically

[7] All dates are in 2023 unless otherwise indicated.

against Dowling's coworker Ricardo Torres. (Tr. 91–92, 339; R. Exh. 42.[8]) Chaires stated that when he asked Dowling if he wrote the things on the whiteboard, Dowling just laughed and did not deny doing it. (Tr. 339, 383.) Chaires stated that Dowling routinely misspelled Ricardo Torres' first name, as it appeared on the whiteboard and the writing on the whiteboard looked like Dowling's handwriting. (Tr. 385–386.) He reported the whiteboard incident and other complaints to a former HR manager whose name was "Tamita." (Tr. 335–339, 387.) Dowling acknowledged that Chaires talked to him about the whiteboard incident, but denied doing it, and stated that HR never talked to him about this or any other complaints.[9] (Tr. 178–179.)

Chaires credibly testified that Dowling would not return his work–related text messages and would not complete the work orders he asked Dowling to do. (Tr. 31.) Chaires testified that Dowling would make comments such as, that it was not his work to do preventive maintenance (PM) work, saying "that is what you have your Mexican friend for," and would make other anti–Mexican comments to him and others. (Tr. 342.) Chaires also stated that Dowling talked at work about owning guns and that he kept them in his car. (Tr. 395.) Dowling denied that employees feared him, or that he had told coworkers that he owned guns. (Tr. 94–96.) Dowling testified that Chaires thought Dowling was racist against the Mexican employees at the facility.[10] (Tr. 186.) Based on the foregoing, I conclude that Dowling and Chaires had a very poor work relationship, and they believed each other to be biased and/or racist against the other.[11]

2. April 12—Dowling's toolbox is spraypainted at work

On April 12, Dowling found his work toolbox spray painted after he left it in a tool crib at the facility. Dowling immediately believed that the toolbox was vandalized by someone at work. He had bought the toolbox with his own money, and kept his tools locked in it at work.

[8] A picture of the white board is in the record. It shows that somebody wrote "Mexican's gay love," "Racardo [sic] is gay," "Edwin [heart symbol] Racardo [sic]" "Racardo [sic] loves" and a drawing of a penis, and "Racardo [heart symbol] dicks." (R. Exh. 42.) I find there is insufficient evidence to establish that Dowling wrote these comments.

[9] There is no evidence of any reports to HR about Dowling. However, Camilla Li, who in April and May, worked helping the Romulus facility out while there was no HR manager on site, credibly testified that the previous HR manager "Tabatha" had serious performance and absenteeism issues, and that records were missing at the facility due to this HR manager's performance issues. (Tr. 447–448, 452–453.) Li was a strong and credible witness, and I credit her testimony regarding the fact that the previous HR manager was a poor performer. Li is no longer employed by Respondent and testified under subpoena.

[10] Dowling is Caucasian but testified that he is part-Mexican and when asked about his Mexican heritage replied that he is "not full Mexican" but "I don't hate myself." I note that Dowling did not unequivocally deny that he made anti-Mexican comments at work. (Tr. 184.)

[11] Dowling was not a credible witness. Dowling's testimony was full of inconsistencies. For example, at one point Dowling denied accusing Chaires of being "racist" against him. However, after being confronted with texts where he called Chaires a racist, he muddled his testimony stating that he could not explain his texts other than to say it "might be a race thing." (Tr. 91, 137, 141–142, 186, 197; R. Exhs. 38 and 40.) Dowling changed his testimony about critical issues many times throughout the hearing, as will be discussed more fully below. As a result, I do not credit his testimony, unless it is explicitly supported by other, reliable evidence.

The toolbox in question is about 6 feet tall and 5 feet wide. Dowling stated that these types of toolboxes cost upwards of $1000. A picture of the toolbox is in the record and shows smudges of mostly green and some yellow spray paint on the body of one side of the black toolbox, and a smaller green/yellow line on another side of the toolbox. (Tr. 30–32; GC Exh. 2.)

Dowling went "straight to IT" to ask that video surveillance be checked to see who had damaged his toolbox. (Tr. 96.) He also immediately texted Operations Manager Tang, at 12:50 p.m., with a picture of the toolbox and asked him to check the cameras. (R. Exh. 40.) Tang replied to Dowling's text by drawing a circle on the picture that Dowling sent signaling that a piece of metal on the metal rack right by the toolbox was also spray painted and asked if it was possible that someone painted his toolbox accidentally as they were working on spray painting the metal piece. Dowling replied that the spray paint on the side of the toolbox was too much of a straight line to be unintentional. He complained that he paid for his toolbox with his own money. (R. Exh. 40.) At 12:59 p.m., Dowling also texted Plant Manager Larry Pratt with the picture of the toolbox and asked him to check the cameras to see who did it. Pratt replied that he was sorry that had happened, and he would check. (GC Exh. 10, R. Exh. 38.) Dowling eventually talked to someone in IT and was told that the camera system was down that morning because the Company was "switching over" to a different system. Dowling continued to text Tang and Pratt stating that the cameras were down, that he had paid for the toolbox with his own money, and that he thought it "funny" that this happened when the cameras were down. Tang texted back that he would check to see what he could find out about this incident. (Tr. 97–102; R. Exhs. 38, 40.) Dowling did not reach out to his direct supervisor Chaires for assistance with his toolbox.

3. April 13—Dowling has an altercation with Chaires

On Thursday, April 13, Chaires received an early–morning call from Ricardo Torres saying that he was upset and scared about working with Dowling because he had heard that Dowling was accusing him (Torres) of painting Dowling's toolbox.[12] (Tr. 344–346.)

On the morning of April 13, Chaires and Torres went to talk to Tang at his office. Chaires told Tang that Torres wanted to leave work because of Dowling, and Tang told Chaires that Torres could not go home because they were short on manpower. According to Chaires, Tang instructed Chaires to call Dowling to the office and offer to pay for his toolbox. (Tr. 347, 393.) Tang testified that he did not instruct Chaires to call Dowling to the office. (Tr. 594–596.) Nevertheless, Chaires called Dowling to come meet him at the office. Senior Group Leader Terrence Davison, who was sitting close to Tang in the office and overheard the conversation, texted Dowling at 8:30 a.m. saying "chill bro," "be clam [sic] when u come in here." (R. Exh. 39.) Davison and Dowling had become friends at work and frequently texted each other about non–work things, like building car engines. (Tr. 105–106, 560; R. Exh. 39.) Davison testified that he sent the text to Dowling "because I know how he was feeling about his toolbox, so I didn't want him to come up here and be kind of mad" (Tr. 561.) Based on Davison's text, I credit Chaires' testimony that Tang told him to call Dowling.

The parties jointly submitted video evidence of the April 13 meeting between Chaires and Dowling. (Jt. Exh. 1.) The video is 8.28 minutes long and has no audio. The camera was evidently

[12] Ricardo Torres was not called as a witness.

positioned in the back left corner of a large open rectangle–shaped office area and was angled toward the main door into the office space. On each side of the room, there is a row of open cubicles, with an open hallway in the middle. The video starts with Chaires coming in through the door, putting a bag he carried in with him on a desk in a cubicle on the left side of the room and walking over to talk to Tang who was sitting at a desk in a cubicle on the right side of the office area. Tang's desk was right by another cubicle where supervisors Davison and Larry Pratt were working together. Soon after, Torres came in the door and joined Chaires and Tang. Chaires and Torres remained standing while speaking with Tang, who remained sitting. They spoke for about 3 minutes, and then Chaires and Torres moved across the room, to the left side, and continued to talk to each other. Chaires can be seen talking into a radio transmitter and looking at his phone. Eventually, Chaires and Torres sat reclining on a desk. (Jt. Exh. 1.)

The video shows Dowling opening the door at minute marker 4:48. He had a small tool bag in his hands, which he quickly placed on a nearby desk, before turning to talk to Chaires. Chaires is seen with his back to the camera, reclined on a desk, with Torres doing the same, on his right side, which is farthest from Dowling and the door. Given the position of the camera, the video shows Dowling's front side, and Chaires' and Torres' backs. The first few seconds after Dowling came in, he appears to be listening to Chaires speak. Torres also appears to have said something. Then, Dowling is seen taking a few steps toward Chaires and Torres and pointing his finger at Torres while talking. He seems agitated. Moments later, Dowling grabs his tool bag, as though he was leaving, but turns around to look at Chaires, who appears to be speaking to him. At about minute marker 5:44, Antonio Mollado comes in through the door and walks by the men to go work at a desk close to where Chaires had left his bag. Dowling is seen placing his tool bag back on the desk and appears to be talking with Chaires more calmly. However, shortly after, Dowling grabs his tool bag again, and Chaires stands up, with Torres standing up right behind him. Dowling is next seen talking while pointing and looking at Torres, over Chaires' shoulder. Dowling looks agitated again, motioning with his hands while he talks and points at Torres. Dowling also starts to pace back and forth a few times. (Jt. Exh. 1.)

At about minute marker 6:41, Chaires, with his hands in his pockets, slowly takes a few steps toward Dowling, and it looks like Dowling is listening to Chaires say something. At this point, Torres was standing right behind Chaires with his arms crossed in front of his chest. At minute marker 6:50, Dowling says something to Chaires while placing his tool bag on the floor and squares up to Chaires. Upon seeing and hearing Dowling, Davison and Tang get up, and Davison quickly starts walking over to Dowling. Then, Dowling raises his arm right in front of Chaires' face while Davison grabs Dowling with an arm across Dowling's chest and pulls him away from Chaires. There is no way to see if Dowling touched Chaires from the video. Chaires still has his hands in his pockets, while Dowling continues to talk and make hand gestures toward Chaires, except that now Davison is standing in between Dowling and Chaires and can be seen moving Dowling back from Chaires. Eventually, Dowling goes around Davison and grabs his tool bag from the floor and starts walking toward the door. By this time, Davison, Pratt, Tang, and Mollado were all standing and watching Dowling. Davison is seen walking Dowling toward the door. Dowling then stands at the door, turns, and starts pointing and gesturing toward Chaires in an agitated manner for another 30 seconds, at one point holding the door open, while he continues to talk to Chaires. Dowling then walks out and then immediately walks back in and starts talking and gesturing with his hands at Chaires again, before finally leaving the office area. (Jt. Exh. 1.) The parties moved into evidence a still picture of the video identifying all the people

in the room at the time of the altercation. The people in the picture are Dowling, Chaires, Torres, Davison, Pratt, Tang and Mollado. (Jt. Exh. 2.)

Dowling, Chaires, Davison and Tang testified at the hearing, and Dowling and Chaires were shown the video multiple times to testify about this incident.

Dowling testified that as soon as he walked into the office, Chaires asked him why he was blaming other employees for spray–painting his toolbox. Dowling stated that he told Chaires that he was not blaming anyone and then the two men started arguing back and forth. Dowling testified that when the video shows him pointing at Torres he was saying, "I didn't blame you for anything, I don't know why you're trying to lie to him." Dowling testified that as the argument got more intense Chaires told him he was the one that spray painted his toolbox, walked over to him angrily, and asked "what are you going to do about it." Dowling stated that was when he stuck his arm out and told Chaires "Get the fuck away from me." (Tr. 34–35, 106, 109.)

Chaires testified that when Dowling first walked in, he asked Dowling to stop accusing people of damaging his toolbox without proof, and Dowling told him that he had a witness, that he knew Torres painted his toolbox, and that he knows "how we are" in reference to the Mexican crew. Chaires told him he had to stop talking that way and stop accusing others without proof. (Tr. 348–349.) As Dowling got more agitated, Chaires asked, "What do you want to do? What do you want to know?" "You want a name and that is going to put you down, and you're going to take it easy, and we're going to try to fix it, so what do you want?" Dowling allegedly stated, "I know you painted my toolbox." And Chaires replied, "okay if you think that some of us painted your toolbox, okay, think I did it, how can we fix it. We will pay you the toolbox." (Tr. 350.) Chaires testified that he walked over to Dowling because Dowling lowered the volume of his voice, and English is not Chaires' first language, so he sometimes gets closer to a person to be able to see their mouths while they speak. Chaires testified that when Dowling put his arm out to his face, Dowling put his hands in the form of a gun and said, "just because you the boss you don't think I can do something about it," and hit him on his forehead with one finger. (Tr. 351–353, 371–372, 398, 403.)

Dowling was asked several different times during his testimony whether he touched or struck Chaires when he stuck his arm out. On direct examination, Dowling first testified "I don't think I intentionally did, but I might have nicked him when I stuck my arm out and told him, get the fuck away from me." (Tr. 41.) On cross-examination, Dowling was asked to confirm that he admitted to touching Chaires. Dowling replied unequivocally "yes" and "I told him to get the fuck away from me." (Tr. 82.) Dowling was asked again if he touched Chaires on the forehead, and Dowling repeated, yes. (Tr. 109.) He was asked if he took his two fingers and pushed Chaires on his forehead with them, and Dowling testified that "I just told him, get the fuck away from, me," "I didn't stick two fingers out, I stuck one hand out." (Tr. 109.) Dowling stated that he felt threatened but did not back up in the "heat of the moment."

On the second day of the hearing, Dowling changed his testimony about touching Chaires:

> Q. – And you did testify yesterday that you put your fingers on Mr. Chaires' forehead, correct?

A. – I originally said that. If I did, it wasn't by – you know, that I was aware of it, because I believe I really did not touch him, to be honest. It just happened so fast. But when I originally told you, I said that I wasn't intentionally, if I did.
Q. – Well, yesterday you testified that you did touch him on the forehead. Are you changing that testimony now?
A. – Correct.
Q. – All right, so now you're saying that you didn't touch him.
A. – Correct.
(Tr. 166.)

Dowling was then confronted with a Board affidavit he signed on July 5, where he admitted to touching Chaires. The pertinent part of the affidavit was read into the record:

"A couple of days later, April 13th, my boss calls me up to the office, and begins to tell me to stop blaming people for what happened to my toolbox. I told him I had no idea what he was even talking about, and that I wasn't going around blaming people. My supervisor, Oscar [Chaires], then called me a liar, and we had words back and forth. He then ran in my face very aggressively and began to call me a racist. So then I stuck out my arm and touched him, asking him, why are you yelling in my face and why are you running up on me. And I told him to back away from me." (Tr. 166–167.)

Next, Dowling was confronted with a second affidavit he provided to the Board dated August 1, where he changed his testimony to state that he "did not press two fingers on Chaires' head. I did not make any physical contact with Chaires." (Tr. 167.) At the hearing, Dowling tried to explain these inconsistencies stating "As I tried to tell you before, I wasn't really aware if I did or not. And then, I don't know, I guess I just got confused." (Tr. 168.)

On redirect, Dowling was again asked if he touched Chaires, and his response was "I honestly couldn't tell you, like I said. I am not 100 percent sure I did, but I feel like if I did, he would have moved, fell backwards, or something. I'm just not sure, if I did, I was not intentional." (Tr 180–181, 192.)

Davison testified that he saw Dowling point his finger at Chaires, and touch Chaires' forehead. (Tr. 562–563.) Tang similarly testified that he saw Dowling reach his arm to Chaires and touch Chaires' forehead. (Tr. 599.)

As explained earlier, Dowling was not a credible witness. His inconsistent and changing testimony regarding whether he touched Chaires seriously hurt his credibility. Further, no one other than Dowling testified that he said to Chaires anything remotely close to "get the fuck away from me." As will be discussed below, Li investigated this incident, and after interviewing all witnesses, concluded that Dowling put two fingers on Chaires' forehead and threatened Chaires by saying something to the effect of "don't think I can't beat you." (R. Exh. 18.) I do not credit Dowling's denial at the hearing that he did not make that statement. (Tr. 192.) Further hurting Dowling's credibility is the fact that Dowling insisted that Chaires "admitted" to him he painted Dowling's toolbox and did not offer to pay for his toolbox. (Tr. 111–112.) However, as will be discussed below, Dowling's own texts about the incident contradict this testimony and show that he was not sure who had painted his toolbox, but in any case, he wanted Chaires punished for it.

(See R. Exh. 39, p. 4.) No other witness testified (or reported to Li) that Chaires was aggressive toward Dowling, or that Chaires said to Dowling that he painted the toolbox, so what are you going to do about it. The credible evidence reflects that Chaires told Dowling something to the effect that if Dowling thought he spraypainted the toolbox, then they could assume he did, so they could talk about a resolution. There is no credible evidence showing that Chaires spraypainted the toolbox or that anyone spraypainted the toolbox intentionally. Dowling incredibly testified on cross–examination that he was not angry nor was he blaming Torres when he was shown the video where he was gesturing and pointing agitatedly toward Torres. (Tr. 108.) However, my independent review of the video shows that Dowling was agitated, gesturing with his hands and arms aggressively at Chaires and Torres, and that when he deliberately put his tool bag down on the floor and squared up to Chaires, he looked like he was ready to fight Chaires. Additionally, the video clearly shows that Chaires did not walk up aggressively toward Dowling, as Dowling claims. On the contrary, the video shows Chaires calmly and slowly, with his hands in his pockets, walking closer to Dowling. Moreover, everyone in the room reacted to Dowling's conduct—not Chaires', and it is clear from the video that Dowling reached out his arm and hand toward Chaires' face right before Davison jumped up and physically restrained Dowling, held him back from Chaires, and continued to move Dowling away from Chaires while Dowling continued to gesture and speak. Based on the foregoing, I have no doubt that Dowling touched Chaires' forehead with his hand. I do not credit Dowling's testimony that he did not touch Chaires or that he told Chaires to get away from him.

4. April 13—Dowling sends multiple texts after altercation with Chaires

Soon after the altercation, Dowling texted Davison letting him know that he had not seen his earlier text warning him about keeping himself calm when he was called into the office. He then texted "but fuck that that [sic] mf walk right up on me Should [sic] of went in his shit." Davison replied, "yea he was wrong on that" and asked, "where u at." Dowling replied that he was by shipping and asked, "am I fired." Davison texted back saying that he was not fired and that he was on his way. (R. Exh. 39, pg. 1.) At the hearing, Dowling testified that he understood that he had engaged in conduct that could get him fired. (Tr. 118–119.)

Dowling and Davison exchanged multiple texts during the rest of the day. Dowling texted that Pratt could check the cameras to see who had painted his toolbox, and Davison replied that Pratt could not see who did it, and that Tang had asked someone else to look at the cameras for him. Dowling texted that he felt threatened "if he walks up on me again I don't feel safe fr [sic] lol" and Davison replied, "lol he fasho [sic] not go do that they said the same about u [sic] lol." Dowling texted that Chaires had admitted he painted his tool box, and that Chaires thinks "he can just fuck with every1 [sic] and do w.e [sic] he want to ppl he's got it wrong" "man I'm begging you if some shit happens will you plez [sic] tell the truth and not cover for that asshole." Davison replied that he would always tell Dowling the truth. (R. Exh. 39, p. 2–3.)[13]

Dowling also texted Tang, at 11:39 a.m., stating that this "has gone to [sic] far," that Chaires walked up to his face like he was going to harm him, that he did not feel safe, that Chaires

[13] "Fr" stands for "for real," "lol" for "laugh out loud," "fasho' for "for sure," and "w.e." for "whatever."

had admitted that he was the one who spray painted the toolbox, and that something needs to be done "today." Tang did not immediately reply. (R. Exh. 40, p. 3.)

In addition, Dowling texted Pratt saying that everyone heard Chaires say he painted his toolbox and walked up on me "like he was going to hit me or something." Dowling also texted that he did not feel safe, and that if no one is going to do anything about it, he will "take things further." Pratt replied that Dowling should go talk to "Monica" in HR. (R. Exh. 38.)

At the hearing, Davison testified that it was his impression that Dowling did not really believe that Chaires had painted his toolbox. (Tr. 565–566.) Dowling was also asked if he really believed that Chaires had painted his toolbox, and he replied, "there was a good chance, I didn't have a good standing relationship with him for the last 3 years" . . . "There was a chance that Chaires did it. I wanted to see the videos." (Tr. 112.)

5. April 13—Dowling files a police report against Chaires

At some point on April 13, Dowling called the police to report that Chaires had damaged his toolbox. Dowling asked Davison by text for the spelling of Chaires' last name. (R. Exh. 39, p. 3.) Dowling testified that he needed the correct spelling of Chaires' name because he needed it to be able to file the police report. (Tr. 129–130.)

Dowling also texted maintenance technician Walter Turner at 12:58 p.m. to get Chaires' name and address for the police report. (Tr. 675–676.) Dowling texted "yupp I already talk to the police too I gotta go make a report after work he admitted to destroying my property and harassing me." Turner replied, "wow man that is crazy" "what a fucking joke." At 3:08 p.m., Dowling texted Turner "U know were [sic] Oscar [Chaires] lives don't u they wanna [sic] know for the police report." Dowling also asked if Turner knew how to spell Chaires' last name. Turner replied with Chaires' name and said he got it from Chaires' Facebook page. Dowling then asked Turner to send him the Facebook page link and Turner sent it. Turner also sent an address. They exchanged several more texts through the evening where Dowling commented that the house on the address Turner sent was not Chaires' house and Turner replied that was the correct house because Chaires had sent the address to him for his birthday. (GC Exh. 36.)

The record indicates that at some point Larry Pratt learned that Dowling had complained to the police about Chaires. Apparently, the police went to the facility to investigate Dowling's allegations but there is no evidence regarding who the police talked to or when they visited the facility. Dowling stated that charges were not filed. The record does not have any documentary evidence of any police report. (Tr. 129–130.)

6. April 13—Dowling contacts the Union

Dowling initially testified that he first contacted Union Organizer Justine Cane in April "before his toolbox was sprayed," to talk about union benefits. However, on cross–examination he was confronted with his August 1 affidavit and acknowledged that in his affidavit he stated he first contacted the Union on April 13. Dowling signed a union authorization card on April 18. (Tr. 52–54, 76, 162; GC Exh. 26.) For the foregoing, I find that Dowling reached out to the

Union sometime between April 13 and 18. There is no evidence reflecting that Dowling made his union activities known at this time.

7. April 14—Dowling texts Davison that he was planning on leaving the Company

On Friday, April 14, Dowling texted Davison several times again. Dowling texted that he had been planning on leaving the Company soon "but now fuck no I ant gonna let nun [sic] of them try and adtimdate [sic] me into leaving lol." He also texted concerning Chaires that "after fucking with me for over a year he wants to work shit out now and replace my shit the guy has been fucking harassing me for a long fucking time and what every1 else is pretty much staying out of it n [sic] not gonna do shit bout him doing that shit to me but if I would of hit him when he ran up on me would he of [sic] not called the cops…" (R. Exh. 39, pg. 4.) Notably, these texts show, contrary to Dowling's testimony, that Chaires offered to replace his toolbox.

D. HR Investigation Recommends Dowling's Termination

On April 14, Tang asked Camilla Li to conduct an HR investigation concerning the April 13 incident. At the time, the Romulus facility did not have an HR person onsite. On Monday April 17, Tang sent Li the video recording of the April 13 incident via WeChat, which is a Chinese messaging application. (R. Exh. 34; Tr. 447–453, 500–508, 601.)

Li conducted phone interviews with Chaires, Mollado, Torres, Davison, Tang, Pratt and Turner between April 17 and 20. She prepared a witness interview memo for each interview conducted. Each memo is addressed to Lei Wang, who is also known by the last name Stone, and who was Respondent's HR director at Respondent's offices in Tennessee. (Tr. 517, 531; R. Exhs. 8–15). Each witness signed and dated a declaration under penalty of perjury stating that they were interviewed by Li, reviewed her interview notes of the incident on April 13, and that her notes accurately reflect what they witnessed. The declarations were signed between August 23 and 29 and reflect a few edits.[14] (R. Exhs. 24–28.)

During Tang's interview with Li, Tang stated that he saw Dowling and Chaires argue about who painted the toolbox, and that it seemed to him that Dowling was trying to talk to Ricardo Torres, and Chaires stood in between them. Tang did not hear exactly what was said other than Chaires saying to Dowling that if Dowling wanted to say that he did it, then okay, let's say he did, what do you want from me, to pay for it? Tang said Dowling moved toward Chaires and put his fingers on Chaires' head. Tang, who is not a native English speaker, stated that he did

[14] The General Counsel objected to hearsay statements within the interview notes. The interview notes are business records, and I find that the signed declarations from each employee stating that they reviewed the interview notes gives credence to these documents. The interview notes corroborated the testimonies provided by Chaires, Tang, and Davison. I also credit Li's testimony that she prepared the interview notes based on what she heard from each employee interviewed. (Tr. 449–451, 534–535.) Further, the interview notes are admissible for the nonhearsay purpose of showing Respondent's state of mind as it relied on the notes to make its decision to terminate Dowling.

not really understand everything that they said to each other, but he said Davison separated Dowling from Chaires once Dowling touched Chaires. (R. Exh. 13.)

Davison told Li during his interview that Dowling and Chaires were arguing about who painted Dowling's toolbox, and that it was a "big argument." At some point, Chaires said to Dowling, if it makes you happy, I'll pay for your toolbox. Dowling said, "you got to whop me, you got to bat me?" (although Davison revised this statement on August 24 to say that Dowling said something to Chaires but that he could not exactly hear what). Davison stated that Chaires said that he could not hear Dowling and walked closer to Dowling. Dowling got angry, and put his hand on Chaires, and said "don't ever walk up on me." That is when Davison grabbed Dowling because it looked "like something [sic] going to happen." (R. Exh. 12.)

Chaires told Li that he got a call from Torres complaining that Dowling was being "very aggressive" and referring to Torres in an "awful way." Chaires stated that he called Dowling to the office and asked him "to stop using bad words against people. It's not right." He asked Dowling what he wanted, and Dowling started to yell saying "they," "they." Chaires asked Dowling that if he thought Torres, Mollado or Chaires did it, it was because they are the only three Mexicans on first shift. He told Dowling if it makes you feel better, I did it, okay, I did it, what do you want to fix it. Dowling came to his face and "put a finger at my face." Chaires stated that things with Dowling had been problematic for 3 years, and that he forwarded issues to HR. Chaires stated that Li could talk to Walter Turner, who had made a report to HR in the past, and that she should ask "Monica." (R. Exh. 8.)

Chaires supplemented his interview with a typed written statement he prepared and sent to Li the day after his interview, April 18. In his statement, Chaires again stated that he repeatedly asked Dowling "what do you want, do you want to know who did it, is that going to calm you down?" But that Dowling did not understand, and kept repeating insults and saying whoever did it would be subject to consequences. Chaires said to Dowling that "if it calms you down, then think it was me, now what do you need." Dowling got even more upset. Chaires wrote that Dowling attacked him, "he hit me with his finger on the forehead of my head." Chaires also reported to Li the years–long issues he had had with Dowling. (R. Exhs. 9, 50.)

Larry Pratt, who was not called as a witness at the hearing, told Li during his interview that Chaires first came to Tang and Pratt about Torres and Mollado not feeling comfortable working with Dowling. Pratt stated that "there's always been tension between Jessie [Dowling] and the Mexican people." Pratt stated that he heard Dowling saying to Chaires that he thought "you guys" painted his toolbox. At one point Pratt heard Chaires say he wanted to hear Dowling better and walked up to him. Chaires "in sarcasm" said "if you know I painted your toolbox then I did it." Pratt said that he and Davison stood up when the men got closer, because it seemed that things were going to escalate physically. Pratt stated that he did not see if Dowling touched Chaires's forehead, and said he recalled hearing "think I can't beat you? "you want to whop me?" "you want to beat me?", but he was not sure if it was Dowling. Pratt stated Chaires did not say anything to deserve Dowling's response. Pratt commented that Dowling had a lot of personal things going on and had to take an extended time off at one point to deal with them. Pratt believed Dowling thought Mexicans receive favoritism at work. Pratt commented that it was very difficult for Chaires to deal with Dowling. (R. Exh. 14.)

Torres, who was not called as a witness, told Li that Dowling had talked negatively about him behind his back for a long time, and that he found it very hard to work with Dowling. Torres recounted that on April 13, he asked Chaires to let him leave early because he did not want to work with Dowling. He and Chaires talked to Tang, and then Chaires called Dowling into the office. Dowling became very angry and said that someone had to pay for "this" and at one point Dowling dropped his tool bag and walked in front of Chaires and put his finger on Chaires' head saying you're going to pay for this, and then Davison grabbed Dowling. (R. Exh. 11.)

Mollado, who was not called as a witness, told Li that when he got to the office, Dowling was complaining about his toolbox and implied that someone damaged it on purpose. Chaires was telling Dowling that nobody had damaged it, and that he was trying to help him. Dowling started to yell and accused Chaires of lying. Dowling started pointing at Torres and said this was not the first time Chaires was protecting someone else. Torres stood up and Chaires moved in between Torres and Dowling because Dowling became "excited." Chaires asked Dowling what he wanted, and Dowling stated that Chaires was provoking him and dropped his tool bag, as if he was ready to fight. Mollado saw Dowling touch Chaires with his finger and said, "don't think if you're my boss I can't beat you." That is when Davison stopped Dowling. Dowling walked to the door and said that someone must pay. Mollado also commented that Dowling has talked negatively about Chaires, Torres and himself for a long time. (R. Exh. 10.)

The interview notes regarding Walter Turner reflect that he heard what happened between Dowling and Chaires, but he did not have firsthand knowledge as he was not there. The notes do not reflect whether he was asked about anything else or whether he had any issues with Dowling in the past. (R. Exh. 15.)

On April 18, Li asked Tang to find out if "Monica" had any records of a complaint made against Dowling in September 2022. (R. Exh. 34.) Li testified that she did not receive any records in response to her request. (Tr. 489.)

Li did not interview Dowling. Li wanted to first understand the incident better and potentially interview Dowling last because she suspected the situation would warrant his termination. She stated that there was a general fear that Dowling would retaliate against other employees. (Tr. 453–454.) Li also testified that she was afraid of "unexpected incidents," that Dowling would go back to the plant and do "something against whoever was involved." She testified that she thought that was a real possibility based on the reactions of the people in the room as seen in the video and based on talking to the people involved. (Tr. 522.)

At the conclusion of her investigation, Li determined that Dowling should be terminated. She determined that Dowling was the aggressor in the altercation with Chaires, that Dowling had touched Chaires' forehead, and had threatened Chaires by saying something to the effect of "don't think I can't beat you." Li also concluded that Dowling was "unstable." (Tr. 527, 530.)

On April 19, Li sent a WeChat message to Tang asking if she could inform Dowling "to stay at home tomorrow don't come to work pending investigation? I'm not your HR." Tang replied, "please don't do anything for now" "until further notice." Li replied, "we have enough evidence to terminate him for threatening violence, treat him as a dangerous person and terminate asap." Tang replied, "we need to make sure we make a safe decision." (R. Exh. 34.)

On Thursday April 20, Li sent via WeChat her interview notes to Tang and Wang. She wrote that Dowling's behavior "last Thursday warrants termination. The company has a duty to preserve a safe working environment. From the video and everyone in the room's [sic] statement, Jesse [Dowling] did put fingers on Oscar's [Chaires'] forehead, probably saying "think I can't beat you," everyone including Terence [Davison] felt the physical threat coming from Jesse [Dowling]. This is termination per company policy. I would recommend to confront Jesse [Dowling] and terminate, or to let Jesse [Dowling] go home on leave, write his statement at home and terminate over phone. Since he's unstable, I don't recommend talk to Jesse [Dowling] and let him go work because we don't know what he will do being held responsible. Company has a duty to keep workplace safe. If we know someone made physical threat did nothing, and the same employee got physical later and caused harm, the company can be responsible for retention." (R. Exh. 34; Tr. 455, 527.)

Following the above WeChat message, Li had a phone conversation with Tang. Tang told Li that Dowling was asking for Chaires' address at work, and he was concerned for Chaires' safety. (Tr. 458, 523–524, 604.) Tang agreed with the recommendation to terminate Dowling, but he was worried that Dowling was capable of harming employees at work if he was terminated. (Tr. 602–603.)

E. Dowling Finds Out About HR Investigation and Continues to Request That Chaires be Punished Saying That What is Happening is a "Racist Thing"

On April 17, Dowling sent a text to Davison stating that someone had told him that Chaires was saying that he (Dowling) was a "gang member now lmfao . . ." Davison replied, "idk I just feel if HR have [sic] not call u they on [sic] bullshit." (Tr. 134–135.) Dowling replied that he did not know what "they" asked Davison, but based on what someone else told him, it seemed like the Company was "trying to turn thing [sic] around from what really happ [sic]." Davison replied that was "bull shit." (R. Exh 39, p. 6.)

On April 25, Dowling texted Pratt, asking if the Company had found any video about his toolbox. Dowling also texted that he had heard that the Company got an attorney involved, and that Chaires had accused him of being a "racist gange [sic] member" and that he felt this was a "racist thing" that was happening to him. Pratt replied that the toolbox incident had turned into a "legal matter since police reports were filed" and that Tang would talk to Dowling about replacing his toolbox. Dowling replied that he could not believe that no one had viewed "the footage" and accused the Company of hiding "the person who did it" and not punishing the one person "who said they did it." Dowling texted that the Company had gotten an attorney involved "to cover up management actions" "for all you know I have recorded on my phone what happened up there." Pratt sent Lei Wang's contact information, and told Dowling that Wang was the HR director, and Dowling could reach out to him. (R. Exh. 38, pp. 4–6; Tr. 137.)

Dowling also texted Tang stating that he was asking him "personally for a solution on this ongoing problem with Oscar [Chaires]," that he felt that "things" that were said to other employees about him were 100 percent "racist" and that he knew that the Company had involved an attorney "to get me in trouble." Tang texted back that the Company was not able to find out who had painted his toolbox, but that Pratt would be calling Dowling to talk about the toolbox issue. Tang also informed Dowling that the ongoing issues between Dowling and Chaires would

be handled by HR. Dowling replied that Chaires said in front of Tang that he did it. Dowling also texted that Pratt told him to talk to Tang, but now Tang was asking him to talk to Pratt. Tang replied that he talked to Pratt "this morning." Dowling asked if there was footage because he knew there was a camera that was angled to see the tool crib. Tang texted that Dowling should come see him so he could show Dowling what they were "trying to find." Dowling testified that after receiving that text, he went to Tang's office and Tang showed him what the video surveillance had captured (which did not show who painted the toolbox). (R. Exh. 40, pp. 3–6: Tr. 143–144.)

Later, Dowling texted Davison to tell him that he thought it "funny" that the camera did not record who had walked over to where his toolbox was on April 13. Dowling stated that he felt sure that the Company knew who did it, and that he was not "buying" that the camera just missed it. Dowling asked Davison to give him a heads up if he heard anything from management. Davison replied that Dowling should wait and see what the police say and take it from there. (R. Exh. 39, p. 11.)

Later that same day, Tang sent Dowling's text to Li via WeChat and asked her if she had contacted Dowling yet. Tang informed Li that he had asked Pratt to talk to Dowling about the toolbox. Li replied that she had not contacted Dowling, and Tang replied that Dowling probably heard it from Davison, "Terence [Davison] will tell him everything." (R. Exh. 34; Tr. 664–665.)

F. May 2–Dowling Tells Terrance Davison He Needs 15 More Signatures to File a Board-Conducted Election Petition

On Tuesday, May 2, Dowling told Davison for the first time that he was involved in a union organizing campaign. According to Dowling, he was working on a machine when Davison asked him to go talk outside and then allegedly told Dowling, "Be careful." Dowling asked why and Davison allegedly said, "you're getting everyone hyped up about the Union." Dowling told him that there was nothing he could do about it, that he could not just "tell 'em to stop, there's already a lot of people that want this." (Tr. 54–55.) At some point during the conversation, Dowling also told Davison how many more people he needed to sign authorization cards to file a petition for an election with the Board. (Tr. 144–146.)

On the other hand, Davison testified that he and Dowling were outside at work on a break talking about nonunion things. At some point, Dowling brought up the Union and told Davison how many more people the Union needed to sign authorization cards to file a petition. Davison denied that he initiated the conversation or that he told Dowling to be "careful" or to "calm down" about union organizing. (Tr. 567–569, 581.)

Davison testified that he felt an obligation to inform Tang that there was an organizing campaign going on. When he went to talk to Tang, Tang already knew, and told Davison that the Union needed 20 more signatures. Davison told him that he had heard the Union needed 15 more signatures. Davison denied that he told Tang that it was Dowling who shared this information with him. (Tr. 568–569.) Tang testified that some employees had come to him to talk about what they had heard about the Union and authorization cards, and that Davison was

one of those employees. However, he did not recall talking to Davison about the number of Union authorization cards the Union needed to be able to file a petition for an election.[15] (Tr. 665–666.)

Later in the day, Dowling texted Davison asking him if he had "told them what we talked about" and "how many more ppl [sic] we needed to sign." Dowling testified that someone "on the floor" had heard Davison and Tang talking and told Dowling. (R. Exh. 39, pg. 16; Tr. 55.) Davison texted back that Tang "already new [sic] somebody else told him." Dowling texted that he was the only person who knew, and he told Davison, and Davison replied that Tang already knew, and that Tang told him he thought they needed 20 more people, and Davison told him that they needed 15 more people. (R. Exh. 39, p. 16.)

Dowling sent eight more texts to Davison, but Davison did not reply to any. Dowling texted that he was the only one who knew how many more people were needed, that he had started "all this" after he saw how he was treated with "my situation" and that it was not hard to "get this going only took a week and a half and I really don't care if u tell em [sic] it was me. All I know is they better come up with a solution fast like I would not of even tried this shit if they would have just did the right think like fr [sic] fuck them." Dowling went on texting that this would cost the Company money, "all cuz of three fucking stupied [sic] ass ppl that should not be in the position they are in" "and I wish they would fire me will onely [sic] help my case out more." Dowling then texted a picture of a posting titled "Romulus Hourly Support Team," which announced a revised pay structure and employee incentive program. Dowling texted a laughing emoji, stating "tell 'em that was dumb" because if employees get the Union in, they will get even more money. "Like I said they have the wrong ppl [sic] in management running shit they do not know how to do shit." "Plez [sic] help me out and say I started all this I really did I will show u all the msg and tell tang if you pay every1 [sic] 1$ a hr more I will cost yapp at least 480 k a year if no1[sic] works overtime that is what Oscar [Chaires] has costed [sic] you guys cuz if the union comes in it will be more money if they don't come in it will costed [sic] yapp that much either way Oscar [Chaires] has costed them a lot of money plez tell them it was me n [sic] I did everything cuz of him." (GC Exh. 9, R. Exh. 39, pg. 19–24; Tr. 56, 147–150.)

On May 3, at 4:47 p.m., Dowling texted Davison that he did not know why Davison was mad at Dowling, and that "what I said to you today was just joking around," that he had not been telling anyone anything bad about Davison, that everyone was "kinda bad mouthing ya" and that he told everyone that Davison was the only one helping Dowling out with everything he had going on. Dowling asked Davison if he had put him in a bad spot. Davison did not reply. (R. Exh. 39, p. 24.) Neither Dowling nor Davison testified about these texts.

I credit Davison's testimony over Dowling's concerning what they spoke about on May 2. Dowling's version of events is incredible. I do not find it believable that Davison asked Dowling to go talk outside, out of the blue, just so Davison would tell him to be careful and/or calm down about the Union. Davison's testimony is more credible, and I find that Dowling started the conversation with Davison about his union activity and how many more signatures the Union needed to file a petition. This is corroborated by the texts that followed this conversation, where Dowling does not mention anything about Davison telling him to be careful or calm down, and

[15] As will be discussed later, by this time Tang had learned about the union organizing campaign from another employee.

only refers to the conversation with Davison related to the number of signatures needed. Further, Dowling's texts show a high level of trust in Davison, and in fact, the opposite of being told to be "careful." Dowling mentioned several times in his texts to Davison that he wanted the Company to know of his union activities, asking him to "please" tell them it was him, even wishing he would be fired to help his "case" out. Based on these texts, I find it evident that up to this point Dowling had not made his union activities known to management nor did he believe that management had any idea of his involvement.

G. May 3–Chaires is suspended based on the HR investigation

Sometime between April 20 and May 3, Tang and Li discussed the next steps resulting from the HR investigation and decided to terminate Dowling and to suspend Chaires. Tang asked Li to conduct the disciplinary actions. (Tr. 490–491, 606–607, 617–618.) Tang testified that Chaires was suspended for admitting he painted the toolbox when he had clearly not done so. Tang stated that Chaires technically said to Dowling that "if" he said he did it, what do you need from me, and Tang took that to mean that Chaires did not do it but should not have communicated this Dowling. (Tr. 637–639.)

On Wednesday, May 3, Li was at the Romulus plant on a business trip. Toward the end of the day Li met with Chaires to issue him a suspension. (Tr. 363–364, 616.) The disciplinary form, dated May 3, states that on April 13, Chaires "admitted" to Dowling that he painted his toolbox, and that this violated the Company's policy against "damaging other employees' property." Lei Wang, HR director, signed the disciplinary form. Chaires did not agree with his suspension and wrote on it "I said what I said in order to cool the situation cause [sic] he was very aggressive against Ricardo [Torres] and me, but I didn't do it, cause when the time he said it happen I was not at the building and then arrive at 8:00 a.m. on my desk, then meeting 9:00 a.m." The form states that he was receiving a suspension starting on May 3. (R. Exh. 16.) Chaires received a 1-week suspension, and he took a pre–approved scheduled vacation after the suspension. (Tr. 363–364, 368, 431–432, 668–670.)

H. May 3—Chaires and Dowling Have Another Altercation

On May 3, Union Organizer Justine Cane was passing leaflets and authorization cards outside of the facility at a spot where cars enter and exit the parking lot. Sheila Draper, who works for the Union, was helping Cane hand out leaflets. They were wearing union shirts and had union signs. Sometime after his shift ended at 3 p.m., Dowling approached them in his car, rolled down his window, and stopped to talk to Cane. Chaires, who had just been suspended, was in his car right behind Dowling's car. Dowling pointed out Chaires to Cane, told her that was his boss, "the one that sprayed his toolbox." Cane asked Dowling if he wanted to pretend to be arguing with her so that he would not have any issues being seen talking to her. Dowling said that was not necessary. (Tr. 60–64, 209, 212–215, 226–228, 234–239.)

Dowling pulled his car over to the side so that Chaires could drive pass him and got out of his car to continue talking with Cane. Dowling testified that he did not talk to Chaires or make any gestures to Chaires, nor did he go to the trunk of his car or open the trunk. (Tr. 60–64.) Cane and Draper did not see Dowling interact with Chaires. According to Chaires, Dowling moved his car to the side, got out of the car, and started yelling at Chaires "motherfucker" and other words,

and then went to open the trunk of his car. Chaires stated that he was afraid Dowling was going to get a gun out of the trunk of his car and quickly drove away. This was the first time that Chaires had seen any union leafleting at the facility, and he had not heard about any union organizing until that afternoon. (Tr. 361–365, 423, 683.)

Chaires called Tang when he got home to tell him about the incident with Dowling. Chaires was scared that Dowling was going to harm him. Chaires also went to the police station and was told that people have a right to say "whatever" unless they hit you, so he did not file a report. Tang corroborated Chaires' testimony about this incident with Dowling and stated that Chaires sounded scared. (Tr. 605, 626, 647–648.)

The next day, Chaires prepared a typed statement and gave it to Li. Li testified that Chaires handed her the statement, but she could not recall when. (Tr. 492.) The typed statement is undated. Chaires wrote that he started having problems with Dowling 3 to 4 years ago. Chaires recounted the story about the whiteboard and of Dowling accusing him of stealing money. Then he recounted how Dowling accused "us Mexicans" of damaging his toolbox stating that "if there is someone we are very careful not to mess with, is with him." Chaires described the April 13 altercation he had with Dowling stating that Dowling put his hand to his head in the form of a gun, and said "do you think that because you're my boss I'm not going to do something to you, you'll see." Then Chaires described what happened the previous day. Chaires wrote that at around 2:20 p.m., he was in his car exiting the facility and was behind another car who had stopped to talk to some people who were outside. He did not know it was Dowling's car until the car moved forward, then stopped abruptly, and Dowling got out of his car and "said some things, he was very aggressive" when Chaires tried to pass him, and then Dowling "opened the truck of his car and took out something. I don't know what, but it scared me a lot because he said that he has weapons and that he knows how to use them." (R. Exh. 17; Tr. 361–362, 356, 359, 370.)

I do not credit Dowling's testimony that he did not say anything to or gestured at Chaires when he got out of his car. I credit Cane and Draper only in that they had eyes on Dowling when he was in his car talking to them, not when he moved his car out of the way, exited his car, and walked back to where they were leafleting. In the time it took Dowling to park his car to the side of the road and walk back to the gate, he could have yelled and gestured at Chaires without Cane and Draper noticing it. Further, Chaires' testimony was corroborated by Tang, and by his typed statement to Li. Dowling's denial is not credible and is not corroborated. Chaires' description of Dowling acting angry at him and gesturing toward the trunk of his car is consistent with Dowling's threatening conduct on April 13, and his very angry texts to Davison about Chaires just a day prior, including stating that the Union would cost the Company money because of "three fucking stupid ass people that should not be in the position they are in," which considering the context and history, I take it Dowling meant Chaires, Torres, and Mollado.

I. May 4—Dowling is Suspended and Terminated

After the incident outside of the facility, Li and Tang discussed how to terminate Dowling safely and decided to suspend him and then terminate him while he was at home. (Tr. 460.)

On May 4, Pratt asked Dowling by text to meet with him at 2 p.m. (R. Exh. 38.) At that time, Pratt and Li met Dowling in an office at the facility. Li informed Dowling that he was

being suspended pending an investigation until further notice. She tried to get Dowling to sign a packet of papers, but he refused to review or sign them. Li did not ask Dowling for his side of the story but said that Dowling told her that his actions were "not severe enough." Li instructed Dowling to gather his things and walked him out. (Tr. 43–43, 163–165, 461–463, 495–496.)

Li had prepared a disciplinary action form that stated that on April 13, Dowling had "put two fingers on Oscar Chaires' forehead saying, "don't think I can't beat you." Everyone in the room stood up in alert, and Terrance [Davison] pulled you away from Oscar [Chaires]. Your action has violated the Company's policy against workplace violence." The form stated that Dowling was being suspended starting May 4. (Tr. 461; R. Exh. 18.)

At 4:02 p.m., after being suspended, Dowling texted Pratt saying that another employee known as "Beezy" and his brother had gotten into a fist fight in front of the whole plant and did not get suspended or fired. He also stated that he had "recorded everything" the day that he had the altercation with Chaires. Then he stated that he "got the union up there now u guys just target me well I got 30 cards signed I turn in today so I'm not going to be bullyed [sic] or harassed." (GC Exh. 10, R. Exh. 38.)[16]

In the afternoon of May 4, Tang went to Li and showed her a screenshot of a text Dowling had just sent to Walter Turner. This text is not in the record. Tang and Li testified that the text stated: "I got suspended for poking a finger at Oscar [Chaires]" and "They don't know what will happen next." Tang and Li interpreted this text as a threat to Chaires' safety and/or to them and decided to call the police. (Tr. 465–467, 607, 618–620.) Tang did not forward the text to Li, and did not keep it either because Turner had asked Tang to keep him out of it. (Tr. 467, 613–614.)

At 4:20 p.m., Pratt sent an email to Li asking her to send a summary of events regarding Dowling to Sargeant Reese from the Romulus police department, which was on copy in the email. Tang, Stone, and another Yapp employee "Patrick" were also on copy. Pratt included Dowling's date of birth, and the make and model of Dowling's car in the email. At 5:25 p.m., Li sent an email to Sargeant Reese summarizing what had happened since Dowling found his toolbox painted, including her HR investigation, and the content of the text Dowling sent to Turner after being suspended earlier that day. At 5:37 p.m., Li sent another email to Sargeant Reese, almost identical to the first one, but this time she copied Pratt, Tang, Patrick and Stone. Notably, in her second email, she left out the information regarding Dowling sending a text to Turner. In this email, Li restated that on May 3, as Chaires was leaving work, Dowling had said something aggressively to Chaires and had opened the trunk of his car, and taken something out, which scared Chaires. Li stated that Dowling was suspended at around 2 p.m., but did not mention the

[16] At the hearing, Dowling testified this was the first time he informed Pratt of his union support. (Tr. 58.) On cross–examination, Dowling acknowledged that he had no firsthand knowledge of any fight between Beezy and his brother but stated that he knew of five to six different fights at work, and all involved had been terminated. However, Dowling acknowledged that in his August 1 Board affidavit he had stated that he did not know of any other fights at work other than the one involving Beezy. (Tr. 169–172.) Notably, Dowling did not make any reference during his testimony about having recorded anything as he alleged to Pratt in his text. I find this testimony is another example of Dowling's tendency to exaggerate and/or embellish his testimony without regard to the truth.

text to Turner. (Tr. 464–467, R. Exh. 35.) Li explained at the hearing that she changed the second email after Tang asked her to remove any mention of Turner because Tang wanted to honor Turner's request to keep him anonymous. (Tr. 467.)

Dowling, on rebuttal, was asked if he sent a text to Turner stating something to the effect of "they don't know what will happen next." Dowling replied, "No. I don't remember saying anything like this." Dowling was next asked if he had any text message that shows he sent "something like that" and Dowling said no. (Tr. 680.) The General Counsel moved into evidence texts between Turner and Dowling exchanged on April 13. (GC Exh. 36.) However, the last page of texts between Turner and Dowling reflects that there was at least another text that was not included in the exhibit. Therefore, this exhibit is not proof that there were no texts between Dowling and Turner on May 4. Turner was not called to testify. I do not credit Dowling's testimony that he did not send a text to Turner on May 4 that triggered the Company to reach out to the police. Tang's conduct in not keeping Turner's text, and Li's second email to the police keeping out the information about Turner's text do not reflect sound judgment but can be explained by their fear that Dowling was capable of hurting Turner and/or Chaires. Nevertheless, the emails to the police corroborate Tang's and Li's testimonies, and therefore, I credit their version of events over Dowling's.

On May 5, Li called Dowling at his home to inform him he was terminated. (Tr. 43–44, 461–463.) On the same day, Li also mailed Dowling a termination letter. (GC Exh. 4.) Respondent did not contest Dowling's unemployment benefits. (GC Exh. 5, 7.)

J. Facts Concerning Allegations Regarding Ricardo Gomez

Fredrick Pacheco, who at the time of the hearing was employed by Respondent as a process technician level 3, testified that he heard about the union organizing campaign from Dowling in the spring of 2023. On April 28,[17] while Pacheco was smoking outside of the facility, Ricardo Gomez, who was a process manager at the time, approached him and asked him for a favor. No one else was around. Gomez asked Pacheco to go to a union meeting that was scheduled for 1 p.m. that day and report back on what was said. Pacheco, who worked the second shift (2 p.m. to 10:30 p.m.), stated that Gomez told him that he would clock him in. Pacheco went to the union meeting, and came back to the facility at 2:10 p.m. Gomez had clocked him in. He then went to a conference room and met with Gomez and Tang for about 30 to 45 minutes. Pacheco told Gomez and Tang that he heard employees at the meeting talking about wanting more money, respect, and overtime opportunities. (Tr. 243–247, 256, 260.)

About 1 to 2 weeks later, Gomez pulled Pacheco aside at work and accused Pacheco of playing both sides, of lying to him, and of trying to organize employees. Pacheco told Gomez that he would not lie to him, and that Gomez had asked him for a favor, and he had done so. Gomez then told him, "We do not need you to go to any other meetings." Pacheco stated that his shift coworker, Dallas Quick, was a known union supporter and that people thought Pacheco also supported the Union because he is friends with Quick. (Tr. 247–248, 259.)

[17] Pacheco testified that he talked to Gomez the same day that he signed a union authorization card. Pacheco's authorization card reflects he signed it on April 28. (GC Exh. 14.)

Patrick Dallas Quick, who at the time of the hearing was employed as a process technician on third shift, testified that he was a known union supporter, who helped pass out and turn in authorization cards, and wore a union hat and button regularly to work. (Tr. 319–320.) Quick recalled that at the beginning of the organizing drive, sometime in May, his supervisor at the time, Ricardo Gomez, told him that he was not allowed to talk about the union on the shop floor on company time. Quick stated that employees are allowed to talk about non–work–related things on the shop floor such as life events or things employees have in common. (Tr. 294–298.)

Gomez, who worked for the Company from 2018 until March 2024, testified that he never told any employee at the Company that they could not talk about the Union on the shop floor. He did not recall if he heard anyone talking about the Union at work but said that he was aware of union activity since about May. Gomez admitted that he asked Pacheco to inform him and Tang about what was discussed at a union meeting. Gomez explained that Tang asked him if he knew anyone who would be attending the union meeting, and Gomez said he would ask. He then asked Pacheco to attend and clocked him in while Pacheco was still at the meeting. Gomez admitted that he and Tang talked to Pacheco about what happened at the union meeting. Gomez denied he talked about the Union again with Pacheco. Gomez eventually received supervisor training concerning the dos and don'ts during union organizing campaigns and learned that his interaction with Pacheco was inappropriate. Tang similarly testified that he learned that the meeting with Pacheco was improper and testified that he never met with any other employee other than with Pacheco to ask them about the Union. (Tr. 537–545, 609, 611.)

I found both Pacheco and Quick credible witnesses, and credit their testimony over Gomez's where their testimonies differ. See *S.E. Nichols, Inc.*, 284 NLRB 556, 556 fn. 2 (1987) (Current respondent employee's testimony more reliable because it is given against his interest to remain employed by Respondent.).

K. Facts Concerning Allegations regarding the Labor Consulting Group (LCG)

Quick testified that he attended an August meeting led by one LCG consultant where, after the meeting ended, the consultant approached him and told him that after talking to people there, he (the consultant) agreed "we need a union." Quick did not know the name of this consultant, only that he had red hair. The consultant then told Quick that the "UAW was not the way to go" and offered to help set up an internal union, saying that they "could elect a go–between person" and asked Quick if he was interested in that position. Quick told the consultant that he would think about it, but he testified that he did not trust this person. An undetermined time later, Quick was in the office where he was meeting with his supervisor, Gomez, and the consultant saw him and pulled him aside. The consultant asked Quick if he had thought about what they had discussed. Quick told the consultant that he was not interested. (Tr. 298–304.) No other witness was called to testify about these allegations.

L. Facts Concerning Allegations Regarding Catered Lunch and Bowling Event

On September 6, Respondent held a 1-hour lunch catered by Red Lobster in celebration of its new employee cafeteria and to show "employee appreciation." (GC Exh. 15.) Danielle DeRoch and Arthur Banks, who are employed as first-shift production workers, attended the

lunch.[18] Although employees have a 30–minute unpaid lunchbreak, this lunch was paid. Larry Pratt addressed employees during the lunch, briefly spoke about the new cafeteria and employee appreciation, and then went on to make "antiunion" statements. Banks recalled Pratt stating that the Company did not realize things had gotten that bad, and that they did not need a union to come in to work out their problems. Tang also spoke to employees, but the record does not reflect what he said to employees. Quick also attended the lunch, and said that he left after about 20 minutes, when Tang and Pratt started talking about "union stuff." (Tr. 264–271, 282, 287–290, 309–310.) According to Chaires and Davison, the plant did not shut down during this lunch. Chaires did not recall if the lunch lasted more than 30 minutes, but he stated that he grabbed his lunch and went to his desk to eat. Davison did not recall Pratt talking about the Union. (Tr. 437, 439–441, 588–589.)

In the past, Respondent has catered lunches from Famous Dave's barbeque or brought in Mexican food and/or pizza. According to Banks, these previously catered lunches were held to celebrate Thanksgiving or Christmas. On those previous occasions employees could pick up their lunch and go eat it in their cars during their 30–minute unpaid lunchbreak. Id.

On Saturday, September 9, Respondent held a bowling event, from 2:30 to 5 p.m., in celebration of the new cafeteria and as a "teambuilding event." (GC Exh. 16.) Neither Deroch nor Banks attended this event. Deroch could not remember any previous off–site event for employees. (Tr. 272–274, 289–290.) Quick did not attend the bowling event either, stating that in the past the Company had off–site events for Thanksgiving and an Easter egg hunt. (Tr. 307–308.) Davison went to the bowling event with his spouse and stated that Pratt publicly addressed employees thanking them for attending. (Tr. 590.) Chaires also went to the bowling event with his wife and stayed for about 30 minutes. Chaires stated that there was pizza and soda available, and he did not observe anyone speaking to employees. (Tr. 439–441.)

DISCUSSION AND ANALYSIS

A. Credibility Findings

In making credibility determinations, all relevant factors have been considered, including the context of the witnesses' testimony, their interests and demeanor, whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all–or–nothing—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). All witnesses were sequestered during the hearing. Dowling testified first and was present during the testimony of other witnesses. As stated in my Findings of Fact above, I did not credit Dowling, except when his testimony was corroborated by documentary evidence.

[18] Deroch testified that she was a known union supporter, who attended union meetings, and wore a union shirt to work every Thursday. Banks also testified that he was a known union supporter and wore union shirts to work.

I found the rest of the General Counsel's witnesses credible. I also found Respondent's witnesses credible for the most part. All my credibility determinations have been detailed in the Findings of Fact above.

B. Did Respondent Violate the Act By Maintaining and Enforcing Certain Work Rules?

The General Counsel alleges that it is a violation of Section 8(a)(1) of the Act for Respondent to maintain and enforce certain rules in its employee handbook. The General Counsel argues that the challenged rules are overly broad pursuant to *Stericycle*, 372 NLRB No. 113 (2023).

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 guarantees employees "the right to self–organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." 29 U.S.C. §157.

In *Stericycle*, the Board issued a new standard to determine whether work rules that do not expressly restrict employees' protected activity under Section 7 of the Act are "facially unlawful." *Stericycle*, supra, slip op. at 1. The Board stated that this new standard "builds and revises" the standard set forth in *Lutheran Heritage Village–Livonia*, 342 NLRB 646 (2004). The new standard requires the General Counsel prove that the challenged rule "has a reasonably tendency to interfere with, restrain, or coerce employees who contemplate engaging in protected activity." *Stericycle*, slip op. at 1. When evaluating a facially neutral work rule, the Board will assess the challenged rule "from the perspective of the reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in." Id. at 9. Therefore, if an employee could reasonably interpret a rule to restrict or prohibit Section 7 activity, the General Counsel has satisfied her burden and demonstrated that the rule is presumptively unlawful. Id. That is so "even if the rule could be reasonably interpreted not to restrict Section 7 rights" and "even if the employer did not intend for its rule to restrict Section 7 rights." Id. An employer may rebut the presumption that a rule is unlawful by "proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule." Id. at 10.

a. Confidential and proprietary information rule

The confidential and proprietary information rule reads as follows:

> Safeguarding of confidential information of the Company, its current and prospective customers and shareholders is vital to the Company's business. Employees play a vital role in protecting the confidential information of the Company's customers.
>
> Employees must protect nonpublic personal information about the Company's customers and must not disclose such information to the Company's affiliates and non–affiliated third parties, except as required or permitted by applicable laws and regulations.

> Intellectual property, including but not limited to, drawings, prototype samples, and test results etc. which belong to a customer shall not be shared with competing customers. Employees are not permitted to discuss or show product physically or in presentation form that is in development to competing customers.
>
> In addition, employees must not discuss confidential information of the Company's customers with anyone inside the Company who does not have the business need for the information or with anyone outside the Company, such as a family member or friend.
>
> *Employees must also safeguard the Company's proprietary information, including, without limitation, trademarks, patents, trade secrets, copyrights, customer lists, customer information, reports, studies, records, data, computer software and other non–public information about the Company and its business, relationships, customers, prospective customers, applicants and employees*.

Although not alleged in the complaint, the General Counsel objects in his brief to the phrase prohibiting the disclosure of information to "non–affiliated third parties" found in the second paragraph above because an employee could interpret this to include labor organizations; and to the use of the phrase "including but not limited to" in reference to intellectual property because it leaves employees to "guess" what other information may be covered by the provision. (GC Br. at 20–21.) Respondent correctly points out in its brief that the use of these terms in the rule strictly concerns customer information. (R. Br. at 30.) The provision specifically protects the disclosure of "non–public personal information" about *customers* and intellectual property belonging to *customers*, "except" as required or allowed by law. Thus, the rule clearly protects customer information from being disclosed, and I do not find that an employee could reasonably interpret this prohibition to include protected activity.

The General Counsel further asserts that the above provision in italics is unlawful because it broadly prohibits employees from discussing "non–public information about the Company" and its "business" and "employees." The General Counsel, citing *Rio All–Suites Hotel & Casino*, 362 NLRB 1690 (2015), argues that an employee could interpret the instant rule to prohibit the disclosure of non–public personnel information, and information concerning disputes about pay and other terms and conditions of employment, union organizing efforts, and/or work stoppages or protests. (GC Br. at 18–20.) In *Rio All–Suites*, the Board, applying the analytical framework in *Lutheran Heritage*, supra, found unlawful a confidentiality provision that prohibited employees from sharing non–public information "including [c]ompany financial data, plans and strategies . . . organizational charts, salary structures, policy and procedures manuals, research or analyses, and customer or supplier lists . . ." *Rio All–Suites*, supra, at 1691. The Board held that prohibiting employees from sharing "any information about the Company which has not been shared by the Company with the general public" without more, clearly implicated terms and conditions of employment, especially since "the rule goes on to list illustrations of prohibited disclosures that go to the very core of protected concerted activity." Id. at 1690–1691.

Here, the challenged provision does not specifically list as examples of prohibited disclosures any information concerning salaries, policy manuals, and/or organizational charts, as was the case in *Rio All–Suites*. Instead, it broadly prohibits disclosing nonpublic information about "applicants and employees" and about the Company's "business." These prohibitions are

vague and overly broad. I agree with the General Counsel that an employee could reasonably interpret this rule to prohibit them from sharing with others, including with a labor organization, information about their terms and conditions of employment.

Respondent argues that the challenged provision is aimed at protecting the Company's "proprietary information" and that of its clients, and cites *Mediaone of Greater Florida*, 340 NLRB 277 (2003) to assert that the Board has found similar rules to be lawful. (Tr. 471–475; R. Br. at 31.) In *Rio All–Suites*, the Board discussed at length the *Mediaone* case to distinguish the rule found lawful there from the confidentiality rule found unlawful in *Rio All–Suites*. The Board noted that the *Mediaone* rule found lawful prohibited disclosure of "customer and employee information, including organizational charts and databases," but did so only in the context of a lengthy litany of particularized information under the heading of "Proprietary Information." *Rio All–Suites*, supra, at 1692. The Board further noted that the contested phrase appeared within a larger provision prohibiting disclosure of "proprietary information, including *information assets* and *intellectual property* and [was] listed as an example of "intellectual property"; thus, employees would not likely understand that employee terms and conditions of employment were covered by the ban on disclosing proprietary information. Id. citing *Mediaone* at 279 (emphasis in original). The Board reasoned that the *Rio All–Suites* rule's relationship to the employer's legitimate business concerns, was "far less clear, and. . . references to salary structures and policy manuals encompass information that employees have a protected right to disclose." Id.

I find *Mediaone* distinguishable from the instant rule at issue because there the challenged rule was made in the context of providing examples of intellectual property that the company had an interest in protecting. Here, the rule is far less clear, and the limitations on sharing information are not restricted to intellectual and/or proprietary information only but also encompass any other nonpublic information. Thus, I find that the General Counsel has carried his burden and demonstrated that the challenged provision can be reasonably interpreted to restrict or prohibit protected activity, and Respondent had not demonstrated that it is unable to advance its business interest of protecting proprietary information with a more narrowly tailored rule.

b. Conflict of interest

The conflict–of–interest rule states, in part:

> Employees have an obligation to conduct business within guidelines that prohibit actual or potential conflicts of interest. This policy establishes only the framework within which YAPP wishes the business to operate. The purpose of these guidelines is to provide general direction so employees can seek further clarification on issues related to the subject of acceptable standards of operation.
>
> *Because you are an employee of YAPP, you have an up close and personal look at our business in performing your work duties. With this in mind, recognize your responsibility to avoid any conflict between your personal interests and those of the Company. An actual or potential conflict of interest occurs when an employee's personal interests interfere – or appear to interfere – with the employee's ability to make sound business decisions on behalf of the Company.*

> There are common relationships or circumstances that can create or give the appearance of a conflict of interest. These situations involve gifts and business or financial dealings or investments. Examples of such conflicts include, without limitation: selling products or services of the same nature provided by YAPP; servicing or soliciting customers for personal profit or gain during working hours; using YAPP's database, mailing list, work order file or other confidential or proprietary information for personal profit or gain; or accepting gifts, favors or gratuities from customers. Likewise, when an employee is in a position to influence a decision that may result in a personal gain for the employee or for a relative because of YAPP business dealings, it may give an appearance of impropriety. For the purposes of this policy, a relative is any person related by blood or marriage or whose relationship with the employee is similar to persons related by blood or marriage.
>
> [. . .]

The General Counsel alleges that the above provision in italics is unlawful because it is vague, and the term "personal interests" could be interpreted to include union and other protected concerted activity. (GC Br. at 21–23.) Respondent argues that the policy provides numerous concrete examples of what is considered a conflict of interest under the policy, none of which could reasonably be interpreted to hinder an employee's exercise of their Section 7 rights. (R. Br. at. 32–33.) Indeed, the paragraph that follows the challenged provision specifically states that situations involving "gifts, and business or financial dealings or investments" can create or give the appearance of a conflict of interest. Next, the policy provides specific examples of when employees' personal interests may conflict with the Company's (i.e., selling products or services of the same nature as the Company's, servicing or soliciting customers for personal profit during working time, accepting gifts or favors from customers, etc.). The General Counsel did not address the effect these examples have on the overall legality of the challenged provision, other than to assert that "absent some further explanation provided in the rule that excludes protected activity under the Act, which is absent here, an employee would reasonably assume that this restriction also applies to protected activities." (GC Br. at 22.) However, the policy provides a reasonable explanation of what constitutes a conflict of interest by providing specific examples, and none of those examples could reasonably be understood to apply to protected activity. Further, when read in full, an employee reading the policy would reasonably understand that the disputed provision is not a stand–alone rule, but is part of a policy that begins by asserting that the policy is only a guideline, that employees are encouraged to seek clarification about conflicts of interest, and that the employee should become familiar with the provided examples of what may constitute a conflict of interest pursuant to this policy.

I find *Schwan's Home Service, Inc*., 364 NLRB 170 (2016), cited by the General Counsel, distinguishable. In *Schwan's*, the Board, applying the *Lutheran Heritage* standard, found unlawful a provision in a conflict-of-interest policy stating that employees should avoid conduct on or off duty which is detrimental to the best interests of the company or its employees. The Board reasoned that the reference to the term "bests interests" was vague, and the rule contained "no examples of conduct that it prohibits, or any language that would confine its reach to misconduct unrelated to Section 7 activity." *Schwan's*, supra at 174. Here, as discussed above, the policy provides concrete examples for employees to understand what is meant by having a personal interest that may conflict with the Company's interests. The examples provided do not infringe on Section 7 rights. I also find distinguishable other Board cases cited by the General

Counsel in his brief because in those matters the policy at issue did not provide examples of what constituted a conflict of interest. Thus, I find that the General Counsel failed to carry his initial burden of proof under *Stericycle* and recommend that this allegation be dismissed.

c. General work rules

The general work rules section of the employee handbook states, in pertinent part, as follows:

> YAPP expects that all employees conduct themselves in a professional and ethical manner. This is because the orderly and efficient operation of all facilities requires that employees maintain discipline and proper standards of conduct at all times. Such conduct protects the health and safety of each employee, as well as maintains uninterrupted productivity and jobs and protects the Company's good will and property. Common sense and good judgment are your best guides for proper conduct on the job. It is impractical to spell out everything that is expected of you by the Company and your fellow employees in terms of proper conduct. […] In furtherance of this, YAPP requires that:
>
> 3. *Employees must work in a cooperative manner with managers/supervisors, coworkers, customers and vendors.*
>
> 7. *Employees must not alter, falsify or forge any Company forms, records or documents, including time records. This includes the prohibition of swiping another employees' card or badge.*
>
> 23. *Employees must not engage in harmful gossip or make maliciously false statements.*
>
> [. . .]
>
> The above standards are not intended to be all–inclusive of the proper standards of conduct or other obligations of employees. The Company reserves the right to take corrective action for other offenses not specifically listed here.
>
> Note: Failure to comply with these General Work Rules may lead to Corrective Action as discussed above.
>
> [. . .]

i. The cooperation work rule

The General Counsel argues that the above rule number 3 in italics is overly broad because it does not define what is meant by "cooperative," and therefore an employee could reasonably construe the rule to prohibit disagreements with management and others related to protected activity. (GC Br. at 25.) Under extant Board case law, rules prohibiting disrespectful conduct, without more, have been found overly broad. See *2 Sisters Food Group, Inc*, 357 NLRB 1816, 1817 (2011) (rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees" overly broad); *First Transit, Inc.*, 360 NLRB 619,

620–621 (2014) (rule prohibiting "[d]iscourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public . . ." overly broad); *Casino San Pablo*, 361 NLRB 1350, 1351–1352 (2014) (rule prohibiting "disrespectful conduct (including failure to cooperate fully with security, supervisors and managers)" unlawfully broad). I agree with the General Counsel that the term "cooperative manner" at issue here is vague, and that an employee could reasonably construe the rule as limiting their protected conduct, including limiting employees' ability to complain about management.

Respondent argues that this rule is intended "to avoid a perception or possibility of harassment or bullying, and to make sure employees get along, but does not prevent employees from disagreeing or having differences of opinion." (Tr. 481–482, R. Br. at 35.) Notably, the handbook includes 29 general work rules, some of which directly handle harassment, bullying, and getting along. For instance, rule number 4, prohibits insubordination; rule number 10, prohibits fighting, threats of physical harm, or other conduct that could endanger others; rule number 16, prohibits abusive and threatening language; rule number 17, prohibits harassment; rule number 23, prohibits harmful gossip or making maliciously false statements; rule number 24, prohibits interfering with the job performance of fellow employees; and rule number 28, prohibits engaging in threatening, harassing, intimidating, profane, obscene or similar inappropriate language. When reading rule number 3, in context with the rest of the work rules, it is not clear what conduct is prohibited. A failure to work in a "cooperative manner" with a manager could reasonably encompass Section 7 activity that managers deem uncooperative, such as engaging in a protected protest or strike. Therefore, I find that Respondent failed to carry its burden under *Stericycle*.

ii. General work rule concerning falsifying documents

The General Counsel argues that the above rule number 7 in italics is overly broad because it prohibits employees from making "false statements" and that under existent Board case law similar policies have been found unlawful. (GC Br. at. 26.) I find the cases cited by the General Counsel distinguishable. In *LaFayette Park Hotel*, 326 NLRB 824, 828 (1998), the rule found unlawful there stated "making false, vicious or malicious statements toward or concerning [the company] or any of its employees" and in *Cincinnati Suburban Press*, 289 NLRB 966, 975 (1988), the rule found unlawful stated "making false, vicious or malicious statements concerning any employee, supervisor, the company, or its product." Here, the rule prohibits employees from altering, falsifying, or forging Company forms, records or documents. Thus, the rule specifically concerns the accuracy of company records—not "statements" in general. Further, the rule goes on to explain, in plain language, that the prohibited conduct includes the prohibition of swiping another employee's card or badge. The rule does not reference any protected activity. Respondent asserts that this rule is intended to ensure that the Company maintains true and accurate records, and to curtail theft, and does not prohibit any protected activity. (R. Br. at 36.) I agree with Respondent, and do not find that an employee would reasonably understand this rule to encompass protected activity. Thus, I find this rule is not overly broad and recommend that the allegation concerning this rule be dismissed.

(c) General work rule concerning gossip and making maliciously false statements

The General Counsel argues that the above rule number 23 in italics is overly broad because the terms "harmful gossip" and "maliciously false" are ambiguous and could be interpreted to include protected activity. (GC Br. at. 26–27.) The General Counsel argues that the rule prohibiting harmful gossip is akin to rules the Board found unlawful in *Claremont Resort and Spa*, 344 NLRB 832 (2005) (rule prohibiting "negative conversations about associates and/or managers") and in *Hills and Dales General Hospital*, 360 NLRB 611 (2014) (rule prohibiting "negative comments"). I find these cases inapposite. The Board has distinguished rules restricting negativity from rules prohibiting "harmful gossip," finding the latter lawful. In *Hyundai America Shipping Agency*, 357 NLRB 860 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015), the Board explained that the *Claremont Resort* rule "dealt with employee conversations generally, which would implicitly include protected concerted activity" as opposed to a "rule that merely prohibits gossip, which Merrian–Webster's Collegiate Dictionary (10th ed. 1999) defines as "rumor or report of an intimate nature" or "chatty talk." *Hyundai*, supra, at 861. Similarly, in *Casino San Pablo*, 361 NLRB 1350 (2014), the Board again distinguished the *Claremont Resort* rule from the rule at issue there that prohibited "gossiping about other team members (including supervisors, managers, directors)." The Board, citing *Hyundai*, supra, and *Wilshire at Lakewood*,[19] held that employees would not reasonably construe the rule prohibiting gossiping about team members to restrict Section 7 activity. *Casino San Pablo*, supra, at 1351. The Board in *Hills and Dales General Hospital* noted that the part of the rule there prohibiting gossip was not unlawful. See *Hills and Dales*, supra, at fn. 3.

The Board has repeatedly distinguished between rules prohibiting employees from making "maliciously false statements" from those merely prohibiting making false statements. Rules restricting employees from making false statements or malicious statements have been found over broad and with a tendency to chill protected activity. However, rules prohibiting employees from making maliciously false statements, like the rule at issue here, are not overly broad according to extant Board case law. See *Casino San Pablo*, supra, at 1353 (rule prohibiting false, fraudulent, or malicious statements overbroad); see also *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994) (rule proscribing false as well as vicious or malicious statements unlawful, as opposed to rules that proscribe "maliciously false" statements, which employers may maintain). Based on the foregoing, I find that the General Counsel failed to carry his burden under *Stericycle*, and I recommend that the allegation concerning this rule be dismissed.

d. Workplace violence rule

The workplace violence rule states as follows:

> We do not tolerate any type of workplace violence committed by or against employees. Employees are prohibited from make [sic] threats or engaging in violent activities.
>
> The list of behaviors, while not inclusive, provides examples of conduct that is prohibited.
>
> 1. Causing physical injury to another person.

[19] 343 NLRB 141 fn. 2, 145 (2004), vacated in part on other grounds 345 NLRB 1050 (2005), revd. on other grounds *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007) (employer did not violate Sec, 8(a)(1) by maintaining a rule prohibiting rumors and gossip in the facility).

2. Making threatening remarks.
3. *Aggressive or hostile behavior that creates a reasonable fear of injury to another person or subjects another individual to emotional distress.*
4. Intentionally damaging employer property or property of another employee.
5. Possession of a weapon while on company property or while on company business except where [sic] permitted in parked, locked, personal vehicles under state law.
6. Committing acts motivated by or related to sexual harassment or domestic violence.

Threats, threatening conduct, or any other acts of aggression or violence in the workplace will not be tolerated. Any employee determined to have committed such acts will be subject to disciplinary action, up to and including termination. […]

The General Counsel argues that the language in italics above is overly broad because it lacks "sufficient clarification or context." The General Counsel cites to Board cases where the unlawful rules used vague terms like "disrespectful conduct," "harmonious interactions," "negative or disparaging comments," and "language which injures the image or reputation." (GC Br. 28–29.) The cases cited by the General Counsel do not concern workplace violence rules, and I find them inapplicable here.

In *Palms Hotel & Casino*, 344 NLRB 1363 (2005), the Board found a rule prohibiting "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow team members or patrons" did not violate Section 8(a)(1). Id. at 1367. In discussing the *Lutheran Heritage* analytical standard, the Board cited to *Adtranz ABB Daimler–Benz Transp., N.A. v. NLRB*, 253 F.3d 19 (2001), denying enf. in part to 331 NLRB 291 (2000), where the D.C. Circuit vacated as "utterly without merit" the Board's finding that a handbook prohibition against the use of "threatening or abusive language" potentially chilled the exercise of Section 7 activity and therefore violated the Act. The *Adtranz* court stressed that "threatening and abusive language are not inherent aspects of union organizing or other Section 7 activities." The Board found the *Adtranz* case applied "with equal force" to the rule at issue in *Palms Hotel*. The Board reasoned that the conduct prohibited by the *Palms Hotel* rule was no more inherently entwined with Section 7 activity than the "threatening or abusive language" at issue in *Adtranz* or the prohibitions against "verbal abuse," "abusive or profane language," or "harassment" found lawful in *Lutheran Heritage*.

Applying *Stericycle* here, I do not find that the challenged language prohibiting "aggressive or hostile behavior that creates a reasonable fear of injury" could be reasonably construed to implicate protected activity. Notably, the challenged language is part of a larger policy that contains specific examples of conduct that any employee would reasonably understand to be prohibited in the workplace (i.e., causing physical injury to another person, making threatening remarks, intentionally damaging property, etc.). Further, the challenged language does not use vague terms such as "negative" or "disrespectful," nor does it describe behavior inherently associated with organizing or other protected activities. Thus, I find that the General Counsel did not carry his burden under *Stericycle*, and I recommend that this allegation be dismissed.

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

1. Complaint allegations

Paragraph 9 of the complaint alleges that on about May 2, Terrance Davison told employees that the Company knew how many authorization cards the employees had or needed, that employees needed to be careful about their union activities, and that they should calm down with their union activities, and in doing so, caused the impression that employees' union activities were under surveillance, and threatened or impliedly threatened employees with unspecified reprisals.

Paragraph 10 of the complaint alleges that on about May, Ricardo Gomez Acuna (Gomez) threatened employees with discipline if they talked about the union on the shop floor, engaged in the surveillance of employees engaged in union activities, promised pay to employees if they provided information to Respondent about employees' union activities, and interrogated employees about their union activities and the union activities of other employees.

Paragraph 11 of the complaint alleges that on about early June, Gomez interrogated its employees about their union sympathies and gave them the impression that their union activities were under surveillance.

Paragraph 12 of the complaint alleges that on about late August, consultants for the Labor Consulting Group, LLC (LCG) interrogated employees about their union sympathies.

2. Applicable legal standard

The test for evaluating whether there has been a violation of Section 8(a)(1) is an objective one, i.e., whether, under the totality of the circumstances, the employer's statement or conduct would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000); *Sage Dining Services, Inc.*, 312 NLRB 845, 846 (1993). In making this evaluation, the Board does not consider the employer's motive or whether the coercion succeeded or failed. *American Freightways Co.*, 124 NLRB 146, 147 (1959). In determining whether an unlawful threat was made, the Board considers "whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D. Construction Group, Inc.*, 339 NLRB 303, 303–304 (2003). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *Concepts & Designs*, 318 NLRB 948, 954–955 (1995). Accordingly, the context in which the alleged threat was communicated is critical to determining how a reasonable employee could interpret the particular words spoken. *Cintas Corp. No. 2*, 372 NLRB No. 34, slip op. at 4 (2022). The test for determining whether an employer has created the impression of surveillance is whether the employee would reasonably assume from the employer's statements or conduct that their protected activities had been placed under surveillance. *Greater Omaha Packing Co.*, 360 NLRB 493, 495 (2014).

The Board also applies a totality–of–the–circumstances test to determine whether an interrogation is coercive of employees' rights under the Act. Under this test, the Board considers a variety of factors including, among other things, whether the employee is an open and active union supporter, whether there is a history of employer antiunion hostility or discrimination, the nature of the information sought (especially if it could result in action against individual

employees), the position of the questioner in the company hierarchy, the place and method of interrogation, the truthfulness of the employee's reply, and whether other unfair labor practices had occurred or were occurring. *Bannum Place of Saginaw, LLC*, 370 NLRB No. 17 (2021), citing *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom; *HERE, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Where the interrogation is accompanied by threats or other violations of Section 8(a)(1) ". . . there can be no question as to the coercive effect of the inquiry." *Vista Del Sol Healthcare*, 363 NLRB 1193, 1208 (2016); *Parts Depot, Inc.*, 332 NLRB 670, 673 (2000).

3. Analysis

It is undisputed that Davison, a low-level supervisor, had an ongoing friendly relationship with Dowling. As discussed above, I credit Davison's testimony that on May 2, Dowling initiated the conversation with Davison about how many authorization cards were needed to file a Board conducted election, and I do not credit Dowling's testimony that Davison either told him to "be careful" or "calm down." The credited testimony did not establish that Davison asked Dowling anything about his union support. On the contrary, Dowling made it clear that he was intentionally coming out publicly about his union support to Davison and asked Davison to tell others in management. In this regard, Dowling texted Davison on May 2, that he "doesn't care if [you] tell [them] it was me" that started the Union, that "they better come up with a solution fast," "all [because] of three fucking stupid ass [people] that should not be in the position they are in," "I wish they would fire me [because] it will only help my case out more," "[please] help me out and say I started all this I really did I will show you all the [messages]." Dowling was clearly setting Davison up, and notably, Davison did not reply to any of these text messages.

I further do not find that Davison created an impression of surveillance that employees' union activities were under surveillance when he texted Dowling that Tang already knew how many more signatures were needed. Again, the series of texts between Davison and Dowling on May 2 were indisputably initiated by Dowling. Dowling texted Davison asking if Davison had told management how many more people needed to sign, and Davison replied that Tang already knew—*somebody else told him* (emphasis added). I do not find Davison's texts created an impression of surveillance. "A statement as to what someone has heard could be based on (1) what he had heard from the grapevine *or* (2) what he had picked up from spying. There is no reason to infer the latter as the source over the former." *Skd Jonesville Division L.P.*, 340 NLRB 101, 102 (2003). Here, Davison specifically told Dowling that somebody else had told Tang, therefore eliminating any reason to infer that Respondent was "spying" on employees. Based on a totality of the circumstances, I recommend that the complaint allegation regarding Davison be dismissed.

Regarding statements made by former manager Gomez, the record evidence demonstrates that Gomez approached Pacheco to ask him to go to a union meeting and report back on April 28, the date that Pacheco signed a union authorization card.[20] Here, the facts are not disputed. Gomez admitted that he asked Pacheco to go to the union meeting and then report back what was said at the meeting. Pacheco was not an open union supporter, but he stated that people thought

[20] In its brief, the General Counsel correctly asserts that this allegation falls within the Act's 6-month statute of limitations. Case 07–CA–320369 was amended on September 29, to add, in pertinent part, allegations of surveillance and implied threats.

he was because Quick, a known union supporter, is his friend. I find that Gomez' conduct in asking Pacheco to go to a union meeting and report back was a violation of Section 8(a)(1). Pacheco was asked to report back to Gomez and to Tang, the highest management official at the facility, and met behind closed doors with Tang and Gomez. Pacheco was asked to report on his coworkers' union activities right after attending the union meeting. Considering all the circumstances, I find Respondent engaged in surveillance and unlawful interrogation. See *Bannum Place of Saginaw*, 370 NLRB No. 117 (2021) (unlawful interrogation found where employee was questioned by highest–ranking individual at the facility as well as his immediate supervisor in a private office upon employee's return from a union meeting). The evidence does not support finding that Respondent promised Pacheco "pay" in return for providing information about the union meeting, and therefore, I do not find a separate violation of the Act for clocking—in Pacheco while he was still at the union meeting. I credit Pacheco, over Gomez, that Gomez confronted him again in early June, and accused him of playing both sides and of organizing employees. Clearly, this second interaction did not happen in a vacuum considering Gomez' previous request that Pacheco report on employees' union activities. I find that Respondent, by Gomez's statements to Pacheco in June, engaged in unlawful interrogation and created the impression that Pacheco's activities were under surveillance.

Another employee, Quick, credibly testified that on one occasion Gomez told him that he was not allowed to talk about the union on the shop floor while on company time. Quick was an open union supporter who regularly wore a union hat and button at work. The complaint alleges that Gomez' statement was a threat of discipline. Gomez denied making this statement. As discussed above, I credit Quick, over Gomez, and find that Gomez made the statement. Respondent asserts that even if Gomez made the statement, no other employee testified about receiving any such instructions and there is no evidence that any employee, including Quick, was disciplined for talking about the Union. (R. Br. at 50.) Even if no employee was disciplined for talking about the Union, the standard is whether the statement has a reasonable tendency to coerce employees. Gomez was Quick's direct supervisor, and Quick's reaction to Gomez' statement was to stop talking about the Union on company time, although he continued to support the Union. I find that in this circumstance, Gomez' statement could reasonably be construed as an implied threat of discipline. Thus, I find that Respondent violated the Act as alleged.

Finally, Quick also testified that in August, an LCG consultant asked him to consider being the go–between person for an internal union that employees could set up to bargain with the Company. The same consultant later asked Quick again if he had considered the idea. Respondent did not call any witnesses to deny this conduct. Respondent argues that these interactions, even if credited, do not amount to an unlawful interrogation because the consultant did not ask Quick about his union sympathies or activities and, in any event, Quick was an open union supporter, there is no history of union animus, there is no evidence that the consultant was seeking information on which to take action against Quick, the conversation did not occur in a private setting, and Quick answered truthfully that he was not interested in serving as a chairman for an independent union. (R. Br. at 52–54.) I agree that, considering the totality of circumstances, the General Counsel did not establish an unlawful interrogation in this instance. Although the consultant is an admitted agent, there is no evidence that this consultant was a high–ranking employee at LCG, or what specific work he performed at the facility during this time other than to generally talk to employees about the union campaign. The consultant did not ask Quick whether he supported the Union, or about anyone else's union activity. The conversations were

not held in a private office or behind closed doors. Quick answered truthfully and the consultant did not question him further. Finally, the evidence of union animus in this case is minimal (i.e., isolated and minimal unlawful statements). Therefore, I recommend that the unlawful interrogation allegation in paragraph 12 of the complaint be dismissed.

D. Did Respondent Violate Section 8(a)(1) and (3) of the Act by Suspending and Terminating Jesse Dowling?

1. Complaint allegations

The complaint alleges that Respondent suspended and terminated Dowling in violation of Section 8(a)(1) and (3) of the Act, because Dowling assisted the Union and engaged in concerted activities, or in the alternative, enforced its workplace violence rule selectively and disparately by applying it to Dowling.

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.

3. Analysis

Dowling's April 13 altercation with Chaires occurred prior to any union activity. There is no evidence that Respondent had any knowledge of Dowling's union activities prior to Li's April 19 and 20 strongly worded recommendation that Dowling be terminated for violating the workplace violence policy. The credible evidence established that Dowling was not terminated at that time because Tang feared that Dowling could harm others at work, and he wanted to wait for the right time. This fear was based on the Respondent's knowledge that Dowling was asking for Chaires' last name and address at work just after he had threatened Chaires and been physically restrained away from Chaires. Although Dowling explained at the hearing that he needed Chaires' last name and address for a police report, Tang and Li did not know and could not have known this information. At the time, Dowling was blaming Chaires for damaging his toolbox and demanding that Chaires be punished. Thus, it was reasonable for Tang to be concerned about taking safety measures when terminating Dowling. Further, Dowling's text to Davison on April 13 asking if he was fired shows that Dowling knew he had engaged in serious misconduct. When Dowling found out that Respondent had engaged Li to investigate the April 13 incident, Dowling openly asserted that Chaires was racist against him, and that in his opinion the Company was protecting Chaires. Thus, not even Dowling believed that the HR investigation was motivated by any union animus. There is no evidence that the HR investigation's determination that Dowling was the aggressive party on April 13, that he touched Chaires on the forehead, and that he threatened Chaires was baseless. My independent review of the video evidence and of the HR investigation documents lead me to agree with the HR investigation's conclusions.

Turning to the *Wright Line* analysis, the evidence established that Dowling engaged in union activity after the April 13 altercation, but there is no evidence that anyone in management knew about it until May 2 when Dowling told Davison. The General Counsel asserts that by the time Dowling was suspended, on May 4, and his termination on May 5, Respondent knew of his union activity because Chaires saw Dowling talking to union organizers on May 3 and Dowling told Pratt in a text on May 4. (GC Br. at 41.) The evidence established that Chaires called Tang after his interaction with Dowling on May 3, to tell Tang that Dowling had yelled and threatened him outside of the facility. Since Dowling was talking with union organizers when this happened, it is reasonable to infer that Chaires shared this information with Tang, too. Thus, I agree that Respondent would have likely known of some of Dowling's union activities by at least May 3. I do not find relevant that Dowling texted Pratt about his union activities on May 4, because this text was sent after Dowling was suspended and Respondent had already decided to terminate him.

As to evidence of union animus, the General Counsel argues that animus is evidenced by Davison's alleged warning to Dowling to "be careful" about his union activity. (GC Br. at 40.) As discussed above, I do not credit Dowling's testimony about this conversation with Davison. However, even if I were to credit Dowling and find that Davison made the statement, I would not rely on this isolated comment made by a low-level supervisor to find Respondent harbored union animus and was inclined to act upon it. See *Electronic Data Systems Corp*., 305 NLRB 219, 221 fn. 7 (1991) (Board declined to rely on statement made by low-level supervisors to find union animus) and *Sun Oil Co. of Pennsylvania*, 245 NLRB 59, 68, fn. 8. (1979) (isolated and casual statement by low level supervisor not a basis for inferring animus).

The General Counsel also argues that the timing of Dowling's suspension and termination shortly after his union activity became known, and after waiting 3 weeks since the April 13 incident, support finding an unlawful motivation and an inference of animus. [21] (GC Br. at 40–42.) The Board has held that the timing of an adverse action shortly after an employee has engaged in protected activity may raise an inference of animus and unlawful motive. *Lucky Cab Co*., 360 NLRB 271, 274 (2014). Here, I do not find that the timing of Dowling's suspension and termination warrants an inference of animus, and I find that the General Counsel did not establish a prima facie case. The evidence clearly established that Respondent's in-house counsel, who had no knowledge of any union activity at all, promptly investigated the April 13 incident and by April 19, found Dowling had violated the Company's workplace violence policy and strongly recommended his termination. Tang agreed with her recommendation and only asked her to hold off because he had concerns about how to execute the decision safely. Dowling was suspended exactly two weeks later, on May 4, after Tang and Li decided that the safest way to terminate him would be to suspend him and then immediately terminate him while he was no longer at the facility. Under the circumstances, I do not find that three weeks from offense to termination is an unreasonable time. Notably, although between April 19 and May 4, Respondent learned of Dowling's union activity, one other event involving Dowling precipitated his suspension and termination: on May 3, Dowling and Chaires had another altercation outside of the facility.

The General Counsel argues that Respondent did not have an honest belief that anything serious occurred on May 3 between Chaires and Dowling because it did not contact Dowling for his version of events and did not conduct a proper investigation. The General Counsel further argues that at the hearing the evidence showed that in any event Dowling did not engage in any inappropriate conduct toward Chaires on May 3. (GC Br. at 44.) The Union alleges that Chaires completely made up the story about his interaction with Dowling on May 3. (CP Br. at 10–11.) Regardless of what exactly Dowling may have said or done near his car outside of the facility when Chaires drove by him, the credited evidence reflects that Chaires told Tang he felt scared and threatened, and Chaires wrote a statement to Li to that effect. Further, Dowling's texts to Davison just 1 day prior demonstrate that he was very angry at Chaires at the time. Therefore, I find that something happened between Chaires and Dowling on May 3, that scared Chaires. This

[21] The General Counsel also asserts that it is suspect that Dowling was allowed to continue to work under Chaires despite Respondent allegedly thinking that Dowling posed a danger at work. I disagree. Respondent knew for years that Chaires and Dowling did not get along. In allowing them to continue to work together while Li investigated and in the 3 weeks before they were both suspended, Respondent acted in accordance with its past practice.

incident precipitated Dowling's termination, not his union activities. The General Counsel argues that in taking into consideration the May 3 incident prior to terminating Dowling, Respondent showed a shift in its reasons for the termination, warranting an inference of unlawful motive. (GC Br. at 43.) I disagree. The evidence did not demonstrate that Respondent shifted its reasons for terminating Dowling. Dowling was terminated for his conduct on April 13, and the May 3 incident precipitated the termination because the incident further raised Respondent's safety concerns about Dowling.

Even if I were to find that the General Counsel established a prima facie case, I would find that Respondent satisfied its burden of proving that Dowling would have been suspended and discharged regardless of his union support and activities. There is no evidence in the record reflecting that Respondent treated Dowling disparately. In this respect, Dowling testified that he did not know of any employee that had engaged in workplace violence that was not discharged. Moreover, Respondent not only suspended and discharged Dowling, but it also suspended Chaires for the April 13 altercation. The credible evidence established that although Respondent did not believe that Chaires painted Dowling's toolbox, it disciplined Chaires for escalating the confrontation with Dowling when he told Dowling to think it was him who did it.

Finally, the General Counsel requests that if I do not find Dowling's discharge unlawful under *Wright Line*, that, as an alternative, I find it unlawful under *NLRB v. Burnup & Sims, Inc.*, 379 US 21 (1964), or under *Continental Group*, 357 NLRB 409 (2011). Both alternative analyses fail.

According to *Burnup & Sims*, an employer violates the Act if it takes an adverse action against an employee for "misconduct arising out of a protected activity, despite the employer's good-faith belief, when it is shown that the misconduct never occurred." *Burnup & Sims* at 23. Here, the General Counsel argues that Dowling was suspended for his alleged May 3 misconduct toward Chaires while Dowling was engaged in talking to union organizers outside of the facility, and that the evidence demonstrated that Dowling did not engage in any such misconduct. (GC Br. at 44.) The General Counsel mischaracterizes the evidence. Dowling was not suspended or terminated for "misconduct arising out of protected activity." First, the credited evidence reflects that Dowling acted in a threatening manner toward Chaires away from the union organizers and not while Dowling was talking to them. Even if Dowling had started yelling at and threatening Chaires in front of the organizers, his misconduct was not part of and/or related in any way to Dowling's protected activity but was directly related to and was a continuation of their April 13 altercation and Dowling's belief that Chaires had vandalized his toolbox. Second, and more importantly, Dowling was suspended and terminated for his misconduct on April 13, when there was undoubtedly no protected activity at all present. As discussed above, the credited evidence established that Dowling's suspension and termination was hastened when Respondent learned that Dowling scared Chaires on May 3, but it was not the reason for Respondent's decision. Therefore, even if I credited Dowling, which I do not, that he did not say or do anything toward Chaires on May 3, *Burnup & Sims* is inapplicable in this case.

In *Continental Group*, the Board clarified the scope of its long–established principle that discipline pursuant to an unlawfully overbroad rule is unlawful (the *Double Eagle* rule) *Continental Group*, supra at 410–411, citing, inter alia, *Double Eagle*, 341 NLRB 112 fn 3). The Board explained that the *Double Eagle* rule applies in situations in which an employee violated

the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7; and that the employer will avoid liability if it can establish that the employee's conduct actually interfered with their own work, that of other employees, or interfered with the employer's operations. *Continental Group* at 412. Here, the General Counsel argues that Dowling was engaged in protected conduct when he was talking to union organizers on May 3, and he was terminated pursuant to an overbroad rule while in the act of speaking to the union organizers. (GC Br. 44–47.) As discussed above, I do not find Respondent's workplace violence rule overbroad. Moreover, the General Counsel is misconstruing the reason for Dowling's termination. Dowling was not terminated for any conduct while he talked to union organizers on May 3. Thus, I find that the *Double Eagle* rule is inapplicable in this instant.

Based on the foregoing, I recommend the dismissal of the allegations in the complaint concerning Dowling's suspension and termination.

E. Did Respondent Violate Section 8(a)(1) *and* (3) *of the Act by Increasing Employees' Benefits?*

1. Complaint allegations

Paragraph 15 of the complaint alleges that the Company increased employee benefits by providing employees with a catered lunch on September 6, and with food and beverages at a bowling event on September 9.

2. Applicable legal standard

An employer violates the Act by conferring employee benefits during the pendency of a representation election for the purpose of inducing employees to vote against a union. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 679, 686 (1944); *Shamrock Foods Co.*, 369 NLRB No. 5 (2020) (employer violated the Act when it provided holiday banquet to employees with more elaborate prizes and more paid time off than in the past). The granting of benefits to employees during union organizational activity "is not per se unlawful" where the employer can show that its actions were governed by other factors. *American Sunroof Corp*., 248 NLRB 748, 748 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981). To establish such a claim, the General Counsel must first prove, by a preponderance of the evidence, "that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village Inc*., 319 NLRB 916 (1995). If the General Counsel meets this burden, the employer must demonstrate a legitimate business reason for the timing of the benefit. One way to do this is to show the benefit was "part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union." *American Sunroof*, supra; see also *Real Foods Co*., 350 NLRB 309, 310 (2007); *Holly Farms Corp*., 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1087–1090 (2004).

3. Analysis

The record established that Respondent held a 1-hour lunch for all employees catered by Red Lobster on September 6, exactly 8 days prior to the Board–conducted election held on

September 14. Respondent's stated reason for this lunch was to celebrate the new cafeteria and to show employee appreciation. This lunch was different from other previously catered lunches in a few significant ways. In the past, Respondent offered catered lunches to employees during their 30-minute unpaid lunch, on special holidays, like Thanksgiving or Christmas. Past catered lunches consisted of pizza, Mexican food, or barbeque food. In this instant, employees were paid for one1 hour and were offered seafood from a restaurant where the food is arguably more expensive than previous lunch offerings. In addition, Respondent addressed employees during the one–hour lunch and expressed its antiunion stance. Then, on September 9, just 3 days later, Respondent hosted an offsite bowling event which included food and beverages. Respondent's stated reason for the bowling event was again to celebrate the new cafeteria and for teambuilding. The LCG consultants attended the bowling event, but Respondent did not address employees to talk about the Union. No information is in the record about two previous off–site events, a "trunk–or–treat" during Thanksgiving and an Easter egg hunt.

The General Counsel and the Union argue that Respondent's motive for hosting these two events was to improperly interfere with employees' free choice to vote in the election given the timing of the catered lunch and the bowling event in relation to the scheduled election date. (GC Br. 38–39; and CP Br. at 6–7.) The Respondent argues that these events were not unprecedented and corresponded with the Company's opening of a new cafeteria. In support of its argument, Respondent cites to *International Paper Co.*, 313 NLRB 280 (1993), where the Board agreed with the judge there in finding the employer did not violate the Act when it awarded safety jackets to employees 1 day before a Board-conducted election. (R. Br. at 42–43.) I find *International Paper Company* distinguishable. There, the administrative law judge relied on testimony concerning that the company had a history of a safety award program and that the decision to recognize employees' safety achievement with an award was taken precritical period. 313 NLRB at 294. In the instant matter, there is no history of providing a one–hour paid catered lunch and/or offsite event in celebration of anything other than special holidays, less so, hosting two events one after the other for the same reason. There is also no evidence establishing that the decision to celebrate the opening of the new cafeteria was made prior to the filing of the election petition.

Therefore, I find that the General Counsel met its burden to prove that Respondent violated Section 8(a)(1) and (3) of the Act by increasing the benefits of its employees in the form of a catered lunch by Red Lobster and hosting a bowling event which included food and beverages to dissuade employees from supporting the Union.

F. Did Respondent Fail and Refuse to Recognize and Bargain with the Union in Violation of Section 8(a)(1) *and* (5)*?*

1. Complaint allegations

Paragraph 17 of the complaint alleges, inter alia, that since about July 31, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective–bargaining representative of the bargaining unit, and that the serious and substantial unfair labor practice conduct in this case is such that it undermined the validity of the election process and employees' sentiments regarding representation would be protected better by issuance of a bargaining order.

2. Applicable legal standard

In *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), the Board adopted a new standard for determining whether a bargaining order is appropriate. Under the new standard, an employer violates Section 8(a)(5) and (1) of the Act by refusing to recognize, upon request, a representative designated for the purposes of collective bargaining, within the meaning of Section 9(a), by a majority of employees in an appropriate unit, unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) (an RM petition), or unless the union files a petition pursuant to Section 9(c)(1)(A) (an RC petition). An employer may lawfully test the union's claim of majority support and/or challenge the appropriateness of the unit by filing its own RM petition or may await the processing of an RC petition filed by the union. However, if the employer commits an unfair labor practice that requires setting aside the election under the Board's extant standards, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order. 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 requested recognition from the employer. Id., slip op. at 25–26.

Under long–established Board law, an election will be set aside when an employer violates Section 8(a)(3) of the Act during the critical period (the time between the filing of an election petition and the election). See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 277 (2014) (citing *Baton Rouge Hospital*, 283 NLRB 192, 192 fn. 5 (1987)). An election will be set aside based on an employer's critical–period violation of Section 8(a)(1) unless the "violations . . . are so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results." *Longs Drug Stores California*, 347 NLRB 500, 502 (2006). See also *Clark Equipment Co*., 278 NLRB 498, 505 (1986)). In making this determination, the Board considers all relevant factors, including: the number of violations, their severity, the extent of the dissemination, the size of the unit, the closeness of the election, the proximity of the conduct to the election date, and the number of unit employees affected. See *Bon Appetit Management Co*., 334 NLRB 1042, 1044 (2001). See also *Iris USA, Inc*., 336 NLRB 1013,1013 (2001).

3. Analysis

On July 31, the Union filed a representation petition with the Board, and on the same day union organizer Justine Cane sent a copy of the petition in an email to plant manager Larry Pratt. The General Counsel asserts that this email constitutes a demand for recognition under *Cemex*. Respondent argues that the Union's email to Pratt, which only included a copy of the petition, did not amount to a demand for recognition, and thus did not trigger the *Cemex* standards. (R. Br. at 62.) The Board has long held that the filing of a petition itself constitutes a sufficient demand for recognition. *Alamo–Braun Beef Co.*, 128 NLRB 32, 33 fn. 5 (1960); *ARIA Resort & Casino*, 363 NLRB 323, 323 (2015). See, also, *List Industries, Inc.*, 373 NLRB No. 146 (2024) (where the Board affirmed the judge's decision to issue a *Gissel* bargaining order after the judge relied on *Alamo–Braun* to reject employer's argument that the union had failed to demand recognition.)

As of July 31, the Union had collected 113 authorization cards out of 150 employees in the petitioned for unit. Respondent does not dispute the authentication of the union authorization cards. Respondent did not recognize the Union, nor did it file an RM petition. Thereafter, an election was conducted on September 14, where the Union lost the election 84–47. The Union

did not file objections to the election. Respondent asserts that since the Union did not file any objections to the election, the election results cannot be set aside by the issuance of a *Cemex* bargaining order. (R. Br. at 59.) In *Auto–Chlor System of Washington*, 373 NLRB No. 63 (2024), the union there lost a Board–conducted election, did not file objections, but filed an unfair labor practice (ULP) charge after the certification of results issued. The Regional Director in that case issued an order revoking the certification of results explaining that the ULP charge had merit and that the unlawful conduct warranted a *Cemex* bargaining order. The Board determined that it was inappropriate to revoke the certification of results and held that the propriety of the *Cemex* remedial order and its effect upon the certification had to be litigated in the ULP proceeding. Consequently, the Board reinstated the certification. Pursuant to *Auto–Chlor*, I find that it is appropriate for me to consider the *Cemex* bargaining order request despite there being no objections in this case.

As discussed above, prior to the critical period, I found Respondent engaged in a handful of unfair labor practices all single–handedly committed by former manager Ricardo Gomez involving one-on-one interactions with two separate employees. I find Gomez's conduct in June, wherein he engaged in unlawful interrogation, surveillance, and creating the impression of surveillance by his one-on-one interaction with employee Pacheco, was isolated and minimal. There is no evidence that these interactions with Pacheco were disseminated to any other employee in the unit. Similarly, Gomez' statement to Quick, a vocal union supporter, that he could not talk about the Union, involved a single, one-on-one conversation with no evidence of dissemination, and no impact on Quick's union support. Notably, Gomez was not a high-ranking official and is no longer employed by Respondent. I find that these isolated and minimal violations outside of the critical period do not warrant a bargaining order.

Between July 31, and September 14, the critical period, I did not find that Respondent engaged in any unlawful conduct except for the unlawful increase of benefits to employees in the form of a catered lunch and providing food and beverages at a bowling event. Respondent argues that the violations here, at best, are not sufficiently severe to warrant a bargaining order. (R. Br. at. 62.)[22] The Board recently restated its long–standing view that the grants of benefits fall within a category of conduct that the Board and the courts have recognized as "hallmark" violations, because they tend to have such a coercive and long-lasting effect on employees' free choice in a potential rerun election, and absent "some significant mitigating circumstance," they generally warrant a bargaining order "without extensive explication." *NP Red Rock LLC*, 373 NLRB No. 67, slip op. at 7 (2024), *citing NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212–213 (2d Cir. 1980). The court in *Jamaica Towing* noted that "so–called "hallmark" violations and their presence will support the issuance of a bargaining order unless some significant mitigating circumstance exists. They include such employer misbehavior as the closing of a plant or threats of plant closure or loss of employment, the grant of benefits to employees, or the reassignment, demotion or discharge of union adherents in violation of Section 8(a)(3) of the Act." Id. at 212–213.

I find that there are mitigating circumstances in this case that weigh heavily against a remedial bargaining order. For instance, Respondent did not award employees with anything

[22] Respondent also argues in its brief that *Cemex* should be overturned. (R. Br. at 59.) However, I am bound to apply current Board law.

other than food from Red Lobster, and in addressing employees during the lunch, Respondent did not engage in any other unlawful conduct, such as making threats or implied threats, promising increased benefits, or any other similar conduct. Notably, employees were allowed to grab their food and leave the cafeteria. Similarly, at the bowling event, Respondent only offered food and beverages, and in this instance, attendance was voluntary, and there is no evidence that Respondent addressed employees to talk about the Union. Further, these two violations did not involve other types of objectively more egregious grants of benefits violations, such as, a wage increase or readjustment, improved and/or revised benefits, and were not accompanied by other egregious unlawful conduct such as discharging union supporters. There is no evidence reflecting the value of the Red Lobster lunch or the food provided at the bowling event. There is also no evidence reflecting that employees' union support decreased as a result of the lunch or the bowling event. Finally, there is no evidence that Respondent has engaged in any other unlawful conduct postelection. Thus, it is virtually impossible, without more, to conclude that the two violations resulted in "substantial interference" affecting the election results. I find this case distinguishable from other cases where the Board has issued a *Cemex* order involving a granting of benefits violation. See, e.g., *Brown–Forman Corporation*, 373 NLRB No. 145, slip op. at 5, (2024), where a *Cemex* order was issued after the employer granted an across-the-board $4-per-hour wage increase, improved its vacation policy, and distributed bourbon bottles valued at around $30 during the critical period, and where there was evidence that the wage increase caused employees to end their union support; and *NP Red Rock*, supra, where the benefits announced during the critical period were unprecedented including free health care and a company paid 401(k) plan. As a result, I find that the General Counsel failed to establish a violation of Section 8(a)(5) and (1), and recommend the dismissal of paragraph 17 of the complaint, and the related request for a remedial bargaining order.

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. Respondent violated Section 8(a)(1) of the Act by maintaining rules in its employee handbook that:

   a. Prohibit employees from discussing "non–public information about the Company" and its "business" and "employees."

   b. Requires employees work in a "cooperative manner" with managers/supervisors, coworkers, customers and vendors.

4. Respondent violated Section 8(a)(1) of the Act when on about April 28, Ricardo Gomez, at its Romulus facility: (a) engaged in surveillance of employees; and (b) interrogated employees about their union activities and the union activities of other employees.

5. Respondent violated Section 8(a)(1) of the Act when in early May, Ricardo Gomez, at its Romulus facility, threatened employees with discipline if they talked about the union on the shop floor.

6. Respondent violated Section 8(a)(1) of the Act when in early June, Ricardo Gomez, at its Romulus facility: (a) interrogated its employees about their union sympathies; and (b) gave employees the impression that their union activities were under surveillance.

7. Respondent violated Section 8(a)(3) and (1) of the Act when it increased the benefits of its employees on about September 6, by providing them with lunch catered by Red Lobster, and on about September 9, by providing them with food and beverages at a bowling event.

8. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Respondent will be ordered to rescind the overly broad and unlawful language in certain provisions in its employee handbook, as detailed in the order below, and to notify in writing all current employees who received this handbook that these provisions will not be enforced. Respondent will also be required to post a notice, as detailed in the order below. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. The General Counsel requested that Respondent be ordered to read the notice to employees. I do not find that a notice reading is warranted in this case. See *Starbucks Corp*., 372 NLRB No. 122, slip op. at 1 fn. 3 (2023).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

Respondent, YAPP USA Automotive Systems, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

[23] 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. 102.46 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Maintaining and enforcing the following rules in its employee handbook: (1) as part of the confidentiality and proprietary information rule, prohibiting employees from discussing "non–public information about the Company" and its "business" and "employees"; and (2) general work rule number 3, which requires employees work "in a cooperative manner with managers/supervisors, coworkers, customers and vendors."

(b) Threatening employees with discipline if they talk about the union on the shop floor.

(c) Engaging in surveillance of employees' union activities and/or giving employees the impression that their union activities are under surveillance.

(d) Interrogating employees about their union activities and the union activities of other employees.

(e) Increasing the benefits of employees by providing them with a catered lunch or food and beverages at an offsite event because employees engaged in union activities and to discourage them from engaging in these activities.

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

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

(a) Within 14 days from the date of this Order, rescind, in the manner described in the decision, the overly broad language in the confidential and proprietary information rule and general work rule number 3, and notify employees, in writing, that these provisions will not be enforced.

(b) Within 14 days after service by the Region, post at its Romulus, Michigan facility, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's

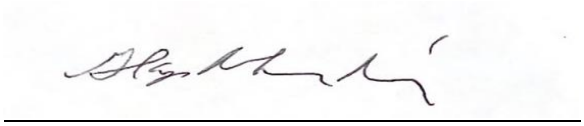
[24] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement due to the pandemic, the 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."

authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including in employee breakrooms, on the bulletin board, and all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C., June 11, 2025



G. Rebekah Ramirez
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 maintain and enforce the provisions in our employee handbook that prohibit employees from discussing "non–public information about the Company" and its "business" and "employees," and general work rule number 3, which requires employees work "in a cooperative manner with managers/supervisors, coworkers, customers and vendors."

WE WILL NOT threaten employees with discipline if they talk about the union on the shop floor.

WE WILL NOT engage in surveillance of employees' union activities and/or create the impression that employees' union activities are under surveillance.

WE WILL NOT interrogate employees about their union activities and the union activities of other employees.

WE WILL NOT increase the benefits of employees by providing them with a catered lunch or food and beverages at an offsite event because employees engage in union activities and to discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed you under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days of the date of this Order, rescind the overly broad language in the confidential and proprietary information rule and general work rule number 3 in the employee handbook.

YAPP USA AUTOMOTIVE SYSTEMS, 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

NLRB Region 7
Patrick V. McNamara Federal Building
477 Michigan Ave., Rm 05–200, Detroit, MI 48226
(313) 226–3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/07-CA-320369 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, (313) 226-3200.