

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

TRADER JOE'S EAST, INC.

and

Case 09-CA-312856

TRADER JOE'S UNITED

Erik P. Brinker, Esq., for the Acting General Counsel
Sarah Beth Ryther, for the Charging Party
Christopher J. Murphy, Esq. and Kelcey J. Phillips, Esq. (Morgan, Lewis & Bockius, LLP), for
Respondent

DECISION

Sarah Karpinen, Administrative Law Judge.

STATEMENT OF THE CASE

The hearing in this case was held in Louisville, Kentucky on March 10 and 11 and April 8, 2025. The allegations are based on a charge filed by Trader Joe's United (the Union) on February 21, 2023, alleging that Respondent Trader Joe's East disciplined employees in retaliation for engaging in union and concerted activities. The Regional Director for Region 9 issued a Complaint and Notice of Hearing on December 23, 2024, alleging that Respondent issued a disciplinary warning to employee Zachary Smith on February 20, 2023, because of his support for and activities on behalf of the Union, and to discourage other employees from engaging in those activities. (GC Exh. 1(g)). Respondent timely filed an Answer, which it amended on March 6, 2025, and denies that it retaliated against Smith. (GC Exh. 1(p)).

This case was originally consolidated with Case 09-CA-335100, and both cases were tried in the same hearing. On September 4, 2025, I ordered that Case 09-CA-335100 be severed from Case 09-CA-312856 for decisional purposes. I issued my decision in Case 09-CA-335100 on September 5, and a copy of my September 4 Order is attached to that decision.

After carefully considering the entire record in this case, including the briefs filed by the Acting General Counsel and Respondent, I make the following findings of fact, conclusions of law, and recommendations in Case 09-CA-312856.

JURISDICTION

Respondent operates a nationwide chain of retail grocery stores, including the Louisville store that is at the center of this case. Respondent admits deriving annual gross revenue in excess of \$500,000 and indirectly receiving \$50,000 in goods from businesses that sourced them from points outside of Kentucky. (Amended Answer, para 2(b)). The Board will assert jurisdiction over any retail operation with a gross volume of business of over \$500,000 and de minimis direct or indirect business over State lines during a representative twelve-month period. An indirect inflow of \$50,000 clearly meets this standard. See *A-W Washington Service Station, Inc.*, 258 NLRB 164, 167-168 (1981) (finding indirect inflow of \$5,000 to be sufficient). I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the Board has jurisdiction over this case pursuant to Section 10(a) of the Act. I also find, based on the record as a whole, that the Union has at all material times been a labor organization within the meaning of Section 2(5) of the Act.

FINDINGS OF FACT¹

I. Alleged unfair labor practices

Trader Joe's stores have a maritime theme. Store managers are called captains, assistant managers are mates, and rank and file employees are crew members. (Tr. 55-56). The Louisville store typically has one captain, 12 mates and about 106 crew members. (Tr. 419, GC Exh. 4). Mates direct the work of crew members, who typically work in teams. (Tr. 76). Crew members are typically assigned to various work tasks in one-hour increments. (Tr. 77-78, 418). When they move from one job to the next, they check in with the mate in charge of the new work area to get their assignments. (Tr. 130). They are expected to check in with a mate at least once every hour, and when they deviate from the tasks assigned in the daily work log. (Tr. 128-129).

Both the captain and the mates can issue discipline to crew members. Respondent does not have a formal progressive discipline policy. Current store captain Travis Todd testified that managers "use the proper accountability, based on [the] behavior" to address poor performance and misconduct. (Tr. 521). First-time offenses are typically addressed through verbal counseling, which is documented in Respondent's Dayforce timekeeping and performance system. Counseling is not considered discipline. If a crew member repeats the conduct, the mates or captain may issue an incident report, which is considered discipline. (Tr. 498-500). Incident reports remain in crew member files indefinitely. (Tr. 590).

A. Organizing drive

Employees at the Louisville store started a union organizing drive in the spring of 2022. Crew member Connor Hovey was one of the principal organizers and is now the president of

¹ I have cited specific pages and documents to aid the reader, but my findings are based on the entire record and not just the portions that are cited. Unless otherwise noted, I credited witness testimony that went unchallenged by the other parties and have incorporated that testimony in my findings of fact. When testimony was contested, I made specific credibility findings, as outlined in detail later in this decision.

Trader Joe’s United Local 3.² (Tr. 61). Hovey and other employees formed an organizing committee, held meetings, and asked coworkers to sign cards indicating their support. (Tr. 99). By mid-December 2022, 65% of the employees in the Louisville store had signed cards. (Tr. 64).

5 Hovey is in a committed relationship with discriminatee and crew member Zachary Smith. They commute to work together and are open about their relationship with coworkers and supervisors. (Tr. 68-69, 109). Smith was not a leader in the organizing drive but wore union buttons and participated in meetings and other activities in support of the Union. (Tr. 54-59, 72-73, 216-218). Captain Todd, who was a mate during the organizing drive and was promoted to store captain in April 2023, testified that Smith wore union buttons, and he believed him to be pro-union. (Tr. 535). Mate Micheal Brodbeck³ testified that he knew that Smith was pro-union “by association with Connor [Hovey].” (Tr. 631).

1. Smith finds mates at his locker

15 Smith testified that in mid-December, he found Mate Brodbeck “rifling through” his locker. Crew members do not have assigned lockers but are allowed to claim one by writing their name on an erasable placard. Smith testified that his name was on his locker, and that he found Mates Brodbeck and Sibert in front of it, with the locker “wide open” and his bag “disheveled.” (Tr. 228, 230, 232-234). Smith testified that Brodbeck seemed surprised to see him, and that although none of his belongings were missing, the straps on his bag were open even though the bag was closed when he left it there at the start of his shift. (Tr. 235-236).

25 Brodbeck testified that Smith’s locker was open when he walked by, and he saw inappropriate graffiti inside it. Brodbeck described the graffiti, which was of a sexually suggestive nature and did not pertain to the Union. (Tr. 634). Brodbeck testified that he was not aware that Smith was using the locker and went inside it only to remove the graffiti. When Smith approached him, Brodbeck told him he was removing the graffiti. He testified that he did not search Smith’s belongings. (Tr. 634-636).

30 On cross examination, Smith acknowledged that Brodbeck pointed at graffiti in the locker when he asked him what he was doing. Smith could not recall what the graffiti said. (Tr. 321-323). Based on Smith’s partial corroboration of Brodbeck’s testimony, I credit Brodbeck that he was not searching Smith’s locker and was instead simply removing graffiti. If Smith’s belongings were moved, it seems likely that they were accidentally moved while Brodbeck was inspecting and cleaning the graffiti. There is no evidence that Smith had any union materials in his locker on the date Brodbeck went in it, or that any other lockers were opened or searched.⁴

² This is incorrectly identified as “Local Free” in the transcript.

³ Mr. Brodbeck’s first name was misspelled as “Michael” in the Complaint. (Amended Answer, p. 2).

⁴ In making this and the other credibility findings in this decision, I considered the witnesses’ testimony in the context of their demeanor, the weight of the evidence, the facts, the probability that what they said was true, and the reasonable inferences that could be drawn from the testimony. See *Double D Construction Group*, 339 NLRB 303, 305 (2003), citing *Daikichi Sushi*, 335 NLRB 622, 623 (2001). I was also mindful that credibility determinations are not “all or nothing,” and that it is possible to disbelieve part of a witness’ testimony without discrediting all of it. See *Daikichi Sushi*, supra, at 622.

2. Union campaign goes public on December 20, 2022

On December 20, 2022, then-store captain Craig Wood posted a notice in the break room informing employees that he knew they were organizing a union and urging them to reach out to him if they had any questions. (Tr. 65). That same day, crew members organized a “march on the boss” to take the organizing campaign public and inform management that they planned to file a representation petition with the NLRB. (Tr. 66). About 40 crew members, including alleged discriminatee Smith, and 20-30 community and labor supporters participated in the march, which was led by Hovey. (Tr. 66, 68, 178, 231). Hovey approached Captain Wood, who was working on a cash register, and gave him the employees’ NLRB petition and other paperwork. (Tr. 67). Hovey testified that Wood said he was not allowed to accept the documents, so he placed them on a desk in the bridge, where Mate Sibert attempted to “shoo” them off the desk by fanning them. (Tr. 67-68). Hovey took a photo of the documents and he, Smith, and the other participants left the store. (Tr. 69). The petition was filed with the NLRB that day. (GC Exh. 3). As the campaign continued, crew members continued to meet weekly. (Tr. 122).

3. Union wins representation election on January 26, 2023

The NLRB conducted an election at the store on January 25 and 26, 2023. A majority of votes were cast for the Union. (Tr. 70, GC Exh. 4). Respondent filed timely objections. On May 26, 2023, an NLRB Hearing Officer issued a report recommending that the objections be overruled in their entirety. On January 17, 2024, the Regional Director for Region 9 overruled the objections and issued a Certification of Representative to the Union. (GC Exh. 5). On January 23, the Union requested bargaining. On February 8, Respondent filed a Request for Review of the Regional Director’s Decision and Certification of Representative. To date, Respondent has not bargained with or recognized the Union. (Tr. 72). The resulting refusal to bargain allegations are addressed in my decision in Case 09-CA-335100.

B. Post- election events

1. Increased supervision of lead organizer Hovey

Crew member and lead organizer Hovey testified that after the election, he noticed that one of the mates, Keith Akers, would often work near him or watch him from across the store. Hovey testified that he complained about discriminatory treatment (not related to union activity) from Akers in 2018, and that Akers apologized and avoided him after that incident, so it was unusual for him to work near Hovey. (Tr. 101-102). Hovey estimated that Akers would watch him about 10% of the time prior to the election, and 75% of the time after the election. (Tr. 105). Respondent did not provide evidence to counter Hovey’s testimony, which I credit in its entirety.

2. Smith’s January Performance Review

Crew members receive a performance review every six months. Possible ratings include “meets expectations” and “needs improvement.” (GC Exh. 12). Employees are rated in fifteen individual categories. If an employee is rated lower than “meets expectations,” they do not

receive a raise. If they do meet expectations, they receive a seventy-five-cent per hour raise, and if they exceed expectations, they receive a one-dollar raise. (Tr. 93-94).

Alleged discriminatee Smith was rated overall as “meets expectations” on all his reviews in 2021 and 2022. (GC Exh. 12). On January 30, 2023, the first review after the Union election, he was rated “meets expectations” and received positive feedback that management could put him in “any section and trust that it will be worked both efficiently and thoroughly,” and that he was “always learning” and “willing to share great information with customers.” He was also thanked for “being on the team.” He received a .75 raise. (Tr. 223, GC Exh. 12, p. TJ013).

C. Smith receives counseling on February 2, 2023

On February 2, 2023, Mate Brodbeck verbally counseled Smith for taking an extended break, clocking in at the back of the store, and going to his locker to put away his jacket after clocking in. Crew members are expected to put their things away, put on their bib and their name tag, and be ready to work before they clock in. (Tr. 144, 242, 608, GC Exh. 11, p. 24). They are also required to take a ten-minute paid break for every four hours that they work. (R. Exh. 1, p. 27). Crew members clock in and out at the beginning and end of the day, and for their unpaid lunch breaks. They do not clock in or out for their paid breaks. (Tr. 79).

The Louisville store has a partially enclosed area near the registers known as the “bridge” which serves as a base of operations for store employees and a location for customers to seek assistance. There are two computers inside the bridge, and a tablet hanging on the outside that serves as a dedicated time clock. Most employees use the tablet at the bridge to clock in and out. (Tr. 79, 84, 135, 423). However, other computers in the store, including the two computers on the bridge, and the “shares laptop” and the “crew laptop” in the back of the store, have time clock applications that can be used to clock in and out. (Tr. 138, 327). The shares laptop is attached to the wall at the back of the store near the emergency exit. (Tr. 326, 504). It is used by crew members to process unsaleable inventory that can be donated to charity.⁵ (Tr. 139-140, 503). Employees also have use of a crew laptop which is not fixed to a wall or desk and may be moved around in the store. (Tr. 140, 326, 504).

Clock records show that most employees clock in and out at the tablet on the bridge, but that some also use the computers inside the bridge, or the laptops at the back of the store. (GC Exh. 13(a)-(d)). Respondent’s handbook refers to employees clocking in at a “timekeeper terminal” and does not mention the time clock applications on the store’s computers. (R. Exh. 1, p. 24). Both Mate Brodbeck and Captain Todd acknowledged that mates sometimes invited employees to clock out on the bridge computers when there was a line to clock out at the tablet, or the tablet was broken. Mate Brodbeck testified that he trained employees to clock in and out using the tablet on the bridge and never saw anyone other than Smith use the shares laptop. (Tr. 601-603). Captain Todd testified that he instructed new employees to clock in and out on the tablet at the bridge and did not discuss the time clock applications on the other computers during orientation. He testified that he would “prefer” that employees not clock in and out on the

⁵ Some witnesses also referred to the shares laptop as the “crew kiosk.” For clarity, when I use the term “shares laptop,” I am referencing the laptop affixed to the wall at the back of the store, and not the movable laptop.

laptops when the dedicated time clock tablet was functioning and said that “we’ve asked them not to,” but when pressed further, he was not sure if he ever communicated this to employees and instead testified that the “message was just in the store in general.” (Tr. 507-508, 584).

5 **1. Testimony from Brodbeck and Smith about the events of February 2**

10 Brodbeck testified that on February 2, he went through the double doors between the front and back of the store and witnessed Smith clocking in on the shares laptop, which was visible from the doors. (Tr. 605-607). Smith did not recall whether he used the shares laptop to clock in from lunch that day. (Tr. 242). Time clock records confirm that he clocked in on the shares laptop at 5:33 PM on February 2. (GC Exh. 13(a), p. 2).

15 Brodbeck testified that he then saw Smith go down the hallway to the employee lockers. (Tr. 607). He said he was not “really watching” Smith at this point but saw Smith do “things at his locker.” (Tr. 608). Smith testified that he “didn’t use the lockers [after the graffiti incident], so I don’t recall taking anything to a locker,” and explained that if he had personal belongings, he used a coat hook next to the lockers instead. (Tr. 242, 296). Smith testified that “to his knowledge,” he did not put his coat away after clocking in but admitted that he could not remember whether he did or not, and faulted Brodbeck’s failure to call his attention to the matter until late in his shift for his memory lapse. (Tr. 356-357). I credit Brodbeck, as Smith was admittedly unable to recall what happened. Even if Smith used a coat hook instead of a locker, this does not discredit Brodbeck’s testimony, because the hooks were next to the lockers.

25 Brodbeck testified that around 7:00 PM on that same shift, he was in the back of the store, facing the double doors and waiting for Mate Akers to take over for him, when Smith walked into the back of the store and told Brodbeck he was taking a ten-minute break. Brodbeck testified that he looked at the clock and noted that it was 7:03 PM. He continued to wait for Akers, who came into the back of the store around 7:15 PM, over ten minutes after Smith told him he was going on break. He asked Akers to let him know when Smith came back from break, then went on his own lunch break. When he returned from lunch, he asked Akers when Smith returned from his break, and Akers responded that he returned at about 7:19 PM. (Tr. 613).

35 Smith testified that he was relieved a “couple minutes past 7:00” from the register, and “went straight to the back room” and checked in with Mate Akers. He told Akers he was relieved late and received his next assignment. (Tr. 243-244). Smith testified that he skipped his break, and that this was something he frequently did during the week, because he felt he did not need one when the store was slower. (Tr. 246-247). Smith testified that Brodbeck was not present when he checked in with Akers. (Tr. 258, 262). Mate Akers did not testify.

40 Brodbeck wrote an entry about the incident in Dayforce, stating in part, “When Zach came back from his lunch, he clocked in on the shares computer and then went back to his locker to take off his jacket and then went to the floor. At 701P Zach went on his 10min break. I checked my watch to see what time it was. When Keith came back to relieve me for my lunch at 715, Zach had not returned and I let Keith know. Keith spoke with Zach when he checked in at 720 and Zach said he was relieved late from register.” (Tr. 616-618, GC Exh. 10). Brodbeck testified that the Dayforce entry was more likely to be correct than his testimony, because he made the entry at the time of the event. (Tr. 618-619).

Although both witnesses had specific and detailed testimony about whether Smith took an extended break, Smith's poor memory regarding the clock-in procedure he followed just two hours before, when contrasted with Brodbeck's ability to recall all of the pertinent events, leads me to credit Brodbeck's version of events over Smith's, especially when Smith's testimony relied partly on his usual practice of not taking a break during the week. The small (and explained) difference between Brodbeck's testimony and the Dayforce entry did not harm his credibility. And, although crew member Hovey testified that he never saw Smith take an extended break, Hovey was not present on February 2 and could not say what happened that day.

2. Brodbeck counsels Smith

Brodbeck waited until the end of Smith's shift to counsel him. He testified that he did not say anything to Smith when he clocked in because he had never seen anyone clock in at the shares laptop before and had to check with another mate to verify that this was "not something we do." (Tr. 610-611). Brodbeck told Smith he should clock in and out at the bridge, and that Smith countered that other employees used the shares laptop. Brodbeck also told Smith that he went over on his break. (Tr. 258-259, 614-615). Smith and Brodbeck differ on the next point, with Smith testifying that he told Brodbeck that he did not take a break, and Brodbeck testifying that Smith told him he was relieved late from the register. Both agree that Smith questioned Brodbeck about whether he timed the day shift employees on their breaks. (Tr. 260, 370).

Brodbeck's Dayforce entry states that he spoke with Smith at "9:50...He said that a lot of people use the back computer for clocking in and out. I told him the expectation is to clock in and out at the time clock at the bridge and to be ready for work when you clock in. He smirked when I told him this. I also told him that a 10 min break is a 10-minute break. I told him that he went to break at 7:01 and didn't check in with Keith till 7:20. He said he was relieved late. I let him know that I checked my watch at 7:01 when he went on break. I told him that if he is relieved late he should check in with a mate to let them know. He asked in a terse tone, 'does morning crew get timed breaks as well?' I said yes, and he said 'I'll have to check on that.' I then repeated, 'A ten-minute break is a ten minute break.'" (GC Exh. 10).

Brodbeck testified that he did not recommend that Smith be disciplined. (Tr. 619).

D. Respondent disciplines Smith on February 20

As Smith was leaving work on February 19, he observed crew member Patterson clocking out on the shares laptop. Time clock records show that Patterson clocked out on the shares laptop at 10:01:18 PM. (GC Exh. 13(a)), p. 2). Smith testified that he told Patterson that he had been instructed not to use the laptop to clock out. Patterson told him she was not aware of this rule. Smith testified that he then "clocked out on the same shares computer to test my theory if they were targeting me specifically." (Tr. 266-267). He clocked out at 10:02:38 PM, about a minute and a half after Patterson. (Tr. 593, GC Exh. 13(a)), p. 2).

A February 20 entry in Dayforce under the name "Yass #628" states: "Zach clocked out for the night on the back laptop after he was told by Micheal that the expectation is to use the

time clock or bridge computers.” (R. Exh. 4). Brodbeck testified that the store had a mate named Yass Shapoory at this time, but he did not know how Shapoory knew he counseled Smith. (Tr. 621). Smith testified that he did not see Mate Shapoory (or any other supervisors) when he clocked out. (Tr. 367). Shapoory did not testify.

5

The following day, on February 20, 2023, Smith received an incident report stating:

10 Zach, on 2/2/23 you were provided feedback regarding not being clocked in and ready to work by clocking in from your lunch and then proceeding to your locker to put your belongings away. The expectation has always been for all crew to be ready to work prior to clocking in.

15 On 2/2/23 you were provided feedback regarding 10-minute breaks. You went on break at 7:01pm and did not return to check in with the product team leader until 7:20pm, thus taking a paid 19-minute break. You failed to communicate with the leadership team that you took an unauthorized extended break. It is an expectation for every crew member to communicate with the leadership team so we can support store's needs and to be working during working time.

20

On 2/2/23 you were provided feedback regarding clocking in at the crew member laptop in the back room. Store leadership let you know that it is a requirement for all crew to punch in and out at the time clock at the bridge, not the laptop in the back room.

25

On 2/19/23 despite being told on 2/2/23 to discontinue clocking in and out at the shares computer, you clocked out at 10:02pm using the laptop in the back room. Your actions lack integrity and have proved to be insubordinate. **This is a final warning.** Any further incidents will result in further disciplinary action up to and including termination of employment.

30

(Tr. 87, GC, Exh. 7) (emphasis added).

35 Smith received the write-up during a disciplinary meeting in the store's wine shop. Smith, former Captain Wood, Mate Brodbeck and Mate William Schlopy were present. (Tr. 271). Smith testified that after he received the discipline, the managers asked him to sign it, but he declined unless he could see evidence of a rule prohibiting employees from clocking in and out at the shares laptop, which they did not provide. (Tr. 270-272). Smith also told the managers that he was unaware of any other employee being disciplined for using the shares laptop to clock in or out, specifically mentioning Patterson. Wood told him that the discipline was about him, and Smith responded that he did not see how the managers could pick and choose who to discipline. (Tr. 275-277).

40

45 Brodbeck testified that he did not write the incident report, and it was not his decision to administer it. (Tr. 624-625). He further testified that no one asked him whether the incident report should be issued, and that he would have to talk with Wood about why he issued the discipline before he could offer an opinion on whether it was issued for valid reasons. (Tr. 626).

Brodbeck denied that the Union played any role in his interactions with Smith but testified that he could not speak for Captain Wood or any of the other mates. (Tr. 640-641).

Former Captain Wood did not testify at the hearing. Respondent introduced a Dayforce entry with Wood's name on it stating that Smith was "deflective" during the disciplinary meeting and "claimed he was being targeted." (R. Exh. 4). Current store captain Travis Todd testified that he was not involved in issuing the discipline to Smith. (Tr. 526). He further testified that he does not use the term "final warning" when issuing discipline and that the term was not something he had ever been directed to use by Respondent. (Tr. 590).

E. Events occurring after February 20

The Union filed an unfair labor practice charge on February 21, 2023, alleging that Smith was unlawfully disciplined in retaliation for his union and concerted activity. (GC Exh. 1(a)).

1. Hovey and Smith discover emails between store management and in-house labor counsel for Respondent on store computer

On January 27, 2023 (a few days after the representation election), the following notice was posted on the break room door, addressed to employees of Store #628 from Nancy Inesta, who at the time was Trader Joe's Deputy General Counsel for Labor Issues:

To the extent that you have any HR-related questions that you would have previously directed to Trader Joe's Human Resources Department, going forward please instead contact me at 626-____-____ or _____HRquestions@____.com.

(Tr. 194-195, GC Exh. 9) (full contact information redacted). Crew member Hovey provided undisputed testimony that the notice was posted for several months after the election. (Tr. 196).

Store captain Travis Todd testified that he contacted Inesta for legal advice and guidance about union matters. (Tr. 426). He acknowledged that crew members were told to contact her about HR-related matters, and that he also used her as a point of contact for human resources but saw "all HR related matters" as "legal related matters." (Tr. 443-444). Prior to April 2023, he and the store's mates used the store's general email account to contact Inesta. This email account is accessible to all mates and crew members by opening the Outlook email program on the computers on the bridge. Some crew members use the store's email account to send and receive job-related emails as part of their regular job assignments.

Captain Todd created a rule to send any emails between Inesta and store management to a folder titled "maintenance feedback" in an attempt to keep them private. This folder was originally created for emails with contractors about store maintenance. (Tr. 427-428). Todd did not limit access to the folder or protect it with a password and testified that he did not know how to do that. (Tr. 454). He believed the emails would remain private because no crew members had responsibility for sending or receiving emails regarding store maintenance.

In April 2023, Hovey and Smith were alerted by another crew member that there were emails in the maintenance feedback folder that referenced Smith. Hovey waited until there were no mates on the bridge, accessed the emails and took screenshots of them with his mobile phone camera. (Tr. 337). He had to open the maintenance feedback folder to access the emails but testified that the folder was visible in Outlook when he opened the program. He did not need a password to open the folder or the emails inside it. (Tr. 191, GC Exh. 8 (SEALED)).

On April 12, Smith sent the documents to Respondent's regional corporate office, outlining his concerns that he had been subjected to "targeted retaliation based on my union stance and approximation to union organizers." (Tr. 279-280, GC Exh. 8(a)). He testified that he was prompted to write the letter because he believed Respondent planned to fire him. (Tr. 283). In his message, he said that he found a string of emails between Mate Christi Campbell and "lawyer for the company, Nancy Inesta concerning myself and other pro-union crew members" along with a "list of incidents" and statements that led him to believe that Respondent was planning to fire him without giving him a chance to give his side of the alleged events. (GC Exh. 8(a)).

After Smith sent the screenshots of the emails to the corporate office, Captain Todd and Mate Akers had a short meeting with him and asked how he got the documents. However, they did not caution him against distributing them further or tell him that they were privileged. (Tr. 373-374, 435-436). Todd testified that the emails were deleted from the maintenance feedback folder, and he now communicates with the regional office and headquarters through a store captain account that only he can access.

2. Removal of union flyer in May 2023

In May 2023, after the NLRB Hearing Officer issued her report on Respondent's objections to the election, the Union posted a flyer about the report in the break room. Crew member Hovey testified that he saw Mate Brodbeck carry the flyer face down against his leg (with the Union logo visible through the paper), show it to other supervisors at the bridge, and then bend down near the paper shredder. Hovey later opened the shredder and saw the flyer on top of the other shredded documents. (Tr. 105-106). Brodbeck admitted removing union literature from the break room but could not recall what the flyer said. (Tr. 655). This incident was not alleged in the Complaint and was offered as background evidence of animus.

3. Smith's July performance rating

In July 2023, Smith received his performance review. He got an overall rating of "needs improvement," and the comments on the review mentioned the February incident report, as well as counseling he assertedly received in March 2023 over his work attire and a customer complaint. These incidents (and their inclusion in the review) were not alleged in the Complaint, which the Acting General Counsel has not moved to amend. Smith has been rated as "meets expectations" in all his reviews since July 2023. (GC Exh. 12).

ANALYSIS

The Complaint alleges that Respondent disciplined Smith on February 20, 2023, in retaliation for his union activity. The General Counsel bears the initial burden of proving that (1) Smith engaged in union or other protected activity; (2) Respondent knew about that activity, and (3) the employer had “animus against union or other protected activity.” See *Intertape Polymer Corp. and Local 1149, UAW*, 372 NLRB No. 133, slip op. at 7 (2023), enfd. mem., 2024 WL 2764160 (6th Cir. 2024), citing *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If the General Counsel provides evidence “sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision,” the burden shifts to the employer to show it would have taken the same action in the absence of the employee’s protected activity. *Id.*

I. The February 20 incident report

I find that the February 20 incident report was issued in retaliation for Smith’s support for the Union and his participation in protected activities. Smith was disciplined for clocking out on the shares laptop even though Respondent maintained a time clock application on the laptop and had no established rule against using the shares laptop as a time clock. Smith was treated differently than other employees who clocked in on the shares laptop, and Respondent reacted in an inexplicably harsh manner and against its usual practice by issuing him a “final warning” and disciplining him on February 20 for taking an extended break and punching in before putting away his coat on February 2, even though he had already been counseled for that conduct and there was no evidence it was repeated. The lack of legitimate grounds for the discipline convinced me that Respondent was motivated by animus when considered in light of the disparate treatment of Smith, the timing, and Respondent’s increased supervision of Hovey, who was closely associated with Smith.

A. Activity and knowledge

Smith’s union activity, and Respondent’s knowledge of that activity, is clearly established, with Mate Brodbeck and Captain Todd both admitting that they knew of his activity, and Brodbeck testifying that he knew of Smith’s involvement because of his association with lead organizer Hovey. This case now turns on whether the Acting General Counsel has established that Smith’s protected activity was a “motivating factor” in Respondent’s decision to discipline him. See *Intertape Polymer Corp.*, supra, 372 NLRB No. 133, slip op. at 7.

B. Evidence of animus

It is not necessary to provide evidence of “a proverbial smoking gun” to show that the discipline was retaliatory, as such evidence “is seldom obtainable.” *Id.*, slip op. at 14, quoting *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 8 (2019) (internal quotation marks omitted). The Board has consistently found that “animus and a causal connection may be ‘inferred from circumstantial evidence based on the record as a whole.’” *Id.* Factors that may be considered include “the timing of the action in relation to the union or other protected conduct...shifting, false, or exaggerated reasons offered for the action; failure to conduct a

meaningful investigation; departures from past practices; disparate treatment of the employee; and reliance on pretextual reasons for the action.” *Id.* It is not necessary to “produce separate or additional evidence of particularized animus toward an employee’s own protected activity or of a causal “nexus” between the protected activity and the adverse action to meet her burden.” *Id.*

5

The Acting General Counsel can also establish discriminatory motive by showing that the justification for the discipline is pretextual. See *Id.*, slip op. at 7 (quoting *Wright Line*, supra, 251 NLRB at 1088 n.12, for its holding that “the absence of any legitimate basis for an action...may form part of the General Counsel’s case,” and *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (“If [the trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal--an unlawful motive--at least where . . . the surrounding facts tend to reinforce that inference.”)).

10

15

1. Respondent did not have an established rule against using the time clock application on the shares laptop

The computers on the bridge and the laptops in the back of the store have time clock applications that employees can access. By putting these applications on the computers and connecting them to its timekeeping system, Respondent gave employees implicit permission to use them. There is no evidence that employees were told that they should not use the applications or should only clock in and out at the tablet on the bridge before Smith was counseled on February 2. Crew member Hovey testified he never received this instruction. Mate Brodbeck and Captain Todd testified that they told new employees to clock in and out at the bridge, but there is no evidence that this was communicated to everyone, or that they told employees that they were prohibited from clocking in and out elsewhere. Captain Todd admitted that while he would “prefer” that employees only use the tablet, he did not think he ever communicated this directly and instead believed the “message was just in the store in general.” (Tr. 584).

20

25

30

The lack of an established rule is further demonstrated by the fact that Respondent’s own supervisors did not know whether there was one. Mate Brodbeck admitted that he had to ask Mate Akers whether employees should clock in at the shares laptop before he could counsel Smith about it. And a Dayforce entry shows that on January 20, 2023, just twelve days before Smith was counseled, Mate Yass observed crew member Patterson, “laden with bags and personal belongings, use the laptop in the back to clock out.” Yass did not prohibit her from using the shares laptop and instead only “asked her if, in the future, if she was going to use the back laptop to please gather her belongings after clocking out.” (GC Exh. 14, p. TJ032).

35

2. Evidence of disparate treatment

Disciplining a known union supporter, but not other employees who engaged in the same conduct, is “strong evidence” that the discipline was motivated by animus. See, e.g., *Constellium Rolled Prods. Ravenswood, LLC*, 371 NLRB No. 16, slip op. at 4 (2021) (suspension and discharge of union supporter for writing profanity on sign-up sheet was evidence of discriminatory motive when record showed the use of profanity and graffiti was commonplace and tolerated by management); *Mondelez Global, LLC*, 369 NLRB No. 46, slip

40

45

op. at 3-4 (2020) (unexplained decision to target union supporters for discipline for alleged time card falsification, but not disciplining others with more offenses, was evidence of animus); *Wendt Corp*, 369 NLRB No. 135, slip op. at 4 (2020) (“circumstantial evidence of animus under *Tschiggfrie Properties* is clearly established by disparate treatment [of union supporter]”), citing
 5 *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001) (disciplining union supporter and not others for failing to maintain log supported a finding that discipline was motivated by animus).

a. Other employees used shares laptop without consequence

10 Time clock records from January through April 2023 show that it was not uncommon to use the shares laptop as a time clock. (GC Exh. 13(a)-(d)). Smith clocked in or out on the shares laptop eight times between January 29 and February 19. Several other crew members also clocked in or out using the crew laptop in January and February, including crew members
 15 McCullough and Rightmyer (who each used it once), Pacheco and Schniepp (twice), Kemper (five times), and Valdez (thirteen times). Crew member Jobe used it once in January and was the only employee to use the shares laptop as a time clock after February 19, using it once on April 3, 2023. Crew member Patterson clocked in or out on the shares laptop over sixty times in January and February. Her last clock-out was on February 19. (GC Exh. 13(a)-(b)).

20 There is no evidence that anyone was counseled about using the shares laptop before Smith. As previously noted, crew member Patterson was observed using the shares laptop to clock out and was counseled about gathering her belongings on the clock- but not about using the shares laptop. She clocked out at about the same time as Smith on February 19 but was not instructed to stop using the shares laptop until after Smith was disciplined. Dayforce entries
 25 show that supervisors spoke to crew members Valdez, McCullough, Patterson, and Pacheco on February 20, 2023, and told them to use the time clock at the bridge instead of the shares laptop in the future. (GC Exh. 14). The failure to address the fact that other employees were also clocking in and out at the shares laptop until after Smith was disciplined suggests either that there was no rule in place, or that Respondent was singling Smith out.

30

b. Smith was treated more harshly than other employees

A Dayforce entry from February 20, signed by former Captain Craig Wood, shows further disparate treatment of Smith. It states:

35

Mate Bobby and I sat down with [Patterson] to ask about a couple of things that were brought to our attention. 1st I was informed that some crew were punching in and out from the crew kiosk in the back room. I asked if she was doing this. Connie said yes. I said it has always been a requirement that
 40 all crew only clock in and out at the bridge. She apologized and said that she understands. 2nd, I asked if she could recall the closing night of 2/10/23 and if she communicated with leadership when she was taking a 10 min break. Connie was able to recall who covered her break (Crew member Connor) Connie did admit to not communicating to any leadership that she was taking her break. I then explained the importance of communication as
 45 our team leaders are planning for store needs throughout the entire day and

need crew member team support and effective communication is the expectation.” (GC Exh. 14).

Based on this entry, as well as Mate Yass’ January entry about Patterson, it appears that
 5 Patterson not only clocked in and out at the shares laptop but also gathered her personal items
 while on the clock and failed to communicate with supervision when she was on a break. But
 unlike Smith, she was merely counseled and not disciplined for this conduct.

10 **c. Other employees were treated more leniently even after Smith was
 disciplined**

On February 21, 2023, the day after Smith received his incident report, Mate Shapoory
 noted in Dayforce that crew member Agnew clocked in before putting his belongings away. She
 made another entry a week later, on February 28, stating that he was counseled again for the
 15 same thing. There is no evidence that he received an incident report or was otherwise disciplined.
 Dayforce entries also show that managers spoke to crew member Washington on December 16,
 2023, and at least five times in 2024, including January 4, March 6, July 23, August 29 and
 October 11, about punching in without putting her belongings away first and not being ready to
 work immediately after punching in. However, there is no evidence she ever received an incident
 20 report, despite also being counseled for being late and being in the break room when she was
 supposed to be working. (GC Exh. 14, p. TJ031-032).

3. **Deviation from past practice**

25 A departure from usual disciplinary policies and harsher enforcement of those policies
 against an employee who participates in protected activity is evidence that a disciplinary action is
 pretextual. See *Stoddy Co., Div. of Thermadyne, Inc.*, 312 NLRB 1175, 1183 (1993). Wood’s
 choice to call Smith’s incident report a “final warning” was harsher than Respondent’s normal
 practice and raises an inference that he was motivated by animus, as current Captain Todd
 30 credibly testified that he did not use that term and had not been trained to do so.

In addition, Wood’s decision to discipline Smith on February 20 for taking an extended
 break and failing to put his belongings away before clocking in on February 2, even though he
 was already counseled for it on February 2, punished him twice for the same offense and was an
 35 unexplained departure from Respondent’s normal disciplinary procedures. Captain Todd testified
 that incident reports are typically given for “repetitive behavior that we’re looking for an
 adjustment on,” and that if an employee took a long break he would usually handle it by asking
 them to come back “and be part of the team again” if it was the first occurrence and would
 consider discipline only if the behavior continued. (Tr. 500, 517-518, 520).

40 Mate Brodbeck testified that he timed breaks for other employees and counseled them for
 going on break for longer than ten minutes. He specifically mentioned counseling crew member
 M. Delahanty and reminding her that a “ten-minute break is a ten-minute break” when he noted
 that she went over on her break by four minutes. (Tr. 648). His testimony is corroborated by
 45 Dayforce records, which show that someone (the entry is unsigned) had a conversation with
 Delahanty about taking a long break from 5:03 to 5:17 PM on February 25, 2023 (after Smith

was disciplined), and used the phrase, “A ten-minute break is ten minutes.” Dayforce records also reflect that Brodbeck counseled crew member E. Gadlage on January 26, 2023 (before he similarly counseled Smith) and told her “a 10-minute break is 10 minutes.” (GC Exh. 14, p. 3).

5 The Complaint does not allege that Brodbeck’s February 2 counseling of Smith was retaliatory, so there is no need for me to decide whether it was. However, there is evidence that employees are typically only counseled for taking extended breaks or punching in before putting their belongings away. Captain Wood’s decision to issue Smith an incident report for that same conduct when he had already been counseled for it, and there was no evidence that he repeated it,
10 was inconsistent with Respondent’s normal practices.

 Captain Wood and Mate Brodbeck were unable to explain why the February 20 incident report was issued. Brodbeck testified that he did not recommend discipline for Smith, and that Captain Wood did not consult him on the decision to issue Smith an incident report. An
15 unexplained decision to increase the severity of a disciplinary action is evidence of a discriminatory motive, and I find that the decision to discipline Smith for conduct that he was counseled for on February 2 is evidence of animus and pretext. See *Lucky Cab Co.*, supra, 360 NLRB at 274 (2014) (unexplained decision to fire employee after previously suspending him for the same conduct was evidence of unlawful motive).

20 **C. Conclusion**

 Based on the above, I find that Respondent lacked a legitimate reason for issuing the discipline, and that based on the treatment of Smith in comparison with other employees, the
25 timing of the discipline a few weeks after the election, and Hovey’s testimony that he was closely watched by supervision during this time, I find that it is reasonable to infer that Smith was disciplined because of his Union activities. See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 274 (discipline of one employee two weeks after organizing drive began and of another employee three weeks after union filed election petition was evidence of animus toward the employees’
30 union activity). See also *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 5 (2019) (factfinder may determine that discipline was motivated by animus when reason behind it was pretextual and the facts support an inference that the true reason was retaliation for union activity), citing *Shattuck Denn Mining Corp.*, supra. I carefully considered whether such an inference is appropriate given the fact that Smith received a positive performance review in
35 January 2023, after supervisors were aware of his union activity. While this shows that Respondent was not targeting Smith in every aspect of his work life, it does not overcome the evidence cited above that Smith was disciplined because of his support for the Union.

40 **D. Respondent did not meet its defense burden**

 Because I have found that Respondent’s stated reasons for disciplining Smith are not supported by the evidence, Respondent cannot show that it would have disciplined him even in the absence of his union or other protected activity. “A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby
45 leaving intact the inference of wrongful motive established by the General Counsel.” *Intertape Polymer Corp.*, supra, 372 NLRB No. 133, slip op. at 16, citing *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981) (additional citations omitted).

Further, the Board has held that an employer cannot meet its defense burden under *Wright Line* when the “evidence affirmatively shows a lack of consistency in the employer’s application of its disciplinary rules.” *Starbucks Corp.*, 374 NLRB No. 8, slip op. at 6 (2024),
 5 citing *Publix Supermarkets*, 347 NLRB 1434, 1438-1439 (2006) (internal quotation marks omitted). Respondent’s decision not to call Captain Wood to testify also prevents it from proving that the incident report was justified, as Respondent failed to offer any evidence about why
 10 Wood issued the discipline or whether he was motivated by union animus when he decided to issue it. See *Starbucks Corp.*, 360 NLRB 1168, 1171 (2014) (finding the failure to present testimony from a decision maker fatal to establishing a *Wright Line* defense.)

II. Events after February 20

15 The Complaint does not allege that Respondent took any retaliatory action against Smith after February 20. Therefore, I have analyzed the events after that date only to determine whether they shed light on Respondent’s motive for the February 20 discipline or the appropriate remedy.

A. Emails in “maintenance feedback” folder

20 Respondent opposed the introduction of the emails attached to General Counsel Exhibit 8 and asserted that they were protected by attorney client privilege. At the hearing, I ruled that they were not privileged but placed the exhibit under seal to allow Respondent to file a special appeal with the Board. Respondent’s appeal was referred to the Chief Administrative Law Judge because the Board currently lacks a quorum. The motion was denied on July 15, and a Motion
 25 for Reconsideration was denied on December 1, 2025.

1. The emails were not protected by attorney-client privilege

30 The burden to establish privilege is on the party asserting it, and any ambiguities are construed against the party making the claim. See *EEOC v. BDO USA, LLP*, 876 F.3d 690, 695 (5th Cir. 2017). Because assertion of the privilege may obstruct “the search for the truth and because its benefits are, at best, ‘indirect and speculative,’ it must be ‘strictly confined within the narrowest possible limits...’” See *Maldonado v. New Jersey*, 225 F.R.D. 120, 127–28 (D.N.J. 2004), citing *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir.1979).

35 The emails at issue were between one of Respondent’s lower-level supervisors, Mate Campbell, and its in-house labor counsel. They were sent and received from a general email account that any crew member could access and were not marked as privileged or confidential. Although Captain Todd tried to shield the emails by placing them in a folder that he did not think
 40 crew members would have reason to open, he did not mark the folder as private or take any steps to limit access to it, such as adding a password.

45 It is undisputed that Inesta was serving not only as in-house counsel, but also as a point of contact for human resources. A company can shelter advice given by an in-house counsel serving in a dual, non-attorney role “only upon a clear showing that [the advice was given] in a professional legal capacity.” See *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984). In fact,

such a showing is required even when in-house counsel is not serving a dual role. See *In re Google, Inc.*, 462 F. Appx. 975, 978 (Fed. Cir. 2012). The lack of any indication in the emails that they sought or contained legal advice and the failure to mark them as confidential or privileged strongly weighs against finding that they were privileged.

5

Further, although Respondent did try to protect the emails, they were sent and received from a general account that any employee could access without a password. Simply forwarding the emails to a folder was not a reasonable precaution, especially when Respondent failed to mark them as confidential or privileged. See *S.E.C. v. Cassano*, 189 F.R.D. 83, 85 (SDNY 1999) (regarding an internal memorandum that was inadvertently disclosed, the court noted “it is difficult to understand why this document, given its sensitive nature, was not stamped ‘confidential’ or ‘privileged’”). Compare *E.B. v. New York City Bd. of Educ.*, CV 2002-5118, 2007 WL 2874862, at *7 (E.D.N.Y., Sept. 27, 2007) (privilege preserved when document was stored in a shared computer folder that only authorized employees could access).

10

15

Finally, Respondent’s two-year delay in asserting the privilege was not reasonable. Even after Respondent knew that crew members accessed the emails, it took no steps to retrieve them, did not tell Smith or other crew members that the emails were privileged, and did not ask them not to distribute them further. In fact, Respondent presented no evidence that it ever raised a privilege claim with respect to the emails in General Counsel Exhibit 8 prior to the hearing. Such a delay “can prejudice the adversary and may be deemed a waiver.” *Prescient Partners L.P. v. Fieldcrest Cannon, Inc.*, 96 Civ. 7590, 1997 WL 736726 at *6 (S.D.N.Y. Nov. 26, 1997) (internal citations omitted). Once a party becomes aware that privileged material has been disclosed, “the relevant period for measuring whether the privilege has been waived” begins. See *In re Nat. Gas Commodity Litig.*, 229 F.R.D. 82, 87 (S.D.N.Y. 2005).

20

25

2. The emails are not relevant to the unfair labor practice allegation

Although I find that General Counsel Exhibit 8 is not privileged, I also find that it is not relevant. The Acting General Counsel did not make any argument in his brief linking the exhibit to the February 20 incident report, which is the only alleged unfair labor practice in this case. Instead, he argued that the emails were evidence that Respondent “continued” to target Smith, citing the performance rating he received in July, which contained comments about two alleged incidents involving Smith’s work attire and a customer complaint. The Acting General Counsel argues that these incidents were fabricated or exaggerated but did not allege them as unlawful in the Complaint. Unalleged conduct can serve as evidence of animus. See *Stoody Co.*, 312 NLRB 1175, 1182 (1993). However, the Acting General Counsel did not explain how the alleged incidents or the contents of General Counsel Exhibit 8 shed light on Respondent’s motive for issuing the February 20 discipline, and my review of the exhibit did not reveal anything that would either support or detract from my finding that the discipline was retaliatory.

30

35

40

3. General Counsel Exhibit 8 should remain sealed

I issued a Protective Order on April 9, 2025, which states that General Counsel Exhibit 8 shall be kept under seal while “Respondent’s appeal is pending before the Board.” I issued a Supplemental Protective Order on May 6 requiring the parties to file redacted briefs, and attach a

45

copy of the Supplemental Protective Order, if they wished to refer to the sealed exhibit in their briefs. That Order states that Exhibit 8 will remain “under seal until further notice.” To date, none of the parties have requested that I remove the seal. I have referenced the sealed exhibit only in general terms in this Decision and have not disclosed its substantive contents. I see no reason to remove the seal on General Counsel Exhibit 8, given its lack of relevance and the absence of any claim from the parties that keeping it under seal is limiting their ability to argue their cases. Therefore, the exhibit shall remain under seal unless and until the seal is lifted by the Board, by me, or by another Administrative Law Judge. The parties should continue to file any motions or briefs that disclose the substantive contents of the exhibit under seal, as directed by the May 6, 2025, Supplemental Protective Order in this case.

B. May 2023 removal of union literature

The Acting General Counsel argues that the removal of union materials from the break room is evidence of union animus. However, the record includes evidence of only one such incident, in May 2023. Smith was unlawfully disciplined in February 2023. The Board has found that conduct occurring after an adverse action can be used to establish that the earlier action was motivated by union animus. See *Dresser-Rand Co.*, 362 NLRB 1100, 1101, fn. 3 (2015), enf. denied 838 F.3d 512, 521 (5th Cir. 2016) (Board found that conduct that occurred a few days after a lockout demonstrated animus and shed light on the reason for the lockout). However, I find that Brodbeck taking down a flyer in May does not shed light on the motivations behind Smith’s discipline three months beforehand, especially when Brodbeck credibly testified that he did not recommend discipline or participate in drafting it. Further, the record is devoid of any evidence about Respondent’s posting policies and whether non-union flyers were also removed.

C. Smith’s July 2023 performance rating

In July 2023, Smith received a “needs improvement” rating, and as a result, did not receive a raise. He was rated as needing improvement in six separate categories, including three customer experience categories, “[b]eing professional in demeanor and dress,” treating “customers as welcome guests,” creating “energy and excitement for customers,” one teamwork category, “Works as directed. Builds knowledge over time. Collaborates and is a team player,” and two “values” categories, including “Does the right thing even when no one is looking. Demonstrates good character by treating others with courtesy and respect,” and “Works to continuously improve performance.” (Tr. 223, GC Exh. 12, TJ014).

The review states that on February 20, Smith received an “incident report which included not being ready to work at the start of your shift and taking extended breaks without communicating to leadership.” It further states that he received feedback on March 10 about “walking away from a customer at the register” and was counseled on March 10 and again on March 25 “wearing a sweater with the word ‘hate’ down the sleeves while on the clock” which “caused others to feel uncomfortable and does not support integrity.” (Tr. 224- GC Exh. 12, TJ014). The Complaint did not contain any allegations concerning the two March incidents or any independent allegations about the July rating.

When an employer “disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful.”

The Hays Corp., 334 NLRB 48, 50 (2001); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 787 (8th Cir. 2013) (finding that “[a]n adverse employment decision is unlawful if it relies upon and results from a previous unlawful action.”). This issue typically comes into play when an employer uses progressive discipline to issue a harsher penalty to an employee based on previous discipline that should not have issued because it was retaliatory in nature. See, e.g., *NP Red Rock, LLC*, 373 NLRB No. 67, slip op at 5 (2024) (final written warning when it was based in part on an earlier written warning that was given in retaliation for protected activity).

In his brief, the Acting General Counsel notes that the February 20 incident report was mentioned in Smith’s performance review but does not argue that Respondent would not have rated Smith as “needs improvement” absent the discipline. Instead, he argues that Respondent’s comments about the sweater and the customer complaint were not supported by the facts. Respondent’s references to the sweater and the customer complaint were not alleged as retaliatory, so there is no basis for me to decide whether Respondent was justified in including those incidents in Smith’s performance review. I am therefore left to consider the review and the record as a whole to determine whether there is enough evidence that Smith’s rating was lowered because of the February 20 incident report.

Captain Travis Todd testified that there is no set number of “needs improvement” categories that lead to an overall rating of “needs improvement,” and that the overall rating is based on an assessment of the employee’s performance as a whole. (Tr. 589). When Smith was asked whether he would have received a rating of “needs improvement” even if the only incident included in the review had been the counseling he received about the sweater, he testified that he believed the rating was “less about the hoodie and more about the embellishment of the customer complaints.” (Tr. 319).

The February 20 incident report is mentioned in the review, but the incident with the shares laptop is not. The comments about the incident report state only that Smith was not ready to work at the start of his shift and took an extended break without telling his supervisor. This takes up only one and a half lines of the comments section; there are four and a half lines devoted to discussing the sweater and the customer complaint. Since I have credited Brodbeck’s testimony that Smith took an extended break and punched in before putting his coat away on February 2, I can’t fault Respondent for including those incidents and can only find fault with the mention of the incident report itself.

Based on the above, I am unable to find that the incident report was the tipping point in lowering Smith’s rating from “meets expectations” to “needs improvement,” especially when at least three of Smith’s “needs improvement” ratings were in the “customer experience” category, and Smith himself testified that he believed his rating was based mainly on the customer complaint. While I understand that Smith strongly believes that the customer complaint was baseless, it was not alleged as such in the Complaint, so I have no basis to require Respondent to remove that comment or correct Smith’s rating on that basis.

There is insufficient evidence to recommend that Respondent be ordered to increase Smith’s rating. The only remedy I can recommend is for Respondent to rescind the incident report and remove any mention of it from its files, including from Smith’s July 2023 review.

CONCLUSIONS OF LAW

- 1. Trader Joe’s East, Inc. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 5 2. Trader Joe’s United (Union) is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By disciplining employees because of their support for and activities on behalf of the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.
- 10 4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

15 Having found that Respondent engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist from engaging in those practices and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent is ordered to rescind the incident report issued to Zachary Smith on February 20, 2023, remove from its files any reference to the unlawful discipline, and notify him in writing that this has been done and that the discipline will not be used against him in any way.

20

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁶

ORDER

25

Respondent Trader Joe’s East, Inc. and its officers, agents, successors, and assigns shall:

- 1. Cease and desist from
 - 30 (a) Disciplining employees because of their support for and activities on behalf of the Union.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - 35 (a) Rescind the incident report issued to Zachary Smith on February 20, 2023, remove from its files any reference to it, and notify him in writing that this has been done and that the discipline will not be used against him in any way.
 - (b) Within 14 days after service by the Region, post at its Louisville facility copies of

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice shall be mailed to all current employees and former employees employed by the Respondent at any time since February 20, 2023.

- (c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 5, 2025



Sarah Karpinen
Administrative Law Judge

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

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

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

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO

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

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

WE WILL NOT discipline you because you support or engage in activities on behalf of Trader Joe’s United or any other labor organization.

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

WE WILL within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discipline issued to Zachary Smith, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

TRADER JOE’S EAST, 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.nlr.gov.

NLRB REGION 9
550 MAIN ST
Room 3-111
CINCINNATI, OH 45202-3271
Tel: (513) 684-3686
Hours of operation: 8:30am – 5:00pm ET

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/09-CA-312856> 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, (513) 684-3733.