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

STARBUCKS CORPORATION

and

Cases 15–CA–304674
15–CA–305620
15–CA–304317
15–CA–321864

WORKERS UNITED

Aislyne Calianos and *Jordan Williams, Esqs.*,
for the General Counsel.
Michael Gotzler, Michael Yellin, and *Nina Neff, Esqs.*,
for the Respondent.
Michael Schoenfeld, Esq.,
for the Charging Party

DECISION

GEOFFREY CARTER, Administrative Law Judge. The Acting General Counsel asserts in this case that Starbucks Corporation (Respondent) violated Section 8(a)(3), (4), and (1) of the National Labor Relations Act (the Act) by taking the following actions in 2022, and 2023, because employees formed, joined, and assisted Workers United (Union) and engaged in concerted activities, and/or because employees participated in Board proceedings related to Case 15–CA–290336, et al.: changing its established past practice by implementing a stricter enforcement of its attendance and punctuality policy; and issuing disciplinary action on three occasions to shift supervisor Reaghan Hall for violating the attendance and punctuality policy. The Acting General Counsel also contends that Respondent unlawfully surveilled employees' union and protected concerted activities (in violation of Section 8(a)(1) of the Act), and unlawfully failed to notify and give the Union an opportunity to bargain over the decision and effects of the alleged change to Respondent's established past practices for enforcing the attendance and punctuality policy (in violation of Section 8(a)(5) and (1) of the Act). As explained below, I have determined that the Acting General Counsel did not prove that Respondent violated the Act as alleged in this case, and I accordingly have recommended that the complaint be dismissed.

STATEMENT OF THE CASE

The trial in this case was held in person on August 19–20, 2025, in Memphis, Tennessee. The Union filed the unfair labor practice charges in this case on the following dates:

Case	Filing Date	Amendment Date(s)
15–CA–304674	October 5, 2022	December 22, 2022 March 24, 2023 May 12, 2023
15–CA–305620	October 20, 2022	December 22, 2022
15–CA–307317	November 16, 2022	April 24, 2023
15–CA–321864	July 17, 2023	January 21, 2025

In an "order further consolidating cases, second consolidated complaint and notice of hearing" issued on April 2, 2025 (hereafter referred to as the consolidated complaint), and in further amendments to the consolidated complaint during trial,[1] the Acting General Counsel alleged that Respondent violated Section 8(a)(3), (4), and (1) of the Act by:

(a) on about September 24, 2022, changing its established past practice by implementing a stricter enforcement of its attendance policy because: employee Reaghan Hall and other employees formed, joined, and assisted the Union and engaged in concerted activities and to discourage other employees from engaging in those activities; and/or because Hall and other employees cooperated with the Board investigation in Case 15–CA–290336, et al. and/or testified in the Board-initiated hearing in Case 15–CA–290336, et al., and to discourage employees from engaging in those activities;

(b) on about September 24, 2022, issuing a documented coaching discipline to employee Reaghan Hall because: she and other employees formed, joined, and assisted the Union and engaged in concerted activities and to discourage other employees from engaging in those activities; and/or because she and other employees cooperated with the Board investigation in Case 15–CA–290336, et al. and/or testified in the Board-initiated hearing in Case 15–CA–290336, et al., and to discourage employees from engaging in those activities;

(c) on about January 3, 2023, issuing a written warning discipline to employee Reaghan Hall because: she and other employees formed, joined, and assisted the Union and engaged in concerted activities and to discourage other employees from engaging in those activities; and/or because she and other employees cooperated with the Board investigation in Case 15–CA–290336, et al. and/or testified in the Board-initiated hearing in Case 15–CA–290336, et al., and to discourage employees from engaging in those activities; and

(d) on about February 16, 2023, issuing a final written warning discipline to employee Reaghan Hall because: she and other employees formed, joined, and assisted the Union and engaged in concerted activities and to discourage other employees from engaging in those activities; and/or because she and other employees cooperated with the Board investigation in Case 15–CA–290336, et al. and/or testified in the Board-

[1] On the first day of trial, the Acting General Counsel (consistent with representations made in pre-trial communications), withdrew the allegations in pars. 6(c), 8, 9, 10(a), and 10(b) of the consolidated complaint. (Tr. 14–15.)

initiated hearing in Case 15–CA–290336, et al., and to discourage employees from engaging in those activities.

The Acting General Counsel also alleged in the consolidated complaint that Respondent violated Section 8(a)(5) and (1) of the Act by:

on about September 24, 2022, changing its established past practice by implementing a stricter enforcement of its attendance policy without prior notice to the Union and affording an opportunity to bargain over the change or its effects.

Respondent filed a timely answer denying these alleged violations in the consolidated complaint.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and Respondent,[3] I make the following

[2] The transcript and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: p. 1, l. 5: "Jeffrey Clark" should be "Geoffrey Carter"; p. 8, ll. 16, 23: "the offense" should be "a defense"; p. 9, l. 1: "cripples" should be "privileges"; p. 36, l. 12: "fruit" should be "proof"; p. 85, l. 9: "and" should be "and not the"; p. 110, l. 17: "pile" should be "file"; p. 116, l. 24: "pile" should be "file"; p. 131, l. 8: "Paul" should be "Hall"; p. 132, l. 22: "pile" should be "file"; p. 150, l. 11: "that's confusing" should be "what's confusing"; p. 160, l. 5: "(audio interference) too" should be "it's like they played a 2"; and p. 168, l. 15: "Objection" should be "No objection." I also note that on about November 21, 2025, Respondent filed a corrected set of exhibits that includes a more fully redacted version of R. Exh. 14. Agency staff should take appropriate steps to ensure that earlier versions of R. Exh. 14 are not disclosed to the public.

[3] Respondent raised several challenges to these proceedings under the U.S. Constitution, contending that: administrative law judge and Board member removal protections violate Article II of the Constitution; the Board's adjudication of private rights violates the Seventh Amendment right to a jury trial; and Board members improperly wield a combination of executive, judicial, and legislative functions in violation of the separation of powers and due process. (See R. Posttrial Br. at 57–63.) The Board rejected similar constitutional challenges (all but the last one listed) in *Commonwealth Flats Development Corp. d/b/a Seaport Hotel Boston*, 373 NLRB No. 142, slip op. at 1 fn. 1 (2024), and I am bound by that authority. Further, since ruling on Respondent's constitutional challenges could entail halting (at least in part) the operation of the agency, and such a step would be in tension with my duty to faithfully administer the Act, I deny Respondent's constitutional challenges with the understanding that federal courts will likely address the issues at some point in the future. See *National Association of Broadcast Employees & Technicians – Broadcasting & Cable Television Workers Sector of the CWA, AFL–CIO, Local 51 (NABET)*, 370 NLRB No. 114, slip op. at 1–2 (2021) (setting forth similar reasoning in declining to rule on a challenge to the constitutionality of the President's removal of the General Counsel and the appointment of an Acting General Counsel).

FINDINGS OF FACT[4]

I. JURISDICTION

Respondent, a Washington corporation with an office and place of business in Memphis, Tennessee, has been engaged in the business of operating retail coffee shops throughout the United States. During the 12 months preceding the filing of the consolidated complaint, Respondent derived gross revenues in excess of $500,000 and purchased and received goods at its Memphis, Tennessee, facility (located at 3388 Poplar Avenue – hereafter referred to as the Poplar and Highland store)[5] that are valued in excess of $5000 and came directly from points outside the State of Tennessee. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Respondent's employees and managers

Employees, also called "partners," at Respondent's stores work in the following roles (among others):

> Barista: A barista is responsible for preparation of hot and cold beverages, cash register transactions, store cleanliness, product merchandising and excellent customer service. A barista generally works fewer than 40 hours per week.
>
> Shift supervisor: A shift supervisor performs all the duties of a barista, as well as helping guide the work of others and assisting with ordering and accounting. . . . A shift supervisor generally works fewer than 40 hours per week.
>
> Store manager: The store manager is ultimately in charge of all store operations and directs the work of . . . shift supervisors and baristas. The store manager is responsible for personnel decisions, scheduling, payroll and fiscal decisions. A store manager is considered full-time and is generally scheduled to work at least 40 hours each week.

(*Starbucks Corp.*, 373 NLRB No. 53, slip op. at 6 (2024); see also Jt. Exh. 1 (pars. 3, 5) (noting that baristas and shift supervisors are not supervisors under Section 2(11) of the Act); Tr. 26, 80, 138.)

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

[5] Respondent also refers to the Poplar and Highland store as store 8345. (Tr. 96; GC Exh. 3.)

From 2020 through 2023, the following individuals served as store managers at the Poplar and Highland store:

Wanda Hubbard:	2020 through early 2021;
Amy Holden:	early 2021 through November 2021;
Elizabeth Page:	late 2021 through June 2022;
Alyson Hubbard:	early 2022; and
Erik Rocha:	about June 2022 through late 2023.

(Tr. 28, 30, 63, 97–98, 138–139; *Starbucks Corp.*, Case 15–CA–290336, et al., slip op. at 30 fn. 42 (Bogas, J.) (May 4, 2023) (noting that Holden left the Poplar and Highland store in November 2021);[6] see also Tr. 97–99 (explaining that from about early 2022 through about June 2022, Alyson Hubbard and then Rocha covered for Page as "proxy" managers but Page remained the store manager).) The parties have stipulated, and I find, that each of these store managers was a supervisor under Section 2(11) of the Act. (Jt. Exh. 1 (par. 4).)

From October 4, 2021 to January 1, 2023, Cedric Morton served as district manager for the Poplar and Highland store. District managers are the next managerial level above store managers in Respondent's hierarchy. The parties have stipulated, and I find, that Morton was a supervisor under Section 2(11) of the Act. (Jt. Exh. 1 (pars. 5, 9); Tr. 31.)

2. Respondent's corrective action policy

Respondent has maintained a corrective action (i.e., discipline) policy throughout the relevant time period. "Corrective action may take the form of a verbal warning, a written warning, demotion, suspension or separation from employment. The form of corrective action taken will depend on the seriousness of the situation and the surrounding circumstances. The evaluation of the seriousness of the infraction and the form of the corrective action taken will be within the sole discretion of Starbucks. There is no guarantee that a partner will receive a minimum number of warnings prior to separation from employment or that corrective action will

[6] I rely on Judge Paul Bogas' findings in Case 15–CA–290336, et al. here to the extent that the findings are relevant, with the understanding that the Board will make the final administrative decision on the merits of those findings since exceptions to Judge Bogas' decision are currently pending before the Board. See *Voith Industrial Services*, 363 NLRB 1020, 1020 fn. 2, 1024–1025 (2016) (administrative law judge relied on another judge's finding in an earlier case regarding successorship when the Board had not yet issued a decision in the earlier case); see also *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 393 fn. 1, 394–395 (1998) (same, where judge considered findings in earlier case as evidence of animus), enfd. 215 F.3d 1327 (6th Cir. 2000); *Detroit Newspapers*, 326 NLRB 782, 782 fn. 3 (1998) (same, where judge relied on finding in an earlier case that the strike at issue was an unfair labor practice strike), enf. denied on other grounds, 216 F.3d 109 (D.C. Cir. 2000). I emphasize that Judge Bogas' findings are only one part of the picture here; depending on the circumstances other evidence may carry more weight when I address the merits of each complaint allegation.

occur in any set manner or order." (*Starbucks Corp.*, 372 NLRB No. 122, slip op. at 8 (2023), enfd. in pertinent part, 159 F.4th 455 (6th Cir. 2025); see also Tr. 48 (explaining that corrective action steps include a documented coaching, a written warning, a final written warning, and termination); Tr. 140.)

3. Respondent's attendance and punctuality policy

Respondent has also maintained an attendance and punctuality policy that has remained unchanged throughout the relevant time period. That policy states, in pertinent part:

> A partner's reliability in reporting to work when scheduled and on time is essential to a store's efficient operations and in providing customers with the Starbucks Experience.
>
> If a partner cannot report to work as scheduled or will be late to work, the partner must call and speak directly with the store manager or assistant store manager with as much advance notice as possible prior to the beginning of the shift. If a manager is not in the store, the partner should notify the partner leading the shift. Leaving a message or note without first making reasonable attempts to directly contact a manager or the partner leading the shift is not acceptable. Sending an email or a text message is not an acceptable form of providing notice. . . .
>
> Failure to abide by this policy may result in corrective action, up to and including separation from employment. Some examples of failure to follow this policy include irregular attendance, one or more instances of failing to provide advance notice of an absence or late arrival, or one or more instances of tardiness.

(R. Exh. 2; see also Tr. 48, 70, 82, 90, 140.)

At the Poplar and Highland store, store managers gave employees a 5–minute grace period to clock in after the scheduled start of their shift without being marked tardy. Thus, if an employee's shift began at 10 a.m., the employee would not be tardy if they clocked in by 10:05 a.m. because that is within the grace period, but would be tardy if they clocked in at or after 10:06 a.m. (Tr. 48, 62, 75.)

4. Shift supervisor Reaghan Hall

In about September 2020, Reaghan Hall began working for Respondent as a barista at the Poplar and Highland store. In about March 2021, Respondent promoted Hall to the position of shift supervisor. (Tr. 25–26, 79.)

Early in her employment, Hall received a "Partner Guide" that included, among other information, Respondent's corrective action and attendance and punctuality policies. Hall signed an acknowledgement form on September 3, 2020, to affirm that she received the Partner Guide and would abide by the policies set forth therein. (R. Exh. 1; Tr. 80–82.)

In about 2021, store manager Amy Holden rolled out a document that included Respondent's attendance and punctuality policy as set forth in the Partner Guide. Hall signed a copy of that document. (See R. Exh. 3 (document including the attendance and punctuality policy; document includes a handwritten date of May 30 with Hall's signature but does not specify a year); Tr. 83–86 (Hall testimony that she signed a document like R. Exh. 3 in 2021, and that her signature is on R. Exh. 3).)

B. Union Organizing Campaign

1. January 2022: organizing campaign begins

On January 17, 2022, employees at the Poplar and Highland store publicly announced that they were launching a union organizing campaign. Shift supervisor Hall and five other employees signed a letter announcing the campaign. Hall also engaged in assorted other activity in support of the campaign in this timeframe and the months that followed, including serving as a member of the organizing committee, speaking to coworkers and customers about the campaign, posting on social media, wearing a union button, and coordinating a sit-in for customers to visit the store and show support for the campaign. (GC Exh. 2; Tr. 31–37, 106–108; see also Tr. 139–140.)

2. February 8, 2022: "Memphis 7" employee terminations

On about February 8, 2022, Respondent terminated seven employees (referred to by some as the "Memphis 7") from the Poplar and Highland store. Five of the seven terminated employees were members of the organizing committee. Hall, who was not terminated and was the sole remaining employee on the organizing committee, participated in picket lines on the sidewalk outside of the store to protest the terminations. (Tr. 35, 44, 137.)

3. June 9–10, 2022: Hall testifies in court hearing

Following the February 2022 employee terminations, the General Counsel[7] filed a petition for a temporary injunction under Section 10(j) of the Act. Hall testified as a witness for the General Counsel during the federal district court hearing on June 9–10, 2022, about the temporary injunction petition. (Jt. Exh. 1 (par. 7); Tr. 46, 98–99; see also Tr. 47 (noting that Hall also provided an affidavit to the General Counsel before the 10(j) hearing).)

4. June 14, 2022: union election

In a representation election on about June 7, 2022, a majority of employees in the proposed bargaining unit at the Poplar and Highland store cast ballots for the Union. Accordingly, on June 15, 2022, the Board certified the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

[7] During the time period addressed in the Findings of Fact, the National Labor Relations Board had a General Counsel (instead of an Acting General Counsel).

INCLUDED: All full-time and part-time baristas and shift supervisors employed by the Employer at its Store #8345 located at 3388 Poplar Ave., Memphis, Tennessee.

EXCLUDED: All store managers, office clericals, guards, professional employees, and supervisors as defined by the Act.

(GC Exh. 3; Tr. 31, 45; see also R. Exh. 10 (email referencing June 7 as the date that the Union began representing Poplar and Highland store employees).)

5. Collective bargaining

In an email dated June 14, 2022, a member of the Union's bargaining committee for the Poplar and Highland store contacted Respondent to demand bargaining for an initial contract and to request information. The Union proposed that bargaining sessions initially take place virtually. Hall, as a member of the bargaining committee, was listed as someone who signed the email and was aware that the email was sent. Respondent replied to the June 14 email on July 18, 2022, including preliminary responses to the information that the Union requested. (R. Exhs. 10–11; Tr. 109–113.)

At some point after these initial communications, a dispute arose nationally (involving most if not all stores that had unionized as of summer/fall 2022) about whether the Union and Respondent should bargain entirely in person as Respondent proposed or initially bargain virtually as the Union proposed. The Union and Respondent were not able to resolve their disagreement about this issue, and thus no meaningful bargaining for an initial contract occurred in 2022 at the Poplar and Highland store or any other store in the United States. (Tr. 109–110.)

C. June/July 2022: Rocha Becomes Store Manager

In about late June or early July, Erik Rocha began working as store manager for the Poplar and Highland store on a full-time basis. Soon after, shift supervisor Hall had a brief conversation with Rocha about the store and mentioned that there was an issue with time and attendance at the store. Hall also identified four employees who were having time and attendance problems.[8] Rocha promised to look into it. Periodically over the next few months, Hall spoke to Rocha again about time and attendance issues at the store and showed him examples in the daily records book (a ledger that shift supervisors use to make notes about store operations and issues that arise during their shifts). Rocha indicated that there needed to be a pattern with an employee's time and attendance for him to take corrective action, and that he would look into it. (Tr. 55–56, 72–74, 123–124; see also FOF, sec. II(I) (showing that Rocha later issued corrective action to each of the four employees that Hall mentioned, and also issued corrective action to other employees).)

On July 11, 2022, Rocha met with Hall to review a document for shift supervisors regarding five policies selected from the Partner Guide, including the attendance and punctuality

[8] Hall identified N., P., S., and Sh. as employees who had problems with time and attendance. (Tr. 52–53, 56, 72.)

policy.[9] Hall signed the document to confirm that she was responsible for: following the policies; ensuring that other employees working on her shift followed the policies; and communicating policy violations to the store manager. (R. Exh. 5; Tr. 88–89, 125.)

D. September 14, 2022: Hall Testifies in Unfair Labor Practice Trial

On September 12–16 and October 17–18, 2022, Administrative Law Judge Paul Bogas conducted an unfair labor practice trial in Case 15–CA–290336, et al. regarding, among other allegations, whether Respondent violated the Act when it discharged seven Poplar and Highland store employees in February 2022. Hall testified as a witness for the General Counsel in that trial on September 14, and also provided affidavits to the Board before the trial. (Jt. Exh. 1 (par. 8); Tr. 46–47.)[10]

Store manager Rocha did not have any involvement with the events at issue in Case 15–CA–290336, et al. or the federal district court proceedings regarding the General Counsel's petition for a temporary injunction. (Tr. 117–118; see also Findings of Fact (FOF), sec. II(B)(3), supra.)

E. September 24, 2022: Hall Receives A Documented Coaching

On September 24, 2022, store manager Rocha issued a documented coaching to shift supervisor Hall for violating Respondent's attendance and punctuality policy. The documented coaching stated as follows:

> Reaghan was scheduled at 9:00 a.m. on July 30 but did not arrive for their shift until 9:07 a.m.
> Reaghan was scheduled at 5:00 a.m. on August 14 but did not arrive for their shift until 5:11 a.m.
> Reaghan was scheduled at 4:30 a.m. on August 31 but did not arrive for their shift until 4:36 a.m.
> Reaghan was scheduled at 7:30 a.m. on September 5 but did not arrive for their shift until 7:40 a.m.
> Reaghan was scheduled at 4:30 a.m. on September 12 but did not arrive for their shift until 4:52 a.m.

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[9] The document also addressed the following policies: dress code; food and beverage credit; use of profanity; and personal mobile devices. (R. Exh. 5.) It is not clear whether Rocha presented this document to Hall and other shift supervisors in separate one-on-one meetings or in a meeting that Rocha held with a group of shift supervisors shortly after he started working at the store. (Tr. 87, 89; see also R. Exh. 4 (outline for Rocha's meeting with shift supervisors).)

[10] Judge Bogas issued his decision in Case 15–CA–290336, et al. on May 4, 2023, finding, inter alia, that Respondent violated the Act by terminating five of the seven employees identified in the complaint for that case. Exceptions to Judge Bogas' decision are currently pending on appeal to the Board. (Jt. Exh. 1 (par. 8); *Starbucks Corp.*, Case 15–CA–290336, et al., slip op. at 47–56 (Bogas, J.) (May 4, 2023) (finding that Respondent unlawfully terminated Florentino Escobar, Nabretta Hardin, Luis Sanchez, Kylie Throckmorton, and Emma Worrell, and recommending dismissal of the complaint allegations that Respondent unlawfully terminated Lakota McGlawn and Cara Nicole "Nikki" Taylor).)

> As stated in the Attendance and Punctuality section on page 27 of the Partner Guide, "A partner's reliability in reporting to work when scheduled and on time is essential to a store's efficient operations and in providing customers with the Starbucks Experience."

(Jt. Exh. 2(a).) In the conversation that took place when Rocha issued the documented coaching, Rocha told Hall that she was being written up for time and attendance, reminded her about the attendance and punctuality policy, and provided her with a copy of the documented coaching. Hall did not dispute that she arrived late on the dates listed in the documented coaching but suggested that some of the late arrivals could have resulted from a train slowing down her commute and/or from having to wait for another employee to arrive before entering the store (though she was not certain those issues caused the specific late arrivals listed on the documented coaching).[11] (Tr. 58–61, 126; see also Tr. 57, 62 (noting that Rocha did not have a prior verbal discussion with Hall about her attendance as a preliminary step before issuing the documented coaching).)

After finishing the discussion about the documented coaching, Rocha mentioned that another barista complained that Hall was making them feel unwelcome with bullying related to terminated employees (the Memphis 7) coming back to work. Hall responded that she prided herself on making sure that all employees felt included and comfortable, and said that because of her activity with the Union she did not want any employees to feel like she was biased. Hall added that she felt terrible if she made anyone feel unwelcome and would be careful not to make anyone else feel that way. (Tr. 61–62; see also Tr. 118–119 (noting that Respondent reinstated the "Memphis 7" employees).)

F. November 16, 2022: "March on the Boss"

In the late afternoon on November 16, a group of off-duty employees entered the Poplar and Highland store and joined on-duty employees in reading a list of grievances about working conditions to store manager Rocha (employees referred to this activity as a "March on the Boss"). Shift supervisor Hall was not on duty but was present when another off-duty employee read the grievances list. After reading the list of grievances, employees who were on duty left the store to go on strike, leaving Rocha as the only remaining employee who was still on the clock. (Tr. 37–39, 100–103, 142–144; see also Tr. 39, 101 (explaining that the employees asserted in their grievances that: the store had staffing issues due to employee callouts; Rocha failed to help employees when the store was understaffed; and that Rocha played favorites among employees at the store); Tr. 102 (Rocha was on duty and working at the store when employees went on strike).)

As previously noted, Respondent has an established rule that requires at least two employees to be in the store at all times (the "two employee rule"). When all other on-duty employees left the store to go on strike, Rocha exited the store after a few minutes and locked the

[11] For safety reasons, Respondent has an established rule of requiring at least two employees to be in the store at all times (the "two employee rule"). Thus, for example, an employee who is scheduled to open the store cannot enter the store alone due to the two employee rule, and instead must wait for a second employee to arrive. (Tr. 60–61, 93; see also *Starbucks Corp.*, 372 NLRB No. 122, slip op. at 2, 11–12 (discussing the two employee rule).)

front door since the two employee rule prohibited Rocha from staying inside the store by himself. Rocha then went to sit in his car in the store parking lot. (Tr. 60–61, 93, 103, 145; see also *Starbucks Corp.*, 372 NLRB No. 122, slip op. at 2, 11–12 (discussing the two employee rule).)

Meanwhile, the employees began picketing and chanting on the sidewalk in front of the store (the picketers were facing the street with the store and parking lot behind them). Employees could see Rocha sitting in his car and holding his cell phone as if he was sending text messages; occasionally, employees saw Rocha glance in the direction of the picketers.[12] Rocha remained in his car for a few minutes until a police officer arrived and spoke with Rocha. When district manager Morton arrived, Rocha and Morton entered the store and Rocha completed the tasks required to close the store. Employees concluded the picket line after about 1 hour. (Tr. 39–42, 103–105, 144–150, 152, 155.)

G. January 3, 2023: Hall Receives A Written Warning

On January 3, 2023, store manager Rocha issued a written warning to shift supervisor Hall for violating Respondent's attendance and punctuality policy. The written warning stated as follows:

> This serves as a written warning for Reaghan Hall.
>
> Previously Reaghan received a documented coaching for time & attendance on 9/24/22.
>
> On 10/23/22 Reaghan arrived 9 minutes late to their scheduled shift.
> On 11/16/22 Reaghan arrived 6 minutes late to their scheduled shift.
>
> [Summary of attendance and punctuality policy as set forth in the Partner Guide.]

(Jt. Exh. 2(b) (indicating that the written warning was created on November 18, 2022, and issued on January 3, 2023).) Hall expressed frustration to Rocha about getting a written warning because she only had two late arrivals and her time and attendance was not an issue any more. During trial, Hall did not dispute that she clocked in late on the two dates specified on the written warning and did not recall why she clocked in late on those dates. (Tr. 63–66, 91–92.)

[12] The Acting General Counsel's witnesses gave conflicting testimony about how far away Rocha's car was from the protesters and whether Rocha first sat on the store patio before moving to sit in his car. (Compare Tr. 41–42 (Hall testimony that Rocha sat in his car, which was about 50 feet away from the picketers) with Tr. 145–147, 150, 153–154 (Taylor testimony that Rocha sat on the patio for 3–5 minutes before moving to sit in his car, which was a few feet away from the picketers; Rocha then moved his car to a different location in the parking lot that was farther away from the picketers but still within 10 feet).) Since the Acting General Counsel bears the burden of proof, I have credited Hall's testimony that Rocha did not sit on the patio and only sat in his car about 50 feet away from the picketers, because that testimony is slightly more favorable to Respondent.

H. February 27, 2023: Hall Receives A Final Written Warning

On February 27, 2023, store manager Rocha met with shift supervisor Hall for a performance development conversation (a meeting that store managers have periodically with individual employees to talk about how the employee is doing in their role and discuss the employee's strengths and weaknesses). In speaking about weaknesses, Hall mentioned that she felt that her time and attendance had improved. Rocha agreed, but then added that he had to issue a final written warning to Hall for violating Respondent's attendance and punctuality policy. The final written warning stated as follows:

> This serves as a final written warning for Reaghan Hall.
>
> On 2/13/23 [Reaghan] Hall was scheduled to open at 5:30 AM but did not arrive until 6:32 AM. The store was 40 minutes late to open for business as a result.
>
> Previously Reaghan received a documented coaching for time & attendance on 9/24/22 and a Written Warning for time & attendance on 1/3/2023.
>
> [Summary of attendance and punctuality policy as set forth in the Partner Guide.]

(Jt. Exh. 2(c); Tr. 66–68, 95; see also Tr. 69 (noting that Rocha did not speak to Hall about being tardy on February 13 until he issued the final written warning on February 27).) Hall expressed frustration to Rocha that discipline was moving forward for an incident that was out of her control (because, as explained below, her cell phone lost power and thus her alarm did not go off). (Tr. 70.)

During trial, Hall did not dispute that she arrived over an hour late to work on February 13 as specified in the final written warning, nor did she dispute that she was the keyholder and that the store could not open until she arrived. Hall conceded that her late arrival on February 13 should result in some type of disciplinary action, but explained that she arrived late because her cell phone did not charge and lost power, causing Hall to oversleep because her cell phone alarm did not go off. (Tr. 68–69, 92–94 (noting that once Hall awoke, she called her coworkers to confirm that they were at the store and to let them know that she was on the way).) Hall has not received any additional discipline for time and attendance since the February 2023 final written warning. (Tr. 70, 95–96.)

I. Comparator Information

Between about September 19, 2022 and July 9, 2023, store manager Rocha issued approximately 30 corrective actions to various employees (not including shift supervisor Hall) for violating Respondent's attendance and punctuality policy. Notably, all four employees that Hall identified to Rocha as having issues with time and attendance (employees N., P., S., and Sh.) received corrective action in this time period. The evidentiary record does not show any particular pattern of singling out union supporters in this time period for corrective action based on the attendance and punctuality policy (i.e., union supporters received corrective action, as did

employees for whom the evidentiary record does not show whether they engaged in union activities). (R. Exh. 13; Tr. 95; see also FOF, sec. II(C), supra.)

The evidentiary record also shows that various managers that preceded Rocha issued corrective actions to employees at the Poplar and Highland store for violating the attendance and punctuality policy. Specifically, between December 29, 2021 and July 12, 2022, store managers Elizabeth Page and Alyson Hubbard, as well as district manager Morton, issued approximately seven corrective actions to various employees for such violations.[13] During trial, Hall acknowledged that other managers that preceded Rocha issued corrective action to employees for time and attendance infractions.[14] (R. Exh. 13; Tr. 119, 124.)

More broadly, Hall recognized that store managers she has worked with at the Poplar and Highland store have established different priorities for employees than what may have been emphasized by the previous manager. Those store manager priorities have included enforcing certain policies more strictly than the preceding manager. (Tr. 99–100; see also FOF, sec. II(C) (showing that Rocha emphasized five policies from the Partner Guide after he became store manager at the Poplar and Highland store, including the attendance and punctuality policy); Tr. 100 (Hall testimony noting that store manager Holden enforced certain policies more strictly after coming to the Poplar and Highland store in early 2021).

During trial, Hall indicated that part of her concern about Rocha's enforcement of the attendance and punctuality policy was that he did not have a verbal conversation with her about

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[13] The evidentiary record does not include any corrective action forms dated earlier than December 29, 2021. (See R. Exh. 13.)

[14] The evidentiary record includes attendance records showing that from January 3, 2022, to September 1, 2023, various employees clocked in at times later than the start time(s) for their scheduled shifts. (Compare Jt. Exhs. 4(a), 6(a) (clock in times, listed by employee) with Jt. Exhs. 4(b), 6(b) (scheduled starting times for each employee's shifts).) The evidentiary record does not include corrective action forms that correspond to each incident where an employee clocked in after their scheduled start time.

I give little weight to this evidence. The evidentiary record does not include any testimony or documentation from anyone with first-hand knowledge about the context of the apparent late clock-ins (which could have occurred for any number of reasons, many of which could be excusable). (See, e.g., Tr. 61 (noting that two or three times a week, Hall had to clock in late because, due to the two employee rule, she had to wait for another employee to arrive before she could enter the store).) Nor does the evidentiary record include any first-hand testimony or documentation about how managers decided to handle the apparently late clock-ins.

I also give little weight to Hall's and former shift supervisor Taylor's testimony that Respondent had a history (at least until Rocha became store manager) of not enforcing the attendance and punctuality policy against employees who arrived late or missed their shifts. (See Tr. 49–53, 55–56, 141–142; see also Tr. 60 (Hall testimony that she sometimes clocked in late for shifts before July 30, 2022).) Hall conceded during trial that other managers before Rocha issued corrective action to employees for violating the attendance and punctuality policy. (Tr. 119, 124.) Further, as shift supervisors, Hall and Taylor did not have first-hand knowledge about whether other employees received corrective action for attendance and punctuality infractions, nor did Hall and Taylor have first-hand knowledge about what led store managers to take or not take corrective action when time and attendance issues arose. (Tr. 80, 119–120, 122, 152.)

attendance and punctuality issues as a precursor to taking corrective action. For comparison, Hall described having such a conversation about attendance and punctuality with store manager Wanda Hubbard in 2021. There is no evidence in the record about any other informal conversations that managers had with employees as a precursor to future discipline for attendance and punctuality infractions.[15] (Tr. 47–48, 56–57, 63, 83, 121, 141.)

DISCUSSION AND ANALYSIS

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Starbucks Corp.*, 372 NLRB No. 122, slip op. at 17–18 (2023) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent), enfd. in pertinent part, 159 F.4th 455 (6th Cir. 2025). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

The Acting General Counsel contends that I should draw an adverse inference against Respondent because Respondent did not call any witnesses. (GC Posttrial Br. at 18–19.) I do not find that such an inference is warranted here. First, it is permissible for a respondent (at its own risk) to decide not to call a witness because it does not believe it is necessary to do so (e.g., because the respondent is satisfied with the evidentiary record as-is). See, e.g., *Laborers Local 242*, 372 NLRB No. 111, slip op. at 1 fn. 1 (2023) (no adverse inference was warranted where the employer did not call a direct supervisor as a witness but the supervisor's testimony would have been cumulative). Here, I find that Respondent's decision not to call witnesses was a reasonable trial strategy based on the evidence that the Acting General Counsel presented in its case-in-chief. Second, the Acting General Counsel missed the mark when it faulted Respondent for not calling store manager Rocha because an adverse inference is generally not appropriate for the failure to call former managers who are no longer under the control of the company. *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 1 (2018) (explaining that "the 'missing witness" rule allows a judge to draw an adverse inference against a party that fails to call a witness who is under the control of that party and is reasonably expected to be favorably disposed to it," and finding that the missing witness rule generally does not apply to a former employee that is generally not considered to be under a party's control), enfd. 827 Fed. Appx. 724 (9th Cir. 2020). Rocha no longer worked for Respondent when this case went to trial

[15] Store manager Rocha did discuss the attendance and punctuality policy with Hall in July 2022, before he took any corrective action against her based on the policy. See FOF, sec. II(C), supra. The evidentiary record does not show that the July 2022 discussion was prompted by any specific concerns about Hall's attendance (as opposed to being a general reminder about one of Rocha's priorities).

and thus I find that no adverse inference should apply. (See Tr. 119; see also R. Exh. 14 (Respondent attempted to subpoena Rocha but was not successful).)

B. Did Respondent Unlawfully Change How it Enforced its Attendance and Punctuality Policy?

1. Complaint allegations

The Acting General Counsel alleges that Respondent violated Section 8(a)(3), (4), and (1) of the Act by, on about September 24, 2022, changing its established past practice by implementing a stricter enforcement of its attendance policy because employees formed, joined, and/or assisted the Union and engaged in concerted activities, and because employees cooperated with the Board investigation in Case 15–CA–290336, et al. and/or testified in Board-initiated hearing(s) in Case 15–CA–290336, et al.

The Acting General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, on about September 24, 2022, changing its established past practice by implementing a stricter enforcement of its attendance policy without prior notice to the Union, and without affording the Union an opportunity to bargain with Respondent regarding this conduct and/or the effects of the conduct.

2. Applicable legal standards

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).[16] 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.[17] *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

[16] Respondent asserts that the *Wright Line* legal standard should be abandoned or modified. (R. Posttrial Br. at 54-57.) I decline to address that argument because I am bound to follow *Wright Line* as established Board precedent, and Respondent's argument about that precedent must be presented to the Board directly.

[17] I do not find merit to Respondent's suggestion that the Acting General Counsel's initial showing of discrimination includes an additional element of establishing a motivational link or nexus between the employee's protected activities and the employer's adverse employment action. (See R. Posttrial Br. at 40.) In *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 6–13, the Board reiterated that the *Wright Line* framework is inherently a causation test and thus it is superfluous to have a separate "causal nexus" element that the Acting General Counsel must demonstrate.

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. *Starbucks Corp.*, 372 NLRB No. 122, slip op. at 18.

Regarding Section 8(a)(4) of the Act, an employer may not discriminate against an employee for participating in the Board's processes, including filing charges, testifying, or being subpoenaed to testify at a Board proceeding. The Board applies the same legal framework for 8(a)(3) allegations (i.e., the *Wright Line* standard described above for purposes of this case) to determine whether an adverse employment action was for reasons that are prohibited by Section 8(a)(4). *S. Freedman & Sons, Inc.*, 364 NLRB 1203, 1205–1206 (2016) (overruled on other grounds in *McLaren McComb*, 372 NLRB No. 58, slip op. at 9 fn. 48 (2023), enfd. 2024 WL 4240545 (6th Cir. 2024)), enfd. 713 Fed. Appx. 152 (4th Cir. 2017).

Under the unilateral change doctrine (which is implicated by the allegation that Respondent breached a duty to notify and bargain with the Union before allegedly enforcing the attendance and punctuality policy more strictly), an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes.[18] The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. An employer's regular and longstanding

[18] Separate and apart from the unilateral change doctrine, an employer also violates Sec. 8(a)(5) and (1) of the Act if it fails and refuses to bargain over a mandatory subject on request by the union. *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141, slip op. at 1 (2024).

practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. The party asserting the existence of a past practice bears the burden of proof on the issue and must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. The past practice at issue cannot be one that was developed before the union represented employees in the bargaining unit. *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141, slip op. at 5–6 (2024); *Wendt Corp.*, 372 NLRB No. 135, slip op. at 4, 17 (2023); *Howard Industries, Inc.*, 365 NLRB 28, 30 (2016).

If an employer makes a unilateral change to a term and condition of employment, it may still assert certain defenses. For example, the employer may assert that the change did not alter the status quo because the change in question was part of a regular and consistent past pattern that did not involve the exercise of significant managerial discretion. *Wendt Corp.*, 372 NLRB No. 135, slip op. at 4. In addition, the employer may assert that the union contractually surrendered the right to bargain over the change through a clear and mistakable waiver. To demonstrate that the union and the employer bargained for such a waiver, the employer must show that the union and the employer "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007); see also *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141, slip op. at 9–10, 15, 17–18 (restoring the clear and unmistakable waiver standard as outlined in *Provena*).

3. Analysis – Section 8(a)(3), (4), and (1)

The Acting General Counsel's primary theory in this case is that after employees at the Poplar and Highland store began their union organizing campaign, voted in the Union, and participated in various Board processes, Respondent retaliated against employees by enforcing its attendance and punctuality policy more strictly at the store. That type of retaliatory conduct, if proven, violates the Act. See, e.g., *Nieses Construction Corp.*, 365 NLRB 1269, 1269–1271 & fns. 5–6 (2017) (finding that the employer violated the Act by more strictly enforcing its attendance policy in retaliation for employees' union activities, which led to unlawful disciplinary action against employees based on the stricter policy); *Hyatt Regency Memphis*, 296 NLRB 259, 262 (1989) (finding that the General Counsel made an initial showing of discrimination by presenting evidence that the employer enforced its sign-in/sign-out rules more stringently as a consequence of the successful union organizing campaign), enfd. 944 F.2d 904 (6th Cir. 1991); *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987) (employer violated the Act by more strictly enforcing its attendance and punctuality policy in retaliation for employees' support of the union in the representation election), enfd. 928 F.2d 609 (2d Cir. 1991).

Having considered the evidentiary record, I find that the Acting General Counsel failed to make an initial showing that Respondent unlawfully enforced its attendance and punctuality policy more strictly in retaliation for employees' union and protected concerted activities and participation in Board processes. There is no dispute that employees engaged in union and protected concerted activities (e.g., the union organizing campaign, the representation election,

and preliminary efforts to negotiate an initial collective-bargaining agreement) and participated in Board processes (e.g., providing affidavits and testifying in court proceedings), nor is there a dispute that Respondent was aware of those activities. The Acting General Counsel fell short, however, with its evidence of animus. Putting aside the question of whether Respondent changed an established past practice regarding how it enforced its attendance and punctuality policy at the Poplar and Highland store (a topic that I address in the next section), there is insufficient evidence that Respondent acted with an improper motive when it enforced the policy. As shift supervisor Hall explained, it was not unusual at the store for new store managers to prioritize different aspects of Respondent's various policies. Consistent with that practice, shortly after being assigned to the Poplar and Highland store full time in around late June or early July 2022, store manager Rocha indicated to Hall and other shift supervisors that he would be emphasizing five policies, including the attendance and punctuality policy. In that same time period, Hall expressed concerns to Rocha about employees arriving late for their shifts and/or missing their shifts altogether. (FOF, sec. II(C), (I).) That evidence alone indicates that Rocha had valid and nondiscriminatory reasons for enforcing the attendance and punctuality policy more strictly and consistently than some previous managers may have before he arrived.

Perhaps more important, there is scant evidence of animus in the record. Indeed, there is no evidence that Rocha was involved in any alleged or adjudicated unfair labor practices related to the union organizing campaign. Nor is there any evidence that Rocha expressed any anti-union sentiment or any opposition to employees participating in Board processes. (See FOF, sec. II(B)(3)–(4), (D); see also Tr. 87, 117–118 (Hall conceded that she did not recall Rocha saying anything negative about the Union, and that the Board proceedings that Hall participated in (in 2022) did not relate to Rocha).)[19] That leaves the Acting General Counsel with an argument that the timing of the alleged stricter enforcement is suspicious insofar as the stricter enforcement began about 3 months after employees voted to unionize and Hall testified in a hearing regarding a petition for a temporary injunction, and about 10 days after Hall testified in an unfair labor practice trial concerning allegations that Respondent unlawfully terminated seven employees because they engaged in union and protected concerted activities. I do not find that timing to be suspicious. As previously noted, there is no evidence that Rocha harbored any animus towards Hall's (or any other employee's) union and protected concerted activities or participation in Board processes. That fact, coupled with the legitimate reasons that Rocha had for enforcing the attendance and punctuality policy, indicates that any timing proximity between alleged stricter

[19] The Acting General Counsel also (briefly) contended that Respondent's history of unfair labor practices (both nationally and at the Poplar and Highland store) supports a finding of animus. (GC Posttrial Br. at 26, 28; see also id. at 23–24 (citing the administrative law judge's decision in *J.P. Stevens & Co.*, 245 NLRB 198, 215 (1979), enfd. 638 F.2d 676 (4th Cir. 1980).) Even if I assume that animus can be established based on a history of unfair labor practices (as opposed to contemporaneous unfair labor practices, which the Board has recognized can be circumstantial evidence of animus, see *Intertape*, supra), I am not persuaded by that argument here. The evidentiary record does not establish a connection between any unfair labor practices at other store locations across the nation and the specific allegations at issue in this case. Nor does the evidentiary record establish that any animus demonstrated in Case 15–CA–290336, et al. (which is currently pending before the Board on exceptions) regarding the Poplar and Highland store carried over to the events here. To the contrary, the events in this case relate to store manager Rocha, who (as noted herein) has no connection to the allegations at issue in Case 15–CA–290336, et al. Accordingly, I do not find animus in this case based on Respondent's history of alleged, pending, or established unfair labor practices.

enforcement and employees' union and protected concerted activities and participation in Board processes was simply a coincidence.

For the same reasons, I find that Respondent established a valid affirmative defense that it would have enforced the attendance and punctuality policy more strictly even in the absence of employees' union and protected concerted activities and participation in Board processes. Attendance and punctuality was an ongoing problem at the Poplar and Highland store, and Hall repeatedly asked Rocha to address that problem. (FOF, sec. II(C).) Given that foundation and the lack of any evidence that the stricter enforcement was a pretext for discrimination, it stands to reason that Respondent, through Rocha, would have taken steps to enforce the attendance and punctuality policy more strictly regardless of employees' participation in activities protected by the Act.

Due to the Acting General Counsel's failure to make an initial showing of discrimination and (alternatively) Respondent's successful affirmative defense, I recommend dismissal of the complaint allegations that Respondent retaliated against employees by enforcing its attendance and punctuality policy more strictly.

4. Analysis – Section 8(a)(5) and (1)

I now turn to the Acting General Counsel's contention that Respondent violated Section 8(a)(5) and (1) of the Act by changing its established past practice by implementing a stricter enforcement of its attendance policy at the Poplar and Highland store without first notifying the Union and providing an opportunity to bargain over the change and its effects.

At the outset, a few points are undisputed. There is no contention that Respondent changed the written attendance and punctuality policy. To the contrary, the written policy remained the same throughout the relevant time period (2022 and 2023). It is also undisputed that Respondent did not notify or bargain with the Union in 2022, or 2023, over how the company was enforcing the attendance and punctuality policy at the Poplar and Highland store (though Respondent's defense is that it did not have an obligation to bargain over that issue). (See FOF, sec. II(A)(3).)

With that stated, I turn to whether the Acting General Counsel demonstrated that there was an established past practice at the Poplar and Highland store regarding how managers enforced the attendance and punctuality policy. (See Discussion and Analysis, sec. (B)(2), supra (the party asserting the existence of a past practice bears the burden of proof on the issue).) In its posttrial brief, the Acting General Counsel maintained that Respondent had an established past practice of "rarely acting upon the tardiness of its employees at the [Poplar and Highland] store unless the infractions included no call, no shows." (GC Posttrial Br. at 21.) I find that the Acting General Counsel did not meet its burden of proving that this alleged practice occurred with such regularity and frequency at the Poplar and Highland store that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis.

The Acting General Counsel did not present sufficient proof that Respondent had an established past practice for how it enforced the attendance and punctuality policy. First, the

evidentiary record shows that enforcement of Respondent's policies varied between store managers, such that one manager (e.g., store manager Rocha) might emphasize the attendance and punctuality policy while another might give that policy less attention and instead prioritize other issues. By predicating its past practice argument on early 2022, when Elizabeth Holden was the store manager, the Acting General Counsel overlooks the evidence in the record that enforcement of the attendance and punctuality policy intermittently varied depending on which store manager was working at the Poplar and Highland store between 2020 and 2023. (See FOF, sec. II(A)(1).)

Second, the Acting General Counsel's reliance on attendance records is unavailing. The attendance records that the Acting General Counsel cited indicate that, in early 2022, various employees clocked in after the scheduled start times of their shifts but were not disciplined as frequently as employees were after store manager Rocha began working at the Poplar and Highland store full time in about late June or early July 2022. Those records, however, do not shed sufficient light on how Respondent enforced its attendance and punctuality policy because: (a) as previously noted, the attendance records largely relate to a time period when store manager Elizabeth Holden was in charge (and thus do not account for the variation in how other managers that preceded Rocha and Holden enforced the policy at the store); and (b) there is no evidence in the record to establish whether the apparent late arrivals were unexcused or, alternatively were excused (e.g., because the employee arrived on time but simply forgot to clock in, or because the employee arrived on time but, due to the two employee rule, had to wait for another employee to arrive before entering the store).[20] Due to these shortcomings, the attendance records do not demonstrate that Respondent had an established past practice of rarely enforcing the attendance and punctuality policy at the Poplar and Highland store.

Third, the witness testimony that the Acting General Counsel offered during trial did not show that Respondent had an established past practice for enforcing the attendance and punctuality policy. Neither shift supervisor Hall nor former shift supervisor Taylor (the only two witnesses who testified) had first-hand knowledge of Respondent's disciplinary practices at the Poplar and Highland store, and thus I gave little weight to their testimony regarding how Respondent customarily enforced the attendance and punctuality policy at the store. Further, it bears noting that to the extent that Hall contended that Respondent had a past practice (albeit based on only one example), the practice that Hall described is different from what the Acting

[20] In its posttrial brief, the Acting General Counsel stated that "it was unable to elicit testimony regarding punch date [attendance] or disciplinary records of other employees at the [Poplar and Highland] store" because the records were voluminous and Respondent did not provide the records until after the opening of trial. (GC Posttrial Br. at 9 fn. 4.) I would be remiss if I did not point out that the Acting General Counsel's contention about being "unable" to elicit testimony is not accurate. Early on the first day of trial, the Acting General Counsel indicated that it might ask to hold the record open to "review documents at the end of testimony." I responded that I would not require Respondent to start its defensive case until the Acting General Counsel completed its case-in-chief, and thus any document review needed to occur while the Acting General Counsel's case-in-chief was still open. (Tr. 17–18; see also Tr. 21–22 (Acting General Counsel subsequently reported that staff in its office were reviewing documents). On the second day of trial, the parties entered several attendance and disciplinary records into evidence. The Acting General Counsel then rested its case-in-chief, and in the process forewent the opportunity to call witnesses to testify about the records. (See Tr. 166–169; see also Tr. 160–161.)

General Counsel argues in its posttrial brief. Specifically, Hall contended that Respondent had a past practice of having an informal conversation with employees about attendance issues as a precursor to taking disciplinary action.[21] (Compare GC Posttrial Br. at 21 (asserting that Respondent had a past practice of rarely acting upon the tardiness of its employees at the store unless the employees also had no call, no show infractions).) In short, the Acting General Counsel's primary witness did not support the Acting General Counsel's characterization of Respondent's past practices.

Considering the record as a whole, the Acting General Counsel did not demonstrate that Respondent had an established past practice for how strictly it enforced the attendance and punctuality policy at the Poplar and Highland store, let alone a specific established past practice of rarely enforcing the policy unless employees incurred no call/no show infractions. As a result, the Acting General Counsel did not prove that Respondent had an obligation to notify and bargain with the Union when, in 2022, store manager Rocha allegedly began enforcing the attendance and punctuality more strictly.[22] I therefore recommend that this complaint allegation be dismissed. See *CP Anchorage Hotel 2, LLC d/b/a Hilton Anchorage*, 370 NLRB No. 83, slip op. at 19 (2021) (finding that the General Counsel did not demonstrate that the employer had an established past practice of union representatives being able to meet with employees in the company cafeteria without managers present), enfd. 2022 WL 3010171 (9th Cir. 2022); see also *Wendt Corp.*, 372 NLRB No. 135, slip op. at 4 (observing that a past practice can only be long-standing if it has been regular and frequent, and that the duration of the practice is critical to determining whether the practice was so commonplace as to be a basic part of the job itself).

C. Did Respondent Unlawfully Surveil Employees' Union Activities?

1. Complaint allegations

The Acting General Counsel alleges that, on about November 16, 2022, Respondent, by store manager Rocha, continuously watched employees' peaceful picketing activities from Rocha's parked car in Respondent's parking lot and thereby engaged in surveillance of employees engaged in protected activities in violation of Section 8(a)(1) of the Act.

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[21] I do not find that Respondent had an established past practice at the Poplar and Highland store of having verbal conversations with employees about attendance and punctuality issues as a precursor to issuing written discipline. Shift supervisor Hall provided only one example of such a conversation – a verbal conversation with store manager Wanda Hubbard in 2021 about Hall's attendance and punctuality. There is no evidence that Hubbard had similar verbal conversations with any other employees, nor is there evidence that any other manager at the store followed a practice of having verbal conversations with employees as a precursor to any future discipline for attendance and punctuality. (FOF, sec. II(I); see also FOF, sec. II(A)(1) (noting the Poplar and Highland store had four different store managers before Rocha was assigned to the store full time).)

[22] In light of my finding that the Acting General Counsel fell short of proving that Respondent had an established past practice for how it enforced the attendance and punctuality policy, I decline to rule on Respondent's alternate (and now moot) argument that Respondent provided an opportunity to bargain and the Union either waived its right to bargain or failed to meet its own bargaining obligations. (See R. Posttrial Br. at 32–38.)

2. Applicable legal standard

An employer's routine observation of employees engaged in open Section 7 activity on or near the employer's property does not constitute unlawful surveillance. However, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is out of the ordinary and thereby coercive. Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation.[23] *PG Publishing Co. d/b/a Pittsburgh Post-Gazette*, 373 NLRB No. 93, slip op. at 22 (2024), enfd. 2025 WL 3142083 (3d Cir. 2025); *Aladdin Gaming, LLC*, 345 NLRB 585, 585–586 (2005), petition for review denied 515 F.3d 942 (9th Cir. 2008).

3. Analysis

The evidentiary record shows that on about November 16, 2022, store manager Rocha was working with other employees at the Poplar and Highland store when employees held a "March on the Boss" that involved reading a list of grievances about working conditions and then leaving the store to go on strike and participate in a picket line on a public sidewalk next to the store parking lot. Since the strike would have left Rocha by himself in the store and Respondent's two employee rule requires at least two employees to be in the store at all times, Rocha left the store and went to his car in the store parking lot. Rocha remained in his car and generally was looking at his cell phone until a police officer arrived, though Rocha glanced occasionally in the direction of the picket line. When the district manager arrived, Rocha and the district manager entered the store and Rocha performed tasks required to close the store. (FOF, sec. II(F).)

Based on those facts, I do not find that Respondent, through Rocha, unlawfully surveilled employees' protected activities as alleged in the complaint. Due to the two employee rule, Rocha's decision to leave the store and sit in his car was not out of the ordinary, as that was what he was required to do to comply with the rule. Indeed, the two employee rule applies to all employees at the store, and thus there are various circumstances where a single employee must wait outside the store until a coworker arrives (e.g., for an opening shift when one employee arrives but must wait for a second employee before entering the store). I also do not find

[23] The Acting General Counsel listed several additional factors that it contends should be considered when evaluating whether an employer has engaged in unlawful surveillance of employees' union and/or protected concerted activities. (See GC Posttrial Br. at 30 (listing the following factors: duration of observation; frequency and timing of the observation; proximity of the observer to the union activity; likelihood or actuality of trespassory actions by nonemployees engaged in union activity; reasonableness of any perception on the part of the employer of any safety risks to employees or customers associated with the conduct of union activity; existence of demonstrated anti-union animus; the commission of other acts to interfere with the activity being conducted; and the employer's departure from customary or normal practice represented by its presence in the immediate vicinity of the union activity).) It suffices to say that the legal authority that the Acting General Counsel relied on for these additional factors, *Brown Transport Corp.*, 294 NLRB 969, 971–972 (1989) (an administrative law judge's analysis that was not contested in exceptions), only stands as persuasive, non-binding precedent. In any event, the outcome here remains the same even under the additional factors that the Acting General Counsel identified.

Rocha's glances towards the picket line to be out of the ordinary. While Rocha waited in the parking lot and kept an eye out for the arrivals of the police and the district manager, it was to be expected that his attention would occasionally be drawn to the picket line that was in progress nearby. That limited conduct is well short of the "continuous[] watching" that the Acting General Counsel alleged in the complaint, and was incidental to Rocha's presence in the parking lot due to the two employee rule. Since there are no other indicia that Rocha's conduct was coercive, I recommend that the unlawful surveillance allegation in the complaint be dismissed. See *Metal Industries, Inc.*, 251 NLRB 1523, 1523 (1980) (declining to find unlawful surveillance in a case where managers were in the parking lot while leafletting was occurring, explaining that the managers' conduct was not out of the ordinary because managers regularly stationed themselves in the parking lot at the end of the day to say goodbye to employees and answer questions).[24]

D. Did Respondent Violate the Act When It Disciplined Hall for Violating the Attendance and Punctuality Policy?

1. Complaint allegations

The Acting General Counsel alleges that Respondent violated Section 8(a)(3), (4), and (1) of the Act by issuing the following disciplinary action to shift supervisor Hall because Hall and other employees formed, joined and/or assisted the Union and engaged in concerted activities, and because Hall and other employees cooperated with the Board investigation in Case 15–CA–290336, et al. and/or testified in Board-initiated hearing(s) in Case 15–CA–290336, et al.:

(a) a documented coaching issued on about September 24, 2022;

(b) a written warning issued on about January 3, 2023; and

(c) a final written warning issued on about February 16, 2023.

2. Applicable legal standard

The applicable legal standard for these complaint allegations is the same *Wright Line* standard that is set forth above in Discussion and Analysis Section B(2).

[24] The Acting General Counsel cites to *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991) to support its surveillance argument (see GC Posttrial Br. at 29–30), but that case is distinguishable. In *Eddyleon*, the Board found the employer's behavior in watching employees handbill from his car unlawfully created the impression of surveillance because the employer's behavior was "well out of the ordinary." Specifically, the employer's president in *Eddyleon* drove his car to within 15 feet of where a union organizer was passing out handbills to employees on a public bridge, and continued to watch the union activity and speak into a car phone until the handbilling ended. Id. at 887–888. That conduct is far more coercive and out of the ordinary than Rocha's, as Rocha: went to his parked car during the strike because he was unable to remain in the store due to the two employee rule; and only occasionally glanced at the picket line while he waited for the police and the district manager to arrive.

3. Analysis

As described in the Findings of Fact, Respondent issued disciplinary action to shift supervisor Hall on September 24, 2022, January 3, 2023, and February 16, 2023, with each of those disciplinary actions based on Hall violating the attendance and punctuality policy by arriving late for certain shifts. Hall did not dispute that she arrived late for the shifts in question, but provided the following explanations for the late arrivals:

> September 24 documented coaching: Hall speculated that her late arrivals could have resulted from a train slowing down her commute or from having to wait (due to the two employee rule) for another employee to arrive before she entered the store, but Hall was not certain if those events caused the specific late arrivals that Respondent identified;
>
> January 3 written warning: Hall did not recall why she arrived late on the two dates that Respondent identified; and
>
> February 16 final written warning: Hall explained that she arrived late because her cell phone did not charge and lost power, which caused Hall to oversleep because her cell phone alarm did not go off.

(FOF, sec. II(E), (G)–(H).)

Applying the *Wright Line* framework, I do not find that the Acting General Counsel made an initial showing that Hall's union activity, participation in Board proceedings, and/or protected activity was a motivating factor in Respondent's decisions to issue the three disciplines to Hall. As set forth in detail above, while there is no dispute that Hall engaged in various activities protected by the Act and that Respondent was aware of those activities, the Acting General Counsel did not show that store manager Rocha acted with animus when he decided to take disciplinary action against Hall on the three occasions in question.[25] (See Discussion and Analysis, sec. B(3), supra.) Hall committed the attendance and punctuality infractions that Respondent identified, and I do not have a basis to conclude that Rocha's decisions were tainted by unlawful motivation.

Additionally, even if I were to find that the Acting General Counsel made an initial showing of discrimination, I agree with Respondent's affirmative defense that Respondent would have taken disciplinary action against Hall even in the absence of her protected activities.[26]

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[25] I note that the Acting General Counsel does not contend that Rocha's comments to Hall on September 24, 2022 demonstrate animus. (See FOF, sec. II(E) (noting that after giving Hall a documented coaching for tardy arrivals, Rocha mentioned that another barista complained that Hall was making the barista feel unwelcome with alleged bullying related to terminated union supporters coming back to work). I agree that under the circumstances, Rocha's comments did not evince animus.

[26] As part of its defense, Respondent faulted Hall for having a higher number of late arrivals than other employees when assigned as the keyholder and/or assigned to work an opening shift (opener). (See R. Posttrial Br. at 46–48.) I give little weight to that argument. As a preliminary matter, the bare number of alleged late arrivals as either keyholder or opener is not probative because the bare number does not account for how often the employee was assigned to the role. To illustrate, Respondent asserts that Hall

(R. Posttrial Br. at 53–54.) After starting work as the full-time store manager at the Poplar and Highland store, Rocha identified attendance and punctuality as one of his priority areas, and notified Hall and other shift supervisors of that priority. Hall agreed that attendance and punctuality was a problem at the store and encouraged Rocha to address it. Rocha's ensuing enforcement of the attendance and punctuality policy against Hall and other employees was the natural result of Rocha following through on one of his priorities and Hall's requests for action to address employees' attendance problems, and would have occurred even in the absence of Hall's protected activities. Indeed, Hall admits that she had unexcused late arrivals on the dates specified on her documented coaching, written warning, and final written warning. (See Discussion and Analysis, sec. (B)(3), (E), (G)–(H), supra.) For the foregoing reasons and the lack of any evidence showing that Respondent's rationale for disciplining Hall was a pretext for discrimination, I recommend that these complaint allegations be dismissed.

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. The Acting General Counsel did not prove that Respondent violated the Act as alleged in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

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was late for 51 keyholder shifts from January 2022 through September 2023, and asserts that Kylie Throckmorton was the next most frequent tardy keyholder in the same time period with 29 late arrivals for 29 keyholder shifts. (R. Posttrial Br. at 46–47.) That bare claim overlooks the fact that Respondent assigned Hall to about 304 keyholder shifts while assigning about 154 keyholder shifts to Throckmorton. (See Jt. Exh. 4(b) (any imprecision in the count of keyholder shifts is mine).) The additional information about the number of keyholder shifts assigned indicates that Hall's tardy percentage for keyholder shifts (51/304 = 16.8 percent) was lower than Throckmorton's (29/154 = 18.8 percent).

More important, as I noted when the Acting General Counsel relied on this attendance data (see Discussion and Analysis, sec. (B)(4); see also FOF, sec. II(I)), the evidentiary record does not include any information about whether Hall's apparent late arrivals were excusable (e.g., because she arrived on time but, due to the two employee rule, had to wait for another employee; or because she arrived on time but forgot to clock in promptly). Without more information, I cannot draw any meaningful conclusions about the occasions where Respondent's attendance records indicate that Hall clocked in after the scheduled start time for her shift.

[27] 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.

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C., December 10, 2025

Geoffrey Carter
Administrative Law Judge