Amazon.com Services Inc. *and* Connor Vincent Spence

Amazon.com Services Inc. *and* Natalie Monarrez

Amazon.com Services Inc. *and* Derrick Palmer

Amazon.com Services Inc. *and* Amazon Labor Union. Cases 29–CA–277198, 29–CA–278982, 29–CA–277598, 29–CA–278701, 29–CA–285445, and 29–CA–286272

July 2, 2026

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY AND MAYER

On November 21, 2023, Administrative Law Judge Lauren Esposito issued the attached decision. The General Counsel and Charging Party Amazon Labor Union (the Union) each filed exceptions and a supporting brief, the Respondent filed answering briefs, and the Union filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.[2]

On April 20, 2021, employees at the Respondent's JFK8 fulfillment center on Staten Island, New York, formed the Union and launched a campaign to organize the JFK8 employees, with the goal of negotiating a collective-bargaining agreement with the Respondent. For the reasons stated in her decision, we affirm the judge's findings that, in May 2021, the Respondent violated Section 8(a)(1) when a contracted security guard, who was an agent of the Respondent, prohibited an employee from distributing union literature on nonwork time in nonwork areas, surveilled the employee's union activities, and confiscated union literature from nonwork areas and that, in a separate incident about a week later, a second contracted security guard, who was also an agent of the Respondent, created the impression of surveillance of employees' un- on activities.[3] Similarly, we affirm the judge's findings, for the reasons she stated, that, in June 2021, the Respondent violated Section 8(a)(1) when a manager and a human resources employee, in separate discussions, told employees that they could not distribute union literature on nonwork time in nonwork areas and confiscated union literature and, later that same day, another human resources employee prohibited employees from distributing union literature on nonwork time in nonwork areas.

We also affirm, for the reasons stated in her decision, the judge's dismissal of the allegation that, on or about November 3, 2021, the Respondent violated Section 8(a)(3) and (1) by discharging employee Daequan Smith from his position at the DYY6 delivery station, which is adjacent to the JFK8 facility, for his union and protected concerted activity. Even if we were to apply the "cat's paw" discrimination theory advanced by the Union, premised on the U.S. Supreme Court decision in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), neither the General Counsel nor the Union put forth sufficient evidence to show under that theory that an agent of the Respondent was motivated by discriminatory animus in taking an action that was the proximate cause of Smith's discharge. Although the Union argues that Respondent Area Manager Wessam Khalil manipulated Smith's time records, which resulted in Smith's discharge, the record does not establish that any such manipulation occurred.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Amazon.com Services Inc., Staten Island, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its JFK8 and DYY6 facilities on Staten Island, New York,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by: 1) Respondent Labor Relations Consultant Bradley Moss, on May 4, 2021, coercively interrogating an employee regarding her union activities and making statements to an employee indicating that support for the Union would be futile, disparaging the Union using appeals to racial prejudice and derogatory racial stereotyping, and soliciting employee grievances and promising to remedy them; and 2) Respondent Labor Relations Consultant David Acosta, on October 31, 2021, telling employees that, if the Union campaign at the Respondent's JFK8 facility succeeded, strikes would be inevitable, and coercively interrogating employees regarding their union sympathies.

There were also no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by Respondent Area Manager Wessam Khalil, in early September 2021, coercively interrogating employee Daequan Smith regarding his support for the Union, and Sec. 8(a)(3) and (1) by, in late October 2021, dismissing Smith from his work shift early, altering Smith's work assignments and subjecting Smith to closer supervision in retaliation for his support for the Union and protected concerted activities.

[2] The judge provided that Smith's backpay for the Respondent's unlawful early dismissal of him from a shift in late October 2021 should be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). However, because the early dismissal did not result in a cessation of employment, the backpay should be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We correct this inadvertent error.

The judge ordered remedies consistent with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), vacated in part on other grounds 102 F.4th 727 (5th Cir. 2024). As stated in *Performance Plumbing, LLC*, 374 NLRB No. 48, slip op. at 2 fn. 2 (2026), and *Lodi Volunteer Ambulance Rescue Squad, Inc.*, 374 NLRB No. 26, slip op. at 3 fn. 3 (2026), Chairman Murphy and Member Mayer find no need at this time to express an opinion whether the novel remedies announced by the Board majority in *Thryv* are permissible under the Act. They would be open to reconsideration of that precedent in a future proceeding, but in the absence of a three-member majority to overrule it at this time, they agree to apply *Thryv*.

Member Prouty would also grant the General Counsel's request for the remedy to be amended to include that the notice be read to employees and hand delivered to the Respondent's supervisors, managers, and agents at the Respondent's JFK8 and DYY6 facilities. In his view, the Respondent's violations in this case exemplify the need for these remedies: the Respondent blatantly and repeatedly barred employees from distributing their own union literature at the same time that the Respondent's workplace was wired for rapid communication across the entire workforce—such as through the Respondent's A to Z smartphone app and its Voice of Associates bulletin boards—to allow it to inundate employees with its antiunion messaging. Moreover, employees extensively used social media to alert their coworkers about the Respondent's unlawful conduct, and indeed, this was how one of the Respondent's managers learned that an agent of the Respondent had engaged in unlawful surveillance of a union event. While it is impossible to gauge precisely how many employees were affected by the Respondent's unlawful conduct, the judge's focus on the number of employees who directly witnessed the Respondent's unlawful conduct is an incomplete method to assess the much broader impact that the unlawful conduct necessarily had on employees during the organizing campaign. Finally, hand delivery of the notice to all Respondent supervisors, managers, and agents is a modest means of ensuring that all Respondent representatives are aware of employee rights under the Act to deter further violations. Accordingly, the Board's remedy should proactively make Respondent employees, supervisors, managers, and agents aware of the Respondent's unlawful conduct in this case, including that the Respondent denied its employees access to information that they could have used to make an informed decision about union representation. Furthermore, Member Prouty would grant the General Counsel's request that a notice reading, accompanied by distribution of the notice to employees before it is read, be part of the Board's standard remedies for the reasons stated in his concurrence in *CP Anchorage Hotel 2 d/b/a Hilton Anchorage*, 371 NLRB No. 151, slip op. at 9–15 (2022), enfd. 98 F.4th 314 (D.C. Cir. 2024).

[3] We affirm the judge's finding that both security guards involved in this case acted as agents of the Respondent for the reasons stated in her decision. We further affirm the judge's finding that the Respondent failed to repudiate the unlawful actions of its agents for the reasons stated in her decision.

copies of the attached notice marked 'Appendix.'[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the JFK8 and/or DYY6 facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current and former employees employed by the Respondent at that facility at any time since May 4, 2021."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 2026

_____
James R. Murphy, Chairman

_____
David M. Prouty, Member

_____
Scott A. Mayer, Member

(SEAL) 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.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you regarding your activities on behalf of and sympathies with respect to Amazon Labor Union (the Union).

WE WILL NOT make statements indicating that support for the Union would be futile.

WE WILL NOT make statements disparaging the Union using appeals to racial prejudice and derogatory racial stereotyping.

WE WILL NOT make statements soliciting employee grievances and promising to remedy them.

WE WILL NOT tell you that if the union organizing campaign at JFK8 is successful strikes will be inevitable.

WE WILL NOT conduct surveillance of your union activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT prohibit you from distributing union literature on nonwork time and in a nonwork area.

WE WILL NOT confiscate union literature from you.

WE WILL NOT dismiss you from your work shift early in retaliation for your support for the Union and protected concerted activities.

WE WILL NOT change your work assignments in retaliation for your support for the Union and protected concerted activities.

WE WILL NOT subject you to closer supervision in retaliation for your support for the Union and protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make Daequan Smith whole for any loss of earnings and other benefits resulting from his unlawful early dismissal in October 2021, plus interest, and WE WILL make Daequan Smith whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful early dismissal.

WE WILL compensate Daequan Smith for the adverse tax consequences, if any, of receiving a lump-sum back-

[4] 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."

pay award, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Daequan Smith's corresponding W-2 form reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the early dismissal of Daequan Smith, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the early dismissal will not be used against him in any way.

AMAZON.COM SERVICES INC.

The Board's decision can be found at http://www.nlrb.gov/case/29-CA-277198 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.

Emily Cabrera, Esq. and *Matthew Jackson, Esq*., for the General Counsel.

Jeanne E. Mirer, Esq. (Mirer Mazzocchi & Julien, PPPS), of New York, New York, for the Charging Party.

Kurtis A. Powell, Esq. and *Juan C. Enjamio, Esq. (Hunton Andrews Kurth LLP),* of Atlanta, Georgia and Miami, Florida, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon charges filed by Connor Vincent Spence, Natalie Monarrez, Derrick Palmer, and Amazon Labor Union on various dates, the Regional Director, Region 29 issued a consolidated complaint on January 27, 2022, and an amended consolidated complaint on February 18, 2022, in the above cases. The amended consolidated complaint alleges that Amazon.com Services, Inc. (Amazon) violated Sections 8(a)(1) and (3) of the Act by discharging and otherwise retaliating against Daequan Smith for his activities on behalf of Amazon Labor Union (ALU or the Union) and his other protected concerted activities. The Complaint further alleges that Amazon committed numerous independent violations of Section

This case was tried before me by videoconference on the following dates: June 6, 7, 8, 9, 10, and 16, 2022, August 8 and 11, 2022, November 7 and 8, 2022, January 31, 2023, and March 20, 21, 22, and 23, 2023. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel, Amazon, and Amazon Labor Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Amazon, a Delaware limited liability company, has been engaged in providing online retail sales throughout the United States at all material times. This case involves an Amazon Fulfillment Center referred to as JFK8 and a Delivery Station referred to as DYY6, both located in Staten Island, New York. Amazon admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In its answer, Amazon took the position that it was without sufficient information to admit or deny that Amazon Labor Union is a labor organization within the meaning of Section 2(5) of the Act. As a result, General Counsel adduced evidence relevant to ALU's labor organization status during the hearing, and this issue is addressed below.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Amended Consolidated Complaint's Allegations

The amended consolidated complaint alleges that Amazon, by its supervisors and agents, committed multiple violations of Section 8(a)(1) at the JFK8 Fulfillment Center in May, June, and October 2021 during an organizing campaign conducted by the Union. The complaint alleges that on June 12, 2021, HR Assistant Luke Wojahn violated Section 8(a)(1) by telling employees that they could not distribute Union literature and confiscating union literature from employees.[1] The Complaint alleges that on that same day, Operations Manager Ariana Ovadia unlawfully prohibited employees from distributing union literature by telling employees that Amazon had the right to remove union literature from the breakroom, and confiscated union literature from employees. Finally, the Complaint alleges that on June 12, 2021, HR Business Partner Christina Stone also unlawfully prohibited employees from distributing union literature by telling employees that Amazon had the right to remove union literature from the breakroom.

The complaint also alleges that labor consultants, acting as agents of Amazon, engaged in conduct which violated Section 8(a)(1) of the Act at the JFK8 facility. Specifically, the

[1] In their Posthearing Br. at p. 83, fn. 25, General Counsel moves to withdraw Par. 10(b) of the complaint, which alleges that Wojahn directed employees to remove union literature from the breakroom. General Counsel's motion is hereby granted.

Complaint alleges that Amazon's labor consultant Bradley Moss made numerous statements violating Section 8(a)(1) on May 4, 2021, including the following: (i) threatening employees that it would be futile for them to select ALU as their bargaining representative by telling employees there would never be a union at the facility; (ii) threatening employees that it would be futile for them to select ALU as their bargaining representative by telling employees that the Union's organizing campaign would fail because the Union's organizers were "thugs;" (iii) disparaging the union organizers by telling employees that the ALU's campaign would fail because the Union's organizers were "thugs;" (iv) interrogating employees regarding their Union activities; and (v) soliciting grievances from employees with an express promise to remedy them if the employees rejected ALU as their bargaining representative. The complaint also alleges that labor consultant David Acosta violated Section 8(a)(1) on October 31, 2021, by interrogating employees regarding their Union activities and threatening employees by stating that their support for ALU would inevitably engender strikes and walk-outs.

The complaint further alleges that security guards at the JFK8 facility, acting as agents of Amazon, engaged in conduct violating Section 8(a)(1) of the Act. Specifically, the complaint alleges that on May 16, 2021, in an employee breakroom at JFK8, security guard John Hill told employees that they could not distribute ALU literature without Amazon's permission, confiscated ALU literature from employees, and conducted surveillance of employees' union activities. The complaint also alleges that on May 24, 2021, outside the JFK8 facility, security guard Elena Koplevich created the impression that employees' union activities were under surveillance.

The complaint also contains a series of allegations involving events which occurred at the DYY6 Delivery Station in September and October 2021. The complaint alleges that in late September 2021, Area Manager Wessam Khalil interrogated employees at the DYY6 facility regarding their Union sympathies and activities in violation of Section 8(a)(1).[2] The complaint further alleges that in late October 2021, Amazon violated Sections 8(a)(1) and (3) when it suspended DYY6 employee Daequan Smith by dismissing him from a shift early, changed Smith's work assignments, and subjected Smith to closer supervision, in retaliation for Smith's union activities and concerted complaints regarding wages, hours, and working conditions, in particular the pace of work required at DYY6. Finally, the Complaint alleges that on November 3, 2021, Amazon discharged Smith in retaliation for his Union and protected concerted activities, in violation of Sections 8(a)(1) and (3).

On June 3, 2022, Amazon filed a Motion to Sever and Consolidate portions of the complaint in the instant case with portions of a complaint issued against it on May 31, 2022 in Case 29–CA–280153, et al. Amazon contended that allegations in the instant case involving violations of Section 8(a)(1) at JFK8 should be severed and consolidated with the allegations contained in the May 31, 2022 complaint, so that that the instant case would be comprised solely of the allegations that Amazon discharged and otherwise retaliated against Daequan Smith for his union activities and protected concerted complaints. See (Tr. 11–15, 17–18). I denied this Motion in an Order dated June 15, 2022.

This case was tried before me by videoconference on the dates set forth above.[3] Derrick Palmer, Janet Olmedo, Natalie Monarrez, and Connor Spence were called to testify by General Counsel, as was Daequan Smith. Palmer, Olmedo, Monarrez, and Spence were all employed by Amazon at JFK8 at the time of the hearing. (Tr. 41, 149, 467–468, 512–513, 515.) Amazon called as witnesses Ariana Ovadia, Christina Stone, Heather Mirabal, and Tyler Grabowski, who all held HR positions at JFK8 or DYY6 at a time material to the events which are the subject of the complaint's allegations. As of May and June 2021, Ovadia was an Operations Manager, Stone was an HR Business Partner, and Grabowski was a Senior HR Business Partner; all were employed at JFK8. (Tr. 797–798, 854–857, 1202–1203.) In September and October of 2021, Heather Mirabal was an HR Business Partner at DYY6. (Tr. 899–900.) Amazon also called as witnesses Joseph Troy, a Loss Prevention Manager responsible for Amazon's relationship with its security contractor Metro One in May 2021, and Joseph Gomez, who was an HR Regional Coordinator at Amazon's HRRC facility in Tempe, Arizona as of October 2021. (Tr. 1060–1062, 1127–1128.) Amazon admitted in its answer to the complaint that Ovadia and Stone were statutory supervisors and its agents pursuant to Section 2(13), and stipulated at the hearing that Mirabal, Grabowski and Troy were supervisors within the meaning of Section 2(11) of the Act. (GC Exh. 71; Jt. Exh. 2.) Finally, Amazon called labor relations consultants Bradley Moss and David Acosta to testify. Amazon stipulated at the hearing that Moss and Acosta were its agents pursuant to Section 2(13) of the Act for the purposes of the relevant complaint allegations. (Jt. Exh. 1.)

B. Charging Party's Subpoena Duces Tecum, Privilege Assertions, and Evidentiary Sanctions

Prior to the opening of the hearing, General Counsel and Charging Party ALU served Amazon with Subpoenas *Duces Tecum*. While Amazon filed Petitions to Revoke these Subpoenas, the parties were able to resolve the majority of the issues amongst themselves, so that a ruling on the Petitions to Revoke was unnecessary. However, on August 15, 2022, the Union filed

[2] The complaint alleges at Par. 13(b) that in about late October 2021, Khalil conducted surveillance of employees' union activities. However, General Counsel makes no legal or factual argument in support of this allegation in its Posthearing Brief. As a result, I will assume that General Counsel has abandoned this allegation, and recommend that it be dismissed.

[3] On May 25, 2022, I issued an Order for the hearing in this case to be conducted by videoconference, due to circumstances engendered by the COVID-19 pandemic in the New York City area at the time, and the facilities available to hear the case. On June 3, 2022, Amazon filed a Request for Special Permission to Appeal my May 25, 2022 Order, contending that the hearing should be conducted in person. Amazon further contended on the 1st day of the hearing that the proceeding should be held in abeyance pending a Board ruling on its Request for Special Permission to Appeal, which I declined to do. See Tr. 9–11, 13, 15–17. In an Order dated June 15, 2022, the Board denied Amazon's Request for Special Permission to Appeal, finding that it was not filed in a timely manner, but also stated that Amazon's appeal would have been denied on the merits had its Request been timely.

a Motion to Compel Production of certain documents withheld by Amazon on the grounds that they were subject to attorney-client privilege and/or constituted attorney work product. Amazon filed an Opposition, and on September 19, 2022, I issued an Order requesting appointment of a special master to address the disputed privilege assertions. On September 20, 2022, Administrative Law Judge Geoffrey Carter was appointed as special master. On November 4, 2022, after an *in camera* review of documents, Judge Carter issued a Report and Recommendations, concluding that some of the documents at issue should be produced, either in their entirety or on a redacted basis, and that some of the documents had been properly withheld. (Tr. 629; ALJ Exh. 1.)

On November 7, 2022, I adopted Judge Carter's Report and Recommendations on the record; however, Amazon still refused to produce the documents involved. (Tr. 628–630.) General Counsel moved for evidentiary sanctions immediately, but on November 8, 2022, before I could rule on General Counsel's Motion, Amazon filed a Request for Special Permission to Appeal my ruling adopting Judge Carter's Report and Recommendation. On January 4, 2023, the Board issued an Order granting Amazon's Request for Special Permission to Appeal, and denying the appeal on the merits. Amazon subsequently produced many of the documents subject to Judge Carter's Report and Recommendations, my ruling, and, at that point, the Board's Order. However, they refused to produce all of the materials that Judge Carter had determined were *not* subject to attorney-client privilege and/or the attorney work product doctrine. (Tr. 744–749.) Specifically, Amazon refused to produce two documents described in its privilege log as "labor relations reports describing, among other things, the status of ongoing ULP charges" in the instant case, "including the investigation into allegations of the confiscation of union literature." As a result, on March 10, 2023, General Counsel filed an Amended Brief in Support of their Motion for Evidentiary Sections. Subsequently on March 20, 2023, I issued a ruling on the record granting General Counsel's Motion. (Tr. 761–778.) As part of my ruling, Amazon was precluded from "presenting or adducing[4] testimony regarding the alleged confiscation of union literature at the Staten Island facility," and from "presenting documentary evidence regarding the alleged confiscation of union literature which has not already been provided to the General Counsel." (Tr. 775–776.) In addition, I found it appropriate to draw an adverse inference to the effect that the two documents, had they been produced, would have mitigated against proving Amazon's defenses with respect to the allegations involving the distribution of union literature, and would have "tend[ed] to show that Amazon unlawfully confiscated union literature from Palmer and Spence on June 12, 2021, and prohibited them from distributing union literature in the breakrooms that day." Tr. 776.

C. Amazon's Operations at the Staten Island Facilities

Amazon's operations in Staten Island are comprised of several different facilities on Gulf Avenue. The JFK8 facility is a Fulfillment Center, where products ordered by customers are retrieved, packaged, and shipped to either a sort center or a Delivery Station. (Tr. 901.) The DYY6 facility is a Delivery Station, which receives packages from sort centers or Fulfillment Centers such as JFK8, and delivers them to the customer. (Tr. 900.) The DYY6 facility is located next to JFK8. (Tr. 279.) Fulfillment centers and Delivery Stations are different business lines within Amazon, with different supervisory structures.[5] (Tr. 901–902.)

The JFK8 facility is a very large building, the size of about 14 football fields, and over 5000 employees work inside the facility. (Tr. 204.) In addition to areas where products are retrieved, packaged, and prepared for shipment, there is a main office at JFK8 used by its general manager, assistant general manager, operations managers, area managers, and human resources managers and representatives. (Tr. 54.) The main entrance to JFK8 is located on Gulf Avenue. (Tr. 46.) Employees enter JFK8 through its main entrance, and then must scan their employee badges at one of six to eight turnstiles in order to enter the facility itself and proceed to their work areas. (Tr. 46, 471.)

Amazon contracts with Metro One Loss Prevention Services Group of Staten Island in order to provide security services at the Staten Island facilities. (Tr. 1060–1062; GC Exh. 46, 47.) Based upon security objectives established by Amazon, the primary functions of Metro One's personnel are to "Ensure authorized persons who are allowed entry are screened," and "Keep unauthorized people from entering the property." (GC Exh. 46, p. 5.) Palmer, Monarrez, and Spence testified that there is a security desk or counter in front of the turnstiles immediately inside of JFK8, usually staffed by approximately 4 security guards. (Tr. 47–48, 469, 471, 529.) Some of the guards monitor computers, while others check employees' tote bags and backpacks, and respond to lost-and-found questions from employees. (Tr. 47–48, 471, 529–530.) Individuals who are not employees of Amazon and wish to enter JFK8 approach a glass window to speak to a security guard, who either opens the door for them or denies them access. (Tr. 47, 53–54, 530.) Spence testified that he had seen security guards deny an individual entrance to JFK8 on about five separate occasions. (Tr. 530–531.)

During the period of the pandemic, including the spring, summer and fall of 2021, additional exits from JFK8 were established in the first-floor breakroom and near the sanitation area. (Tr. 48–49, 469–470, 528, 472.) Security guards were posted at both of these temporary exits. (Tr. 48–49, 470, 528–529.) Employees were required to scan their badges to exit the building at these locations, and security guards checked any nontransparent bags employees carried as they left the building. (Tr. 48–50, 470–471, 529–530.)

Amazon communicates with its employees at JFK8 in a variety of ways. Amazon maintains signage directed to employees inside the building. (Tr. 551.) There are television monitors which play slideshows with messages to employees involving operational or HR issues located along the "green mile," aisles through the JFK8 facility containing green strips on the walls which are kept clear for employee safety. (Tr. 479–480, 551.) Employee breakrooms within the facility contain "table toppers," small plastic holders for literature which contain information

[4] The word "adducing" was incorrectly transcribed as "inducing" in the transcript. Tr. 775.

[5] Delivery stations are part of the Amazon Logistics or AMZL business line. Tr. 901.

Amazon places there for employees. (Tr. 551.) Small signs referred to as "installments" are posted in the men's bathrooms above the urinals and on the doors inside toilet stalls. (Tr. 551.) Employees also receive emails from Amazon at their personal email addresses, and receive notifications through the Amazon A to Z information system, which is accessible as a website and via an app. (Tr. 551–552.)

Amazon has various ways of obtaining feedback from its employees as well. Amazon maintains a "Voice of the Associate" or VOA board. (Tr. 857.) Employees can submit recommendations or feedback for the VOA board through Amazon A to Z or at live VOA meetings, and management responds, with both the employee comments and management responses posted electronically on the VOA board. (Tr. 857–858, 875.) Amazon also conducts "GEMBA" walks, small group walks through the building during which employees point out safety or cleanliness issues specific to their own work area. (–r. 858-859, 881–883.) Finally, management solicits employee comments and recommendations during "birthday roundtables," meetings with management for all employees who have a birthday during the particular month. (Tr. 858.)

A number of the Complaint's allegations involve the distribution of union literature at JFK8. Amazon maintains a Solicitation Policy, which was applicable at JFK8 at all material times. This Solicitation Policy prohibits solicitation of any kind on company property during working time, and the distribution of literature or materials "by associates in working areas at any time." (R.S. Exh. 3.) Amazon also maintained at all material times a "Solicitation Policy FAQ" providing exceptions which permitted solicitation for "All legally protected activity as defined under local law." (R.S. Exh. 4.) The FAQs state that in the United States "solicitation is legally protected if it:"

- **Does NOT** use any company electronic systems (e.g., email, Phone Tool, Amazon Wiki, Chime and calendaring), company equipment (e.g., bulletin boards, furniture, mail slots, elevators, and posters); *and*
- Relates to terms and conditions of employment. Terms and conditions of employment include pay, work hours, benefits, and job duties. They do not include the products we sell, our customers, and non-work related social or political causes; *and*
- Happens during non-working time.

Additionally, if solicitation involves distributing materials or literature, to be legally protected in the US, it must *also* occur outside working areas (spaces where work is done, as opposed to break rooms, cafes, etc.).

(R.S. Exh. 4 emphasis in original). Senior HR Business Partner Tyler Grabowski testified that Amazon's Solicitation Policy is available to employees on the Inside Amazon internal search engine. (Tr. 1203–1204.)

D. Amazon Labor Union and the Organizing and Elections at JFK8 and DYY6

Palmer and Spence provided uncontradicted testimony regarding the formation, purpose, and activities of ALU at Amazon's Staten Island facility. Palmer and Spence testified that the ALU was formed on April 20, 2021 with Jordan Flowers, Gerald Bryson, and Chris Smalls, all of whom were current or former Amazon employees at the time. (Tr. 43, 517–518.) Palmer testified that the group formed ALU in order to ensure that the Amazon employees knew their rights, and to improve wages, benefits, and job protections at Amazon. (Tr. 43.) Spence stated that ALU was formed to organize a union for the JFK8 workers, improve working conditions, and to establish a collective-bargaining agreement with Amazon. (Tr. 519.) Employees participated in ALU by wearing ALU t-shirts, and attending weekly Zoom and in-person meetings during break times. (Tr. 44, 520.) ALU also maintained a Telegram electronic chat for its organizing committee that was also accessible to employees. (Tr. 525–536.) ALU held an election for union officers in October 2021, conducting a vote of its employee members. (Tr. 45, 520.) Smalls was elected President, Palmer was elected vice president of organizing, and Spence was elected vice president of membership. (Tr. 44–45, 520. ALU has a Constitution and By-Laws, which were ratified by the Union's membership in October 2021. (Tr. 521–522; GC Exh. 3.)

On April 20, 2021, ALU began an organizing campaign at JFK8. Palmer distributed T-shirts and union literature both inside and outside the facility, and solicited union authorization cards. (Tr. 45–46, 468–469, 517.) The Union also held barbecues at the bus stop across the street from JFK8, where they distributed food to the employees. (Tr. 45–46.) In addition to attending meetings and participating in ALU's Telegram chat, employees helped collect union authorization cards, distributed ALU literature, and attend union-sponsored events. (Tr. 519–520, 529.)

On February 17, 2022, Amazon and ALU entered into a Stipulated Election Agreement in Case 29–RC–288020 for a representation election to take place in a unit of employees employed at JFK8 from March 25 through March 30, 2022. (Tr. 524; GC Exh. 2(a-b).) In this Stipulated Election Agreement, Amazon agreed that ALU "is an organization in which employees participate," "which exists for the purpose…of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act." (GC Exh. 2(a-b).) On March 17, 2022, Amazon and ALU entered into a Stipulated Election Agreement in Case 29–RC–290053 for a representation election to take place in a unit of employees employed at LDJ5, another component of Amazon's Staten Island facility, on April 25, 27, 28, and 29, 2022. (GC Exh. 2(c).) Amazon agreed to identical language describing ALU as a labor organization within the meaning of Section 2(5) of the Act in the context of the a Stipulated Election Agreement involving LDJ5. (GC Exh. 2(c-d).)

When the ALU campaign began in April 2021, the Union erected a tent at the bus stop directly across the street from JFK8. (Tr. 45–46.) The Union held barbecues and distributed food to employees at the tent, distributed literature and union authorization cards, and generally conducted organizing activities from

this location. (Tr. 45–46.) JFK8 supervisors and management immediately took note of these activities. On April 30, 2021, Loss Prevention Manager Troy and Employee Relations Manager Christine Hernandez engaged in a chat over Chime, an internal Amazon messaging platform, with 40 additional Amazon personnel, including a number of admitted statutory supervisors. [6] (GC Exh. 40; see GC Exh. 71.) Hernandez stated, "The tent is up with 3 people," and told the group, "Yesterday morning the same thing. 2 hours starting around 4:30 a.m." (GC Exh. 40.) Troy commented, "Only 1 in the tent as of 730," and "An ALU brochure was discovered during a security restroom rove and reported directly to LP [Loss Prevention] at [around] 1035. The brochure was handed to me and I disposed of it." (GC Exh. 40.) Troy then reported, "Everyone has left as of 618." (GC Exh. 40.)

E. Evidence Involving the Conduct of Labor Consultants Bradley Moss on May 4, 2021 and David Acosta on October 31, 2021

1. Moss' conversation with Natalie Monarrez on May 4, 2021

Natalie Monarrez testified regarding a conversation with labor consultant Bradley Moss on the floor of the JFK8 facility which took place on May 4, 2021. Monarrez had worked for Amazon at the JFK8 facility since June 2019, and at the time of the hearing was a sort inductor, scanning and loading packages onto a conveyor belt. (Tr. 468.) Monarrez testified that while she was working at her station early in the afternoon of May 4, a coworker informed her that an auditor was speaking to various employees, and wanted to see her immediately. (Tr. 486–487.) Monarrez walked downstairs to an open area where managers and processing assistants typically conduct their meetings, where she saw Moss standing next to a table. (Tr. 487–488.)

Monarrez testified that Moss began the conversation by introducing himself as an "auditor" for Amazon, and showing Monarrez an Amazon badge similar to Monarrez' own, containing his name and photograph. (Tr. 488, 501.) Moss asked Monarrez what her job duties were and how long she had worked for Amazon, and then stated that his own job involved traveling to different Amazon locations throughout the United States, to speak with workers about their concerns and questions in an effort to try to improve the workplace.[7] (Tr. 488, 501.) Moss mentioned in particular that he had just left Bessemer, Alabama. (Tr. 488.) Moss then asked Monarrez "specifically for three issues that [she] would like to address and improve at Amazon." ()Tr. 488. Monarrez replied that gender and race discrimination were significant problems at JFK8, as well as a lack of promotional opportunities for tier one employees, particularly for women and minorities. (Tr. 488.) Monarrez also stated that the employees had ongoing difficulties filing claims involving on-the-job injuries with Amazon and its Workers Compensation carrier, Centric Insurance. (Tr. 488–489.) Moss had a notebook and pen, and took notes during Monarrez' comments, in addition to recording Monarrez' badge number. (Tr. 489.)

According to Monarrez, Moss responded to her remarks by stating that discrimination existed in every industry and was "simply part of the job" in every workplace, including in the military, based upon his own military service. (Tr. 489.) Moss told Monarrez that some employees always worked harder than others. (Tr. 489.) Moss then stated that Monarrez appeared to be intelligent and capable, and asked her why she didn't just find a job somewhere else. (Tr. 489.) Monarrez replied that it was difficult to find a job, and that she and many of the older employees at Amazon had lost their previous careers during the recession. (Tr. 489.)

Monarrez testified that Moss then asked her what working at JFK8 was like when the COVID-19 pandemic began in 2020. Monarrez stated that while many of the workers left for a 90-day unpaid leave of absence, she remained on a skeleton crew, and that she, like many of her coworkers, became very sick for multiple months between March and June of 2020. (Tr. 489–490.) Moss responded that it was a difficult period for him as well because he was traveling by airplane during the COVID-19 pandemic, and stated again that he had just come from Bessemer, Alabama. (Tr. 490.) Moss then asked whether the spring of 2020 was when Chris Smalls had erected the ALU tent outside of the Staten Island facility and begun the union organizing campaign. (Tr. 490.) Moss also asked Monarrez whether she had joined the protest that Smalls had organized in March. (Tr. 490.) Monarrez replied that she had stayed behind to continue working, and that only a dozen or so of the younger workers had gone outside to attend the protest. (Tr. 490.) Moss then asked Monarrez if she had joined the Union and signed a card. (Tr. 490). Monarrez responded that she was interested in the Union, but had not signed a union card at that point. (Tr. 490.)

Monarrez testified that she and Moss also discussed the union organizing campaign in Bessemer, Alabama in further detail. Monarrez told Moss that she had read media reports that Amazon had installed an illegal post office box in Bessemer, so that its security team could intercept employee votes in the union election conducted there. Tr. 490. Moss looked away and said that that had never happened. Tr. 490. According to Monarrez, Moss then stated that the Bessemer campaign "was not a serious union drive," but "a Black Lives Matter protest about social injustice." (Tr. 491.) Moss told Monarrez that the Bessemer employees "were never going to have a union" because the Union there was "not offering anything to the employees" and "didn't know what they were doing." (Tr. 491.) Moss then pointed to the front of the JFK8 warehouse and said, "Just like these guys out here, they're just a bunch of thugs." (Tr. 491.) Moss told Monarrez that "the guys across the street" also did not know what they were doing, and that Monarrez "should not bother even getting involved" because "the Union would never happen." (Tr. 491.) Monarrez testified that she was offended by Moss' characterization of the union organizers outside the JFK8 facility as "thugs," given that word's pejorative racial connotations, and Moss

[6] Amazon stipulated that the following individuals appearing on this Chime chat were statutory supervisors: Employee Relations Manager Christine Hernandez, Loss Prevention Manager Joe Troy, Employee Relations Manager Elliott Jones, Employee Relations Manager Clem Hall, Senior Human Resources Manager Jenna Edwards, Senior Human Resources Business Partner Tyler Grabowski, and Human Resources Business Partner Mike Tanelli. GC Exhs. 40, 71.

[7] Monarrez testified that she had never previously had a conversation where any member of Amazon management asked her to identify work-related problems. Tr. 494.

turned away from her. (Tr. 491–492.) Moss then showed Monarrez a chart with financial information, and told her that she and the rest of the workers would be getting a 50-cent pay raise, in addition to a 50-cent raise she would receive upon her 2-year anniversary at JFK8. (Tr. 491–492.) Moss stated that "Amazon would take care of their employees," and that the employees "did not need a union." (Tr. 491–492.) Moss further told Monarrez that his boss was a woman, and had direct ties to Jeff Bezos. Tr. 492. Moss stated that his boss would be conveying all of Monarrez' concerns and issues to Bezos himself, reiterating that "everything would be resolved and everything would be taken care of." (Tr. 492–493.)

After some "small talk" about Thousand Oaks, California, where Monarrez and Moss had both lived previously, Monarrez returned to her work station. (Tr. 493.) Monarrez' coworker, who had informed her that she was expected to go and speak with Moss, mentioned that she had been away for 45 minutes, which Monnarez confirmed by looking at her watch. (Tr. 493.) Monnarez characterized the discussion with Moss as "friendly in tone," but also stated that she felt pressure to remain with him and continue the conversation. (Tr. 501–502.)

Bradley Moss was called by Amazon as a witness. Moss testified that in May 2021 he was working as an independent contractor for the Burke Group, as a labor consultant at JFK8. (Tr. 1092, 1094–1095.) The Burke Group is a labor relations consultancy firm with expertise in "union avoidance," "preventative labor relations," and "union-free workplaces." (Tr. 1115–1117; GC Exh. 78.) Moss further testified that while working as an independent contractor for The Burke Group, he also worked for the firm Labor Information Services, a "third-party persuader," when he "was engaged in direct dialogue with associates or employees." (Tr. 1109–1110.) Moss admitted that he may have received some of the payments Amazon remitted to Labor Information Services which, according to an LM-10 form filed by Amazon with the United States Department of Labor for calendar year 2021, was "retained in response to large scale union organizing efforts, including to assist [] in expressing the company[']s opinion on union representation, and to educate employees about the issues, election process, and their rights under the law." (Tr. 1112–1113; GC Exh. 45, p. 5.)

Moss testified that as part of his activities at JFK8 he spoke to between 35 and 50 employees each day, introducing himself as a consultant and asking employees about their experiences working for Amazon. (Tr. 1096–1098.) Moss provided a written summary of his interactions with employees each day to Amazon, particularly Employee Relations Manager Christina Hernandez, who had provided direction regarding his interactions with employees. (Tr. 1119–1120; GC Exh. 71.) Moss testified that he only discussed ALU or union representation if an employee raised the issue first, and only told employees that he questioned Chris Smalls' "experience in running a labor organization" while discussing the Union with them. (Tr. 1100–1101.) Moss denied asking employees at JFK8 whether they had participated in protests or union activities, and whether they had joined ALU or were interested in doing so. (Tr. 1101.) Moss also denied conveying to employees that supporting the Union would be futile, or promising that Amazon would address employees' concerns if they did not vote for the Union. (Tr. 1101–1102.) Moss denied referring to himself as an auditor, asking employees about their work-related problems or concerns, or stating that he knew anyone who could speak directly with Jeff Bezos. (Tr. 1098–1099.) Although Moss admitted that he worked for Amazon at their Bessemer, Alabama location as an independent contractor with the Burke Group, he denied mentioning the organizing campaign in Bessemer during his conversations with the employees at JFK8. (Tr. 1107, 1117–1119.)

Moss testified that he only generally recalled speaking with Monarrez. (Tr. 1102.) Moss stated that his only specific recollection of their conversation was contained in notes he made while speaking to Monarrez, which were entered into evidence as General Counsel Exhibit 36. (Tr. 1107; GC Exh. 36.) These notes consist of a list of general topics, and indicate that he and Monarrez discussed ongoing, "systemic issues" of gender and racial discrimination, specifically involving promotions to leadership positions. (GC Exh. 36.) Moss' notes also mention a complaint to HR and "Senior Ops" regarding that issue, which had not prompted any response. (GC Exh. 36.) Finally, Moss' notes refer to Workers Compensation, and mention a letter sent to Jeff Bezos, stating that Bezos was "too far removed to really know." (GC Exh. 36.)

Moss' activities while working at JFK8 are also reflected in the series of emails he exchanged with Amazon supervisors and other labor relations consultants, including Christina Hernandez, [8] in early May 2021, admitted into evidence as General Counsel Exhibits 30 through 35. On May 2, 2021, Employee Relations Manager Elliot Jones emailed the group at 7:16 a.m., stating as follows:

> All—Since we are in the early stages of the activity outside I think it's important for us to be able to report out to leadership how many AAs [Amazon Associates[9]] are aware of the union outside. Our reports out next week will improve if we can say 'x% of AAs we engaged with during week 2 are aware of the union. . .' and out of that % [x number] showed an interest, were simply curious without interest, etc. Senior leadership will want this specificity soon. If we are already providing this data, please disregard this recommendation.

(GC Exh. 35) (spelling and punctuation anomalies in original). At 9:18 a.m. Moss responded, stating, "We will make a concerted effort this week to quantify the % of associates engaged that are aware of union activity, expressed interest, or simply curious." (GC Exh. 35.) At 9:45 a.m., labor relations consultant Mark Lema forwarded the group "the daily report for May 1, 2021." (GC Exh. 35.) Jones then emailed the group again at 10:10 a.m., asking "How many AAs expressed interest?" and

[8] In addition to Hernandez, this group included Employee Relations Managers Elliot Jones and Clem Hall, admitted statutory supervisors, and labor consultants Mark Lema and Jim Miseracola, admitted agents of Amazon within the meaning of Sec. 2(13) of the Act. GC Exhs. 30, 71.

[9] "AAs" refers to Amazon Associates, or employees of Amazon. See R.S. Posthearing Br. at 23.

Moss' summary states, "Some associates expressed interest in understanding more about the ALU union—think it is an established (regular) union. When they learn that the ALU are essentially amateurs with no experience or resources, they seem to become less enamored with the idea of a union." (Tr. 1121; GC Exhs. 30, 35.) Moss then responded to Jones and the group by stating "3 Associates—one a former UPS employee and Teamster member." (GC Exh. 30.) Moss' report to this same group the next day indicated that employees complained regarding "Favoritism in Assignments," and that one employee "felt that 'a lot' of associates want the union." (GC Exh. 31.)

Several of Moss' daily reports in early May contain information regarding "Any relevant comparisons to BHM1," Amazon's facility in Bessemer, Alabama.[10] (GC Exh. 31–34.) In fact, Moss' report sent the evening of May 4, 2021, the date of his conversation with Monarrez, includes as a "relevant comparison[] to BHM1" for the first time "Accusations of race and gender discrimination."[11] (GC Exhs. 30–32.)

2. Acosta's conversation with Janet Olmedo on October 31, 2021

Janet Olmedo testified regarding a conversation with labor consultant David Acosta at her workstation in the AFE1 area of JFK8, which occurred on around October 31, 2021. (Tr. 15–153, 154–155, 156–157, 175, 178; C.P. Exh. 2.) Olmedo testified that Acosta introduced himself as Dave, and asked her if she "knew what was going on with the Union." (Tr. 155, 158.) Olmedo testified that she told Acosta that she did not know what was going on, even though she was aware that a campaign had begun to organize Amazon and had signed a Union card, because she was afraid of repercussions, specifically of being discharged. (Tr. 158–159, 161.) At the time, Olmedo thought that Amazon management was not aware that she supported the Union, and was "worried that they would find out." (Tr. 162.)

According to Olmedo, Acosta then told her that the Union was "basically just another company trying to make money off the workers, that they don't really care about us." (Tr. 162.) Acosta told Olmedo "that if the union did pass…they would be hosting strikes and walkouts and that that would not look good for the company." (Tr. 162.) Acosta told Olmedo that she "was happy at Amazon . . . not to sign anything or . . . support the Union." (Tr. 162–163.) Acosta concluded the conversation by telling Olmedo that if she had more questions about the Union and "wanted to know the facts," she could ask him. (Tr. 163.) Olmedo testified that the entire conversation occurred within 5 minutes. (Tr. 166.)

David Acosta was called to testify on behalf of Amazon. Acosta testified that he was hired by The Burke Group to consult with Amazon, and worked at JFK8 for about three weeks in late October and early November 2021. (Tr. 823–824, 826.) Acosta testified that he generally approached employees, introduced himself as David, and stated that he was there on behalf of Amazon to answer any questions regarding the Union activity taking place. (Tr. 829.) Acosta denied asking employees about their own union activities or those of other employees, asking employees what was going on with the Union, or predicting that strikes would occur if the employees selected ALU as their collective-bargaining representative. (Tr. 829–831.) Acosta testified that he had no specific recollection of any conversation with Olmedo. Tr. 839–840.

F. Evidence Involving the Conduct of Metro One Security Guards John Hill on May 16, 2021 and Elena Koplevich on May 24, 2021

1. Hill's Interaction with Connor Spence on May 16, 2021

Connor Spence testified regarding the incident involving security guard John Hill on May 16, 2021, which forms the basis for the Complaint's allegations. Spence has been employed at JFK8 since May 2021 as a tier one associate, and typically works in the problem solver position in the AFE1 department. (Tr. 512–513, 514, 515–516.) Spence testified that he is one of the founding members of the ALU, and was elected Vice President of Membership in October 2021. (Tr. 517, 520.) Hill did not testify at the hearing.

Spence testified that after his break began on May 16, 2021, at around 2:30 p.m., he retrieved union literature from the tent ALU had set up at the bus stop across the street from the Staten Island facility. (Tr. 538.) The union flyers which Spence picked up consisted of a Notice to Employees which was part of the settlement of unfair labor practice charges involving Amazon's warehouse in Queens, New York. (Tr. 538–539; C.P. Exh. 1.) Spence took the union flyers to the first floor main breakroom at JFK8 and began distributing them, handing flyers to employees in the breakroom who requested them, but also placing flyers on the breakroom table next to Amazon's own literature in order to comply with Amazon's social distancing policy in effect at the time. (Tr. 539.) Spence testified that he had handed the flyers to two or three employees and placed flyers on the table in front of up to 20 employees present when security supervisor John Hill entered the breakroom. (Tr. 540.) Hill was wearing a security uniform with a blue security supervisor vest. (Tr. 540.) Spence had never seen Hill in the breakroom before. (Tr. 540.)

Hill approached Spence at the breakroom table and asked Spence if he had permission to distribute the papers. (Tr.

[10] I note that in its Objections to the Results of the Election conducted at Amazon's Bessemer, Alabama facility in Case 10–RC–269250, submitted on August 7, 2022, Amazon refers to the Bessemer facility as "BHM1." The Hearing Officer's Report on Objections in that case, issued on August 2, 2021, also refers to the Bessemer facility as "BHM1." Although these documents were not offered or admitted into evidence by General Counsel, I find it appropriate to take administrative notice of them for this purpose, given that the Objections are part of the public case file and were submitted by the same law firm representing Amazon in the instant case. See *International Longshore & Warehouse Union*, 372 NLRB No. 66 at p. 1, fn. 1 (2023) (granting motions to take administrative notice of "prior Board decisions and public case documents" which are "official records of the Board").

[11] The evidence establishes that information from the labor consultants' daily reports was disseminated to Amazon supervisors for "follow up" regarding specific complaints and issues identified by JFK8 employees. For example, in a June 17, 2021 Chime chat with other Amazon supervisors and labor consultants, Christine Hernandez identifies individual employees by name and describes their specific complaints, "from tonight's report out from one of the consultants." GC Exh. 41. Hernandez then directs supervisors to address the issues directly with the named employees that evening. Id.

540–541.) Spence responded that he did not need permission to distribute the flyers, and Hill stated that Spence did in fact need permission. (Tr. 541.) Spence told Hill that under Section 7 of the National Labor Relations Act, he had the right to distribute union literature in a breakroom during his break time. (Tr. 541.) Hill stated again that Spence needed permission in order to distribute the flyers. (Tr. 541.) Spence said that Hill could call his own boss or HR to confirm that he had the right to distribute union flyers in the breakroom on his own break time. (Tr. 541.) Hill then took out his phone and asked to see Spence's badge, in order to take a picture of it. (Tr. 541–542.) Spence took out his badge and showed it to Hill, feeling obligated to comply because Hill was a security guard. (Tr. 542.) Hill took a photograph of Spence's badge and began using his phone, so Spence left the breakroom to make a phone call himself. (Tr. 542–543.) When Spence returned to the breakroom, Hill was holding all of the union flyers Spence had placed on the table in his hand. (Tr. 543.) Spence approached Hill and asked, "Why are you even doing this? You know, you don't work for Amazon." (Tr. 542.) Hill replied, "I'm doing my job," and Spence stated that it was not Hill's job to break the law. (Tr. 543.) Spence then took a photograph of Hill holding the union flyers that Spence had been distributing. (Tr. 543–545; GC Exh. 11.) After taking the photograph, Spence asked Hill to return the union literature, but Hill refused to do so. (Tr. 545.)–

About two to three weeks after the May 16, 2021 incident with Hill, Spence was called into a meeting with Senior Human Resources Manager Tyler Grabowski and Spence's manager in Grabowski's office in the main office area of JFK8. (Tr. 549–550, 1205.) Grabowski testified regarding this meeting as well. Grabowski began the meeting by stating that he had called Spence in to discuss the incident in the breakroom with Hill. (Tr. 550, 1205.) Grabowski told Spence he wanted to extend an apology to him, and to let Spence know that Hill's conduct on May 16 was not directed by Amazon. (Tr. 550, 1205–1206.) Grabowski testified that he informed Spence that "the security team members are third party," and that Hill "was not acting on behalf of Amazon or at the direction of Amazon." (Tr. 1205–1206.) Spence testified that Grabowski stated that Hill had been coached regarding Amazon's policy involving the distribution of union literature, and confirmed that Spence had the right to distribute union literature in the breakroom, in that the right to distribute union literature in the breakroom superseded Amazon's no-solicitation policy. (Tr. 550–551.) Grabowski confirmed that he apologized for Hill's interference with Spence's "protected right to solicit in non-working areas during non-working times, which includes the break space." (Tr. 1206.) Spence acknowledged Grabowski's remarks and left. (Tr. 551.)

Joseph Troy, who was an Amazon loss prevention manager at JFK8 as of May 2021, also testified regarding this incident. (Tr. 1060–1061.) Troy testified that in May 2021 he was responsible for ensuring that Metro One, a security contractor engaged by Amazon at JFK8, fulfilled its contractual obligations at the site. (Tr. 1061–1062.) Troy's primary contact at Metro One as of May 2021 was Kaydee Bertone; Amazon stipulated at the hearing that Bertone was its agent pursuant to Section 2(13) of the Act at the relevant time. (Tr. 1062; GC Exh. 71.)

Troy testified that he was informed by Bertone that security guard John Hill, who was Metro One's acting supervisor on shift at the time, had approached an employee placing papers on the desks in the breakroom, and asked the employee who had given them permission to do so. (Tr. 1063–1064, 1080–1081.) Bertone also told Troy that Hill photographed the employee's badge to consult with HR, and then collected the papers the employee had been distributing. (Tr. 1064.) The employee left, but then returned and asked Hill why he was removing the papers, which were union flyers. (Tr. 1064.) Troy testified that immediately after learning of this incident he informed Metro One that they were not to remove union literature from any breakroom, and met with Hill to discuss his conduct. (Tr. 1064.) Troy testified that he told Hill that Hill was not supposed to be removing union flyers from employee breakrooms, and should not do so in the future. (Tr. 1066–1067.) Subsequently, on May 27, 2021, Troy emailed Bertone regarding this incident. (Tr. 1068–1069; GC Exh. 50.)

Spence testified that he never received any emails from Amazon or notifications via the A to Z app regarding Hill's conduct on May 16, 2021, or employees' Section 7 right to distribute union literature. (Tr. 552–554.) Spence also never saw any notice posted regarding Hill's conduct on May 16 or employee rights to distribute union literature in any of the areas where Amazon typically posted notices to employees, including breakroom table-toppers, television screens, and employee bathrooms. (Tr. 551, 553, 554–555.) Grabowski testified that he did not recall asking more senior managers to send a notification to all Amazon employees stating that Hill's conduct was inappropriate. (Tr. 1216.) Grabowski and Troy testified that they did not have meetings with employees regarding the incident involving Hill, nor did they ask any member of HR to send an email to employees discussing the incident. (Tr. 1221–1222, 1083.) No posts were placed by Amazon on the VOA board or the A to Z app pertaining to the incident with Hill. (Tr. 1216–1220, 1084; R.S. Exh. 6.)

2. Koplevich's conduct on May 24, 2021

Spence also testified regarding the activities of security guard Elena Koplevich on May 24, 2021. ALU was holding a cookout for the employees that day, at its tent at the bus stop across from the Staten Island facility, where employees could pick up food and obtain information regarding the Union. (Tr. 546–547.) Spence was not scheduled to work on May 24. (Tr. 547.) In the afternoon during the cookout, Spence recognized a female security guard that he had previously seen at JFK8, who was wearing a security uniform and a green vest stating "Security" on the back. (Tr. 547–548.) The security guard stood at a small fence that separates the parking lot for the Staten Island facility from the street, where she held up her phone, pointing it at the Union organizers and about employees for two to five minutes. Tr. 548-549; GC Exh. 53.

Troy testified that he learned about Koplevich's conduct on May 24, 2021, when Bertone directed his attention to an ALU social media post discussing the incident, and immediately contacted Bertone to ask that Koplevich be removed from the site. (Tr. 1067–1068, 1069, 1081; GC Exh. 50, 51.) Troy stated in his email that "Elena Kopelevich…was observed taking unauthorized pictures while on duty today under no direction from

Amazon, and not related to an investigation or as part of her regularly scheduled post orders." (GC Exh. 51.) Troy testified that, as he stated to Bertone, Koplevich was acting outside of her authority by taking videos or photographs of union activity, because the security contractor was only permitted to take photographs or video recordings during an active investigation. (Tr. 1068.)

Based upon the incidents involving Hill and Kopelevich, on May 27, 2021, Troy emailed Bertone and other Metro One representatives, requesting that Metro One provide training in labor law to Metro One employees at and assigned to Amazon facilities, including JFK8 and LDJ5. (Tr. 1068–1070; GC Exh. 50.) Metro One later reported to Troy that it had conducted the requested training. (Tr. 1070, 1082.)

Spence testified that management never met with him regarding security guard Koplevich's conduct on May 24. (Tr. 555.) Spence testified that he never received any texts or emails and never saw any notifications regarding Koplevich's conduct, or affirming employees' right to engage in union activities without being subjected to surveillance. (Tr. 555–556.) Grabowski testified that he recalled being made aware of the incident, but did not take any action to inform employees that the security guard's conduct was inappropriate, or to affirm the employees' right to engage in union activities without being subjected to surveillance. (Tr. 1222–1223; see also Tr. 90–91, 1084–1085.)

G. Evidence Involving the Distribution of ALU Literature on June 12, 2021

Derrick Palmer and Connor Spence testified for General Counsel regarding their distribution of union literature on June 12, 2021, and ensuing exchanges with Amazon HR personnel. Palmer testified that on his break time at 10:30 a.m. that day, he distributed union literature to other employees in the third floor breakroom of the JFK8 facility. (Tr. 60–61, 93–94; C.P. Exh. 1.) The specific leaflet Palmer distributed consisted of the same Notice to Employees that Spence had distributed on May 16, 2021, described above. (Tr. 76.) Palmer brought about 50 of these flyers to the third floor breakroom, where he passed them out to about 50 employees on their break by placing flyers in front of them where they sat or handing flyers to the employees directly. (Tr. 76.)

While Palmer was distributing union literature, Senior HR Associate Luke Wojahn entered the breakroom, and removed the union flyers from four tables where Palmer had placed them.[12] (Tr. 77–78; GC Exh. 39.) Employees were seated at the tables while Wojahn removed the union literature. (Tr. 78; GC Exh. 39.) Palmer approached Wojahn and told him that what he was doing was wrong, that removing union literature from the breakroom was illegal and he was not permitted to do so. (Tr. 78.) Wojahn responded that he "got a notification" to remove union literature,[13] and Palmer asked who had directed Wojahn to remove the union flyers. (Tr. 78, 80.) When Wojahn did not respond, Palmer stated again that Wojahn's conduct was illegal, and that he was not allowed to remove union literature from the breakroom. (Tr. 80.) Palmer asked Wojahn to give him the union literature that Wojahn was holding. (Tr. 80.) When Wojahn did not respond, Palmer placed his hand on the leaflets, and Wojahn let them go and exited the breakroom. (Tr. 80–81.) The parties stipulated that video in evidence as General Counsel Exhibit 39 depicts the incident involving Wojahn and Palmer, which occurred between 10 and 10:30 a.m. on June 12, 2021. (GC Exh. 39, 71.) Palmer testified that there were about 50 employees in the breakroom at the time. (Tr. 80.)

Palmer testified that he then went to the main office in order to attempt to determine who had directed Wojahn to remove the union literature, accompanied by an employee named Constantine, who told Palmer that she had seen the incident. (Tr. 81–82, 242.) Wojahn was present in the office when Palmer arrived, so Palmer asked Wojahn who had told him to remove the literature, but Wojahn did not respond. (Tr. 82.) When HR representative Jeffrey Lin stepped in front of Wojahn, Palmer asked Lin who had told Wojahn to remove the literature, but Lin did not respond either.[14] (Tr. 82.) Palmer, then on the phone with ALU attorney Seth Goldstein, stated that he and Goldstein wanted to speak with the legal department. (Tr. 82–84.) Palmer then went inside the HR office, where Wojahn and Lin were on the phone, and asked whether they were going to meet. (Tr. 83.) Wojahn left the HR office, so Palmer returned to his workstation. (Tr. 83.)

Palmer testified that right after his lunch break ended, he was approached by Operations Manager Ariana Ovadia outside the breakroom area next to the AFE2 department. (Tr. 84–85, 798.) Ovadia told Palmer that she had heard about the incident involving union literature, and asked Palmer to tell her what had happened. (Tr. 85.) Palmer told Ovadia that he was distributing union literature, and that the flyers he had placed on the breakroom tables were removed. (Tr. 85.) Palmer stated that he had told the person who had taken the union flyers that they were not allowed to remove them. (Tr. 85.) Palmer also said that he had gone to the office to determine who had directed that the flyers be removed, but was not provided with any information. (Tr. 85.) Ovadia told Palmer that, "well, you know, you're actually allowed to remove literature . . . I have all lawyer friends and all my lawyer [friends] said they're allowed to do that." (Tr. 85.) Palmer said that was not correct, but Ovadia stated again that her "lawyer friends" had informed her that union literature could be removed from the breakroom. (Tr. 85.)

Ovadia then asked Palmer how long he had been with the

[12] Amazon stipulated that Wojahn was its agent within the meaning of Sec. 2(13) for the purposes of the allegations of the complaint involving the events of June 12, 2021. (Jt. Exh. 1). Wojahn did not testify at the hearing.

[13] Wojahn provided a statement to Amazon regarding this incident. According to Wojahn's statement, "I was notified by Stephanie Wu Sr. HRA that there were papers being distributed and left on the 3rd floor breakroom. I was asked to collect and remove those that were not in use by those in that area at approximately 10:30 a.m." GC Exh. 74(a).

[14] Lin also provided a statement to Amazon regarding the incident, which describes his activities as follows: "At 10:55, I exited the main HR office with Luke to begin our site-walk to find possible union pamphlets and materials in any of the eating areas." GC Exh. 75(a-b). Lin did not testify at the hearing. Various Chime messages exchanged between Amazon supervisors at JFK 8 in June 2021, including on June 12, refer to "tracking" Union activity and the presence of ALU literature in the facility. GC Exhs. 38, 41, 42.

company, and Palmer stated that he had worked for Amazon for 5 years. (Tr. 85–86.) Ovadia asked Palmer why he hadn't moved up within the company, and Palmer replied that he had "been through a lot" with Amazon. (Tr. 86.) Ovadia then asked Palmer, "why do [you] hate Amazon." (Tr. 86.) Palmer asked Ovadia what she meant by that, and who had told her that he hated Amazon, because he had never said that. (Tr. 86.) Ovadia responded, "I just figured you hated Amazon." (Tr. 86.) Palmer asked her again what she meant and why she thought he hated Amazon, and Ovadia reiterated, "I just figured you hate Amazon." (Tr. 86.)

Spence was also present at the JFK8 facility on June 12, 2021. He was not scheduled to work that day, but intended to set up the ALU tent at the bus stop and speak to Amazon employees regarding the Union. (Tr. 556.) Before he could set up the tent, however, he received a phone call informing him that Palmer was involved in a discussion with HR, so he entered the building at around noon to attempt to join the meeting. (Tr. 557.) When Spence arrived at HR, Palmer had already left, so Spence decided to distribute union literature in the third floor main breakroom. (Tr. 558–560; GC Exh. 10; C.P. Exh. 1.)

Spence testified that when he arrived in the breakroom at about 12:30 p.m. there were about 20 employees present. Tr. 560. Spence began distributing the union literature by placing it on tables and handing it to employees who requested it. (Tr. 560–561.) Ovadia entered the breakroom through a side door, and immediately started removing the union literature that Spence had placed on the tables. (Tr. 561.) Spence walked up to Ovadia and asked what she was doing, and Ovadia replied that she was removing papers. (Tr. 562–563.) The parties stipulated that videos entered into evidence as General Counsel Exhibits 66 and 67 depict Ovadia removing union literature from the breakroom tables, and her discussion with Spence, at approximately 12:45 p.m. (GC Exhs. 66, 67, 71.)

Spence asked Ovadia what the papers she was removing actually were, and she stated that she didn't know, she was just removing them. (Tr. 563.) Spence asked Ovadia whether the papers were union literature, and she said that she did not know. (Tr. 563.) Spence asked to see the papers Ovadia was removing, so that he could let her know whether they were union literature, but Ovadia would not show them to him. (Tr. 563.) Eventually, Ovadia stopped picking up the Union literature, folded the flyers she had in her hand, and put them in the pocket of her vest. (Tr. 563.) Spence took one of the flyers and said, "Is this one of the papers you were taking, this Union literature?" (Tr. 563.) Ovadia said she dd not know. (Tr. 563.) The papers Ovadia had rolled up and placed in her pocket unrolled to the extent that Spence could see the ALU logo at the top, and Spence said, "that's my Union literature, I know what that is . . . you're taking my Union literature from me." (Tr. 563–564.) Ovadia said that she had to make a phone call. (Tr. 564.) Spence asked Ovadia to give him the union flyers, and Ovadia refused. Tr. 564. Spence told her that the Union had "already filed charges with [the] NLRB because of exactly this type of behavior," and Ovadia gave him the flyers, saying, "fine, take it." (Tr. 564.) Spence asked Ovadia several times for her name, but she ignored him and made a phone call. (Tr. 564.) The parties stipulated that videos in evidence as General Counsel Exhibits 66 and 67 depict the interaction between Ovadia and Spence on June 12, 2021. (GC Exhs. 66, 67, 71.)

Spence testified that he then sent Palmer a text message, telling Palmer that union literature had been confiscated from him, and that he had been prohibited from distributing union literature in the breakroom. (Tr. 565.) The two met at 1:30 p.m., Palmer's break time, to go to HR together and address the issue, since Grabowski had told Spence a few days earlier, in connection with the May 16, 2021 incident involving Spence and security guard Hill, that employees had the right to distribute literature in the breakroom. (Tr. 87, 565.)

Spence and Palmer proceeded to HR and met with HR Business Partner Christina Stone and HR Representative Purvisha Shukla, with ALU Attorney Seth Goldstein participating by phone. Palmer asked Stone why union literature was "being snatched" from the breakroom, and who had directed Wojahn to do so, given Wojahn's comment that he had received a notification that union literature should be removed. (Tr. 88, 566.) Stone stated that Amazon had a policy that managers or HR representatives should clean up "papers or messes" in the breakroom, and that they were permitted to remove the literature. (Tr. 88–89, 566.) Palmer and Spence asked to see the policy involved, because they had never seen managers or HR representatives cleaning employee breakrooms before.[15] (Tr. 88–89, 566–567.) Spence then asked Stone why an Operations Manager who refused to identify herself was taking union literature from the breakroom, given his recent conversation with Grabowski. (Tr. 567.) Stone stated that she would have to look into the matter. (Tr. 567.) Palmer and Spence testified that they were never provided with a copy of the policy that Stone referred to during this meeting. (Tr. 89, 566.)

Spence made a recording of this conversation on his phone, entered into evidence as General Counsel Exhibit 9(a).[16] (Tr. 567-572. After Palmer, Spence, and Goldstein inquired as to the removal and confiscation of Union literature, Stone stated as follows:

> I'm going to be able to speak on behalf of our team on what's going on today. So our, my name's Christina. And the direction that all of our team members in the building follow is that whenever there's anything on our breakroom tables we typically go through GEMBAs and through different, um, like, cleaning initiatives to be sure that our building is clean. So our team does GEMBAs throughout breakrooms, GEMBAs throughout the floor, um, we look for, you know, empty water bottles, paperwork, anything that's on, like an empty or vacant table we would be removing, to keep the area clean for all of

[15] Spence testified that the cleaning contractor ABM cleans the JFK8 facility, including the break areas. Tr. 567; see also GC Exh. 65.

[16] It is unclear from the record whether the transcript of this recording prepared by General Counsel, offered as General Counsel's Exhibit 9(b), was admitted into evidence. As a result, the transcribed excerpts of the recording which follow are based upon my own review of the audio recording.

Stone prepared a written account of the meeting with Spence and Palmer, admitted into evidence as R. Exhs. 8 and 9. Tr. 863, 871.

> our team members. It goes along with our standard work and also some COVID initiatives to ensure that the space is tidy and clean, so if it's empty we come in and clean the space.

GC Exh. 9(a) (0:52-1:33). Spence responded as follows:

> So, this happened once already, I filed a charge with the NLRB, Tyler [Grabowski] called me in a couple of days ago to apologize, said it was wrong of security to take the literature from me, just happened today. The manager took it from me, wouldn't give it back until I threatened legal action, lied about what she was taking from me because she knew she wasn't supposed to, and wouldn't tell me her name, and I still don't even know who she is.

GC Exh. 9(a) (1:31-1:54).

Palmer stated that the confiscation of union literature had occurred twice in the same day, and asked why management was removing union literature from the table where he and Spence had placed it, in circumstances protected under Federal law. (GC Exh. 9(a) (2:23-2:37).) Spence asked to call Grabowski—who had informed him days earlier that he was permitted to distribute union literature in the breakrooms—to the meeting. (GC Exh. 9(a) (2:57-3:01).) After Goldstein suggested that the media would be contacted, Stone said, "So I'll say, I don't have any details on the current situation, all I can let you guys know is that our team was following our standard operating procedures." (GC Exh. 9(a) (3:46-3:54).) After Palmer and Spence asked Stone what policy was being implemented and what direction she had received, Stone stated, "the expectation that our building has is to clean empty, vacant spaces, to adhere to COVID restrictions." (GC Exh. 9(a) (4:01-4:09).) Palmer pressed Stone for a written policy memorializing the protocol she had described, but Stone stated, "I let you know I didn't have anything that I could provide to you right now." (GC Exh. 9(a) (6:03-6:05).) When Palmer asked again where the policy was, Stone stated, "Our policy is to ensure that the public spaces for our team is clean." (GC Exh. 9(a) (6:12-6:16).) Palmer asked again, "Where's the policy?" and Stone responded, "I let you know I'm not able to provide you with any documentation for now." (GC Exh. 9(a) (6:18-6:23).)

H. Evidence Involving the Employment and Discharge of Daequan Smith

1. Smith's Testimony Regarding His Employment at Amazon

Daequan Smith began his employment with Amazon on August 28, 2021, working as an Associate in sortation at the DYY6 facility. (Tr. 278.) Smith testified that he worked 4 hours per day for 5 days each week, usually working Thursday through Monday from 7:50 to 11:50 p.m., with Tuesday and Wednesday off. (Tr. 286–287.) Occasionally he would pick up additional shifts which became available after receiving a notification through the Amazon A to Z app. (Tr. 287–289.) Smith testified that he picked up additional shifts in this manner on less than five occasions.[17] (Tr. 289.)

Smith testified that at the inception of his employment he experienced problems with the functioning of his employee badge. When Smith began working at the DYY6 facility, its entrance doors were locked, and employees opened them to go into work by scanning or swiping their badges. (Tr. 290–291.) Smith testified that when he reported for work the day after his orientation, his badge and the badges of other new employees present were not functioning, and they could not enter the building without assistance. (Tr. 290–292.) Smith testified that he contacted his manager, Justin Caraballo, and told Caraballo that he could not enter the building because his badge was not functioning.[18] (Tr. 292.) Caraballo responded that "everybody's badge is messed up," and that "it will take some time to fix it." (Tr. 292–293.) Smith testified that it took about a month before he was able to open the doors to enter DYY6 with his badge, and that he was late for his shift on one occasion as a result. (Tr. 293–295.) Smith also discussed the issue with a learning ambassador, an Amazon employee assigned to assist new employees with various aspects of the work and employment relationship. (Tr. 295–297.) The learning ambassador asked Smith why his badge wasn't working, and Smith stated that he had just begun his employment. (Tr. 297.) The learning ambassador swiped her own badge and allowed Smith to follow her into the building. (Tr. 297–298.) She also told Smith that she would speak with Caraballo regarding the problem. (Tr. 298.) Smith testified that although his shift officially began at 7:50 p.m., after this incident he began arriving at the DYY6 facility at 7 p.m., to ensure that he could enter the facility and begin his shift on time. (Tr. 300, 304–305.) At some point Smith's badge began functioning and he was able to use it to enter the facility, but Smith could not recall when this occurred. (Tr. 378.)

Smith testified that he also experienced problems obtaining access to and using the Amazon A to Z app because his phone was broken at the beginning of his employment, and subsequent attempts to use the A to Z app did not comport with the app's authentication protocols. (Tr. 309–311, 408.) Employees were generally able to clock in to work using the Amazon A to Z app, in addition to using their badges.[19] T(r. 299–200, 310–311.) However, Smith testified that when he attempted to clock in using the Amazon A to Z app during the first two weeks of his employment, he was unable to obtain access to the app, and therefore had to clock in using his badge. Tr. 309-311. Smith testified that he spoke with his supervisor regarding his inability to obtain access to the A to Z app, who referred him to ERC, an employee help line. (Tr. 311–312.) However, when Smith called ERC, they told him to speak with someone in HR at DYY6 regarding the issue. (Tr. 312.) Smith testified that he was referred back and forth between ERC and HR at DYY6 several times, and could not contact Caraballo because Caraballo had gone on leave. (Tr. 312–317.) Smith testified that he eventually obtained access to the A to Z app in mid to late October 2021,

[17] Although these additional shifts were voluntary, Smith testified that once he had accepted an extra shift that had been offered through the A to Z app, he was required to work those hours. Tr. 305–307.

[18] Smith testified that he learned that Caraballo was his supervisor during his employee orientation. Tr. 307–308.

[19] Employees could clock in by placing their badge in a machine located outside a breakroom that they passed through immediately after entering the DYY6 facility. Tr. 299–300.

although he could not recall when that occurred, or when he obtained a functioning phone. (Tr. 281, 317, 319, 373, 408–409.) In the meantime, Area Manager Wessam Khalil had temporarily replaced Caraballo as Smith's supervisor. (Tr. 320.)

During his employment with Amazon, Smith worked in a number of different positions at DYY6, including sorting, pick to buffer, water spider, jackpot, and problem solving. (Tr. 283–284.) Sorting involves organizing packages by letters and numbers, scanning packages, and placing them in a bag. (Tr. 284.) In the pick to buffer position, employees take packages off the belt and place them on a cart so that the sorters can retrieve them. (Tr. 284.) Problem solving involves evaluating packages that cannot be scanned, were damaged, or contain flammable and other hazardous materials. (Tr. 284–285.) Jackpot also involves removing damaged packages from the production line. (Tr. 285.) In the water spider position, employees unload packages from trucks and place them on a belt. (Tr. 285–286.) Smith was assigned to one of these positions on a daily basis. Immediately after clocking in, employees proceeded to an assignment table, and waited on line at the table to obtain their work assignments from a manager stationed there who distributed them. (Tr. 301–303.) Once each employee reached the head of the line they scanned their badge, and their work assignment for the day appeared on a large monitor screen in the area. (Tr. 303–304, 305.)

During the 1st week of his employment, Smith was approached by ALU member Maddie while he was on a break outside of JFK8. Tr. 320-321. Smith told Maddie he would join the Union and signed a union authorization card. Tr. 321-322. The next day, Smith met other Union members and organizers, including Chris Smalls, Derrick Palmer, Brett Daniels, and Connor Spence, near the bus stop across the street from JFK8. (Tr. 322–324.) Smith received union flyers to distribute and union authorization cards for other employees to sign during this meeting, as well as a card that described employee rights, including Weingarten rights, and also contained the ALU logo. (Tr. 324–328.) Smith was also added to the Union's group chat on Telegram.[20] (Tr. 326–327.) Smith distributed the flyers and union authorization cards to other employees in the breakroom while on break and outside at the bus stop. (Tr. 328–330.) While doing so he spoke to other employees, trying to get them involved in the Union. (Tr. 328-329.) Smith estimated that he spoke with about 20 employees regarding the Union, about 15 of whom signed union authorization cards. (Tr. 330.) Smith testified that he continued to speak with other employees in support of the Union throughout his employment with Amazon. (Tr. 330.)

Smith testified regarding a series of interactions with Area Manager Wessam Khalil, who had temporarily replaced Smith's supervisor Justin Caraballo during Caraballo's leave.[21] Smith testified that one day in early September 2021, he was passing the sign-in table to return to his work station after a break. Tr. 332. Smith was concluding a conversation with three coworkers, when Khalil stopped and asked him whether he was "with the Union." (Tr. 330–331, 333.) When Smith said yes, Khalil stated, "I'm a union buster." (Tr. 331, 333.) Smith testified that his coworkers were walking away, but also continued to observe him while he spoke with Khalil. (Tr. 334–336.) Smith's coworkers then asked him whether he was alright, and what was going on. (Tr. 336.) Smith told his coworkers that he was okay, but that Khalil had asked him whether he was with the Union. (Tr. 336.)

During the next few days, Smith was working water spider for the first time, emptying carts very quickly, when he began to feel lightheaded and fatigued. (Tr. 336–337, 339–340.) Smith testified that the carts that employees empty when working the water spider position are seven feet tall and about 6 feet wide, each holding about 300 packages. (Tr. 340–341.) When Smith stopped working because he was not feeling well, Khalil approached him and said, "Get back to work, Smith." (Tr. 337, 340, 353.) Smith told Khalil that he was tired, and needed a second to "regain himself." (Tr. 353, 354.) After telling him to get back to work again, Khalil pushed a cart toward Smith very hard and fast. (Tr. 337, 341–342, 353.) Smith told Khalil, "you can't have me working like a robot. I'm not a slave, you know. I'm not a robot." (Tr. 342, 354.) Smith stated to Khalil, "We're not slaves."[22] (Tr. 342, 353–354.) Khalil kept telling Smith to get back to work. (Tr. 342.) Smith pulled out the card he had received from the Union regarding employee rights, and gave it to Khalil. (Tr. 354.) Khalil looked at the card and told Smith to go and get a representative. (Tr. 354.) Smith said that he did not know anyone inside the building at the time who could act as his representative. (Tr. 355.) Khalil told Smith to follow him and led Smith to the assignment table, where Khalil told Smith to scan his badge. (Tr. 355.) After scanning his badge, Khalil told Smith to clock out and go home, even though Smith had at least half an hour of his shift left. (Tr. 355–356.)

When Smith arrived at the assignment table after clocking in the next day, Khalil was present. (Tr. 358–359.) After Smith scanned his badge, an assignment for pick to buffer appeared on the computer. (Tr. 359, 360.) Khalil then told Smith to wait, called back the employee who had just left the assignment table, and told that employee to rescan their badge. (Tr. 359–360, 361.) The other employee scanned their badge, and the computer indicated that the employee's work assignment was water spider or unloading. (Tr. 360–361, 413.) Khalil then logged into the computer, scrolled down, and switched the work assignments, so that the other employee was assigned pick to buffer and Smith was assigned unloading or water spider. (Tr. 361–362.) When Smith and the other employee swiped their badges again, as directed by Khalil, the unloading and pick to buffer work assignments appeared, respectively. (Tr. 362–363.) Khalil then told Smith to go to his work station. (Tr. 363.) While he worked unloading that day, Smith saw Khalil standing in the unloading area, watching him continuously. (Tr. 364.) Smith testified that he had nev-

[20] Smith testified that he was able to download the Telegram app to participate in group chats on his phone immediately. Tr. 410–411.

[21] Amazon admitted in its Answer that Khalil was an Area Manager, and was a statutory supervisor and an agent pursuant to Sec. 2(13) of the Act at all material times. Khalil was not called to testify at the hearing.

[22] Smith testified that overwork, an uncomfortable pace of work and inadequate break times to recover were "a common topic" of conversation for workers at DYY6, and were discussed on a daily basis. Tr. 356–357. These issues were also discussed at Union meetings and in the Union's Telegram chat. Tr. 357–358.

er before seen Khalil, or his regular supervisor Caraballo, watch him steadily as he worked. (Tr. 379.)

After that day, Smith was stopped by Khalil and assigned unloading every time he arrived at the assignment table to begin his shift. (Tr. 366–367.) Eventually, 1 day when he arrived at the assignment table Smith asked Khalil to change his assignment from unloading, and Khalil refused. (Tr. 369–370.) Therefore, Smith spoke to Area Manager Victor Ho, whom Smith believed to be a higher level manager than Khalil.[23] (Tr. 367–369.) Smith asked Ho if he could switch his position, because he did not want to work unloading that day. Ho told Smith that he would handle it, and changed Smith's position to stowing in the computer. (Tr. 370–371.) Smith proceeded to the stowing area, where he worked his shift that day. (Tr. 371.) During his shift, Smith saw Khalil speaking to another manager and watching him as he passed through the stowing section, as well as observing him from the unloading section on the other side of a series of conveyor belts. (Tr. 371–373.) Smith testified that after this point he was never directly supervised by Khalil again, and was never again assigned the water spider position. (Tr. 416–417.)

Smith testified that he applied to transfer to another Amazon facility—specifically JFK8—for a full-time position through the Amazon A to Z app on October 27, 2021.[24] (Tr. 279–281, 427–428.) Smith testified that at some point, he received a letter via the A to Z app from HR at JFK8 approving his transfer request for a full-time position at JFK8; Smith was scheduled to begin working at that facility on November 7, 2021. (Tr. 281–283; GC Exh. 8.) The letter from JFK8 HR offering Smith a position at that facility and establishing his start date is also dated October 27, 2021; however, Smith testified that he did not know when he first received it. (Tr. 386; GC Exh. 8.)

2. Amazon's unpaid time system

Smith's employment and discharge involved recurrent issues with Amazon's time and attendance policies and practices, particularly with respect to the accrual and use of Paid Time Off (PTO) and Unpaid Time (UPT) available to employees. Amazon maintains a system of Unpaid Time, or UPT, which employees are permitted to use in 1-hour increments to cover scheduled work time that they miss due to "unforeseen events" or "unplanned absences," when they are not eligible for PTO. (Tr. 903–904–905, 1129; GC Exh. 7, p. 1.) Employees receive a set number of UPT hours at the inception of their employment, and additional UPT hours are allocated to every employee each quarter. (Tr. 903–904; GC Exh. 7, p. 2.) A balance of UPT hours is maintained for each employee, which they may draw upon when they need to come in late or miss work and cannot use PTO. (Tr. 903.) Amazon's policies and practices involving the accrual and use of UPT were addressed at the hearing by Amazon witnesses Heather Mirabal, who was an HR Business Partner at DYY6 in the fall of 2021, and Jose Gomez, an HR Regional Coordinator at Amazon's Human Resources Regional Center (HRRC) facility in Tempe, Arizona.

Amazon uses a timekeeping platform used called Chronos to determine whether an employee has incurred UPT. (Tr. 1041–1042.) The Chronos platform automatically compares an employee's scheduled work hours with their time or clock punches, and recognizes when an employee has missed work and how much work time they have missed. (Tr. 1041–1042.) HR staff are not involved in determining when an employee has incurred UPT, and do not calculate UPT or deduct hours from an employee's UPT balance. (Tr. 1042–1043.) Mirabal testified that employees can obtain information regarding their UPT balances via the A to Z app, by asking HR, or by consulting with their on-site manager.[25] (Tr. 906.) Employees can also use a terminal or a clock-in terminal at the facility to view their UPT balances. (Tr. 906–907.)

If an employee uses more UPT than they have accrued, they enter a status referred to as "negative UPT," and are subject to review for discharge pursuant to Amazon's Attendance Policy. (Tr. 905, 1129; GC Exh. 7.) Amazon's Attendance Policy provides that if an employee's "bank of UPT goes below 15 hours, and your absence is not excused under any other policy, we will invite you to participate in a UPT balance update support discussion," which "will focus on the development of a plan that allows you to address any potential issues or barriers that are keeping you from attending your regular shift." (GC Exh. 7, p. 2.) Mirabal testified that when she worked at DYY6, employees were supposed to receive an "Engagement" with their managers regarding their UPT balances before their balances were negative. (Tr. 925.) Amazon used a portal called Engage, which prompts employees' direct managers to discuss specific topics with the employees they supervise. (Tr. 925–927.) Managers received prompts through Engage regarding specific conversations to initiate with employees—including discussions regarding UPT balances—on a daily, weekly, and monthly basis. (Tr. 926, 976.) Managers recorded each specific conversation with an employee in the Engage portal after it had been completed, and entered notes describing the conversation. (Tr. 926–927.) Mirabal testified that when she worked at DYY6, however, managers did not always conduct these Engagements prior to an employee's entering "negative UPT" status, despite her encouragement that they do so. (Tr. 927, 977–978.)

Mirabal testified that it was possible for employees to have UPT refunded in several different ways. Employees could use accrued PTO to cover UPT they had taken, speak to HR or their manager regarding their UPT balances, contact the ERC regarding their UPT issue, and/or institute a case through Panorama, a data management system where HR cases are logged for each employee and can be retrieved by HR at the facility or by ERC. (Tr. 930, 933, 959, 1042–1043; R.S. Exh. 11.) However, all of these methods ultimately required that an employee have sufficient PTO to cover the UPT that they had used. (Tr. 959.) Mirabal also testified that employees could also take off a scheduled

[23] The parties stipulated that Ho was a statutory supervisor and an agent of Amazon pursuant to Sec. 2(13) of the Act. Jt. Exh. 2.

[24] Smith also testified that he applied to work at the JFK8 facility by completing an application on Google. Tr. 278–279. However, Smith appeared to be referring to his initial application for employment at the Amazon facilities in Staten Island during this testimony, and not for a specific position at JFK8 as opposed to DYY6. Tr. 278–279.

[25] Mirabal testified that she also did an informational presentation regarding PTO, UPT, and other time off policies at new employee orientation. Tr. 999–1002.

shift by using Voluntary Time Off, offers made by Amazon to employees via the A to Z app to forego working a scheduled shift, as opposed to using UPT. (Tr. 961–962.) Finally, Mirabal testified that negative UPT was also excused when incurred in connection with a hurricane affecting public transportation in the New York City area during her tenure at DYY6. (Tr. 979–980.)

Pursuant to Amazon's Attendance Policy, if an employee's "UPT balance becomes negative" and their UPT "is not covered by any other time off policy, your employment status will be reviewed for termination." (GC Exh. 7, p. 2.) Mirabal testified that when she began as an HR Business Partner at DYY6 in late July or early August of 2021, she dealt directly negative UPT balances for DYY6 employees. (Tr. 907–908.) Mirabal testified that during that period of time, she received a list of employees with a negative UPT balance each day from the HRRC; this list was not created at DYY6. (Tr. 908–909.) Mirabal testified that after receiving the list she reviewed it against a report of employees clocked in to work at the DYY6 facility at the time. (Tr. 909.) She then sent the names of employees on the negative UPT list who were clocked in to the employees' managers, via a Chime room for all of the managers on site at DYY6 at any given time. (Tr. 909.) The managers were then expected to pull aside employees they supervised and conduct what is referred to as a Seek to Understand conversation about the employee's negative UPT status, memorialize the conversation in a ticket, and send the ticket to Mirabal and the HRRC team. (Tr. 909–910.) Mirabal testified that a Seek to Understand discussion is an exploratory inquiry designed to gain information and understand a particular situation, whereas an Engagement conversation involves a definite agenda that management is attempting to communicate to an employee. (Tr. 974–975.) Seek to Understand conversations and Engagements were both recorded in the Engage portal. (Tr. 927.)

Based upon the manager's conversation and the available information, Mirabal and her manager at DYY6 would then determine whether the employee had a "true" negative UPT balance. (Tr. 910–911.) A "true" negative UPT balance existed where the employee had no PTO to cover the negative UPT, and there were no errors in their timecard. (Tr. 910.) If Mirabal and her manager determined that there was insufficient PTO to cover the negative UPT, they would decide to discharge the employee. (Tr. 910–911.) Mirabal and Gomez both testified that employees could accumulate significant amounts of negative UPT prior to or at the time of their discharge for reasons involving HR's processing of issues related to their employment. For example, Mirabal testified that an employee's record could contain negative UPT if they accumulated the UPT but were discharged for another reason, or if they resigned before an evaluation of the negative UPT balance could be conducted or a discharge decision could be made. (Tr. 917–918.) In addition, an employee would continue to accrue negative UPT while a leave of absence application that the employee had submitted was being evaluated by an HR entity called DLS. (Tr. 917, 918-921.) Mirabal and Gomez both testified that an employee could accumulate many hours of UPT in this manner before being discharged. (Tr. 918–921, 1140–1141.)

Mirabal testified that when she began working at DYY6 in late July or early August 2021, she discovered that HR and Area Managers were not having Seek to Understand conversations regarding negative UPT balances, reviewing information, and making termination decisions in a timely manner. (Tr. 915–916, 921–922.) As a result, there were many employees at DYY6 with negative UPT balances. (Tr. 915–916.) Mirabal testified that after learning this, HR made the processing of negative UPT balances a priority, speaking with employees who had negative UPT balances, reviewing relevant information, and ultimately making employment termination decisions. (Tr. 917.) However, according to Mirabal, there were so many DYY6 employees with a negative UPT balance at the time that discharging all of them would have had an enormous impact on the facility's operations. (Tr. 922–923.) Mirabal testified that as a result, employees with negative UPT balances would receive a final warning in lieu of discharge when they had sufficient PTO balances to cover their UPT, but had incurred the UPT because they had not submitted a request to use PTO within the required period. (Tr. 922–924.)

The process for evaluating negative UPT balances and making employment termination decisions at DYY6 changed on October 24, 2021. (Tr. 911–914, 1142–1143; R.S. Exh. 10.) As of October 24, 2021, HR at Amazon Logistics facilities, including DYY6, were no longer involved in the processing of negative UPT issues, including the evaluation of individual employee UPT balances and the review of employee time and attendance accruals for possible discharge. (Tr. 912; R.S. Exh. 10.) Thus, after October 24, 2021, Mirabal was no longer involved in the review and processing of employees' negative UPT balances at DYY6, including the identification of employees for Seek to Understand conversations and review of possible employment terminations.[26] (Tr. 914.) As part of this overall change, Area Managers at DYY6 were no longer expected to have Seek to Understand conversations with employees who had negative UPT balances; those conversations were conducted by a group at Amazon's HRRCs, which had assumed responsibility for the processing of UPT. (Tr. 914–915, 1143; R.S. Exh. 10.) Records review and decisions to discharge employees with negative UPT balances were similarly performed solely by the HRRC team. (Tr. 915, 1143–1144; R.S. Exh. 10.)

Joseph Gomez, an HR Regional Coordinator at Amazon's HRRC in Tempe, Arizona, testified regarding the processing of UPT issues after October 24, 2021, and Smith's discharge in particular. The HRRC is a centralized team that services Amazon warehouses throughout the country with respect to employee attendance management. (Tr. 1127–1128.) In October 2021, Gomez was an HR Regional Coordinator, a position responsible for managing attendance and verifying whether an employee has a "truly negative" UPT balance by determining whether there are barriers preventing the employee from attending work. (Tr. 1128–1130, 1158.)

Gomez testified regarding the HRRC team's process for eval-

[26] Mirabal testified that she might still become involved if an employee raised their own situation regarding negative UPT with her directly. Tr. 990.

uating the UPT status of Amazon employees and making determinations regarding discharge. Gomez testified that he obtains a daily list of Amazon employees that have negative UPT generated by the Panorama platform. (Tr. 1130, 1155–1156, 1159–1160.) After retrieving this list, HRRC personnel have access to various Amazon platforms to determine whether each employee has a barrier to attending work, locate and retrieve any open tickets or Panorama cases relevant to the UPT issue, and review the employee's accruals on their time card. (Tr. 1130–1131, 1156.) The accrual records, which are summaries of an employee's available PTO and UPT, are evaluated to determine whether there is any PTO available for the employee to cover the negative UPT.[27] (Tr. 1131–1132, 1164.) If there is available PTO sufficient to restore the negative UPT balance to zero, that time is used to resolve the negative UPT issue. If HRRC staff determine that the employee has one or more unresolved tickets created through ERC, they wait until the ticket is resolved or closed before proceeding with their regular process toward potential termination. (Tr. 1133, 1164.) Similarly, if there is an open Panorama case, HRRC staff wait until that case is closed to continue their process.[28] (Tr. 1134, 1164.) HRRC staff further determine whether there are open applications for leaves of absence created through the DLS team. (Tr. 1135.) If an open leave request or application exists, HRRC staff again pause their own process until the leave request has been resolved. (Tr. 1135, 1164.) After evaluating all of these factors, if there is no reason to delay proceeding, HRRC staff evaluate the case and decide whether or not to submit the employee for termination. (Tr. 1136.) Gomez testified that depending upon the circumstances involved the HRRC's entire evaluation can continue for several weeks, during which the employee in question may continue to accumulate negative UPT. (Tr. 1136.)

Gomez testified that when HRRC staff review an employee for termination, they send an email asking the employee to respond, to raise any issues or explain barriers that prevent them from attending work. (Tr. 1137.) This email, which is sent to the employee's personal email address, contains a deadline of 24 to 48 hours for the employee to respond. (Tr. 1137–1138, 1166–1167.) If the employee responds to this email within the allotted time, the HRRC staff member processing the case conducts a Seek to Understand discussion with the employee regarding barriers the employee may be facing to attending work. (Tr. 1139.) The Seek to Understand component of the process may take anywhere from a few days to a couple of weeks. (Tr. 1142.) The HRRC staff may also contact the site for additional information. (Tr. 1140.) If the employee does not respond to the email within the allotted time frame, HRRC staff proceed with their normal process, up to and including termination.[29] (Tr. 1138, 1171.) Gomez testified that he has made determinations to discharge over a thousand Amazon employees in this manner since October 2021. (Tr. 1150–1151.)

3. Smith's discharge from employment at DYY6

Smith made several complaints regarding time and attendance issues during his employment at DYY6, some of which specifically involved UPT. Smith testified that at some point in early September 2021, he discovered that his record had multiple punches in and out on the same day, far in excess of what would have ordinarily occurred. (Tr. 398–400.) Smith testified that he made a complaint to the HR office at DYY6 regarding the issue, stating that his record showed that he was clocked in at a time that he was not scheduled to work. (Tr. 400.) The HR representative asked Smith if he had taken on an extra shift that morning, and Smith said that he had not. (Tr. 400–401.) The HR representative said that she would look into it, but Smith never heard anything further regarding the issue. Tr. 401. Smith also complained to Victor Ho at the HR section desk area regarding the multiple clock-ins. (Tr. 403–404; GC Exh. 24.) The record indicates that Smith spoke to Ho regarding this issue on around October 16, 2021. (Tr. 410; GC Exh. 24.) Smith testified that after he observed Ho use his backstop, a portable cart with a laptop on it, Ho told Smith that he had fixed the problem. (Tr. 404.) However, Ho indicated in a Chime chat that he had referred Smith to HR regarding the issue. (GC Exh. 24.)

Amazon's record of Smith's UPT accrual, use, and balances appears to have been muddled throughout much of Smith's employment at DYY6, with UPT being added to and deducted from Smith's record at various times for purposes which cannot not be definitively elucidated by the testimony adduced at the hearing or the documentary evidence. (GC Exh. 59, p. 7–8.) Most strikingly, an Engage record produced for Smith indicates that on October 9, 2021, Smith's supervisor Caraballo spoke with him regarding "attendance and low UPT." (Tr. 1034; C.P. Exh. 3.) Mirabal, who administered UPT issues at DYY6 at that time, testified that Caraballo would have had the indicated Engagement with Smith because Smith's UPT hours had fallen below 15, consonant with Amazon's policy pertaining to PTO and UPT. (Tr. 1034–1035; GC Exh. 7, p. 2.) However, Smith's UPT accrual record indicates that as of October 9, 2021, he had a UPT balance of 19 hours, in excess of the 15 hours that would trigger a supervisory Engagement. (GC Exh. 59, p. 7; Tr. 1035.)

The evidence also establishes that on October 17, 2021, Smith made a complaint via the Panorama platform regarding anomalies in his time and attendance record and his UPT balance. (Tr. 965–966; R.S. 11.) Amazon introduced into evidence Respondent Exhibit 11, which consists of communications pertaining to Smith's Panorama complaint. This Panorama record indicates that Smith's complaint was made through Amazon A to Z, either

[27] Accrual summaries are not compared to the employee's schedule or to punches (clock-ins and clock-outs) as part of this process. Tr. 1176–1177.

[28] Gomez explained that a Panorama case is an issue being investigated by Amazon based on a complaint raised by an employee, whereas a ticket is an action that Amazon intends to take in response to an investigation. Tr. 1154–1155. Gomez stated that tickets are usually related to corrections for time cards. Tr. 1154. Gomez testified that HRRC staff might work with site HR or management regarding such issues if HRRC found it necessary. Tr. 1166. In addition, Gomez testified that HRRC staff do not reopen closed Panorama cases involving the same employee as part of their evaluation of negative UPT balances, unless it is necessary to do so. Tr. 1135, 1164–1165.

[29] Gomez testified that HRRC does not reopen a discharge case after making a determination to discharge an employee, even if the employee responds to the HRRC's email notification after the allotted period. Tr. 1151–1152, 1171–1172.

using the Amazon A to Z website or via the app. (Tr. 929, 930–933, 967–968; R.S. Exh. 11 ("Case Origin Amazon A to Z"). The complaint Smith submitted stated, "My a to z app is hacked or someone is messing up my account and schedule. I didn't not work yesterday on Oct 17 I used upt but it shows someone been clocking Me in and out of work various hours and deleted my direct deposit. Now I'm missing upt time."[30] (R.S. Exh. 11, p. 1.)

Mirabal testified that typically such complaints made through the A to Z app are received by the HRRC, which redirects the issue to the site if they cannot answer the question being raised. (Tr. 968.) Smith's complaint was initially acknowledged by Jeff Wood, who stated, "At this time we are partnering with your site HR to deep dive your concerns further. Your Site HR team will reach out to you directly to provide an update." (Tr. 968; R.S. Exh. 11, p. 9.) Smith's complaint was then forwarded to the DYY6 HR case queue, where Mirabal received it. (Tr. 968.) Mirabal reviewed Smith's complaint and reviewed his time card for October 17, 2021, which contained no punches. Mirabal then sent Smith a message on October 18, 2021, stating, "We do not see any punches on 10/17 . . . Please let us know if you have any questions." (Tr. 968-969; R.S. Exh. 11, p. 9.) Smith sent two responses on October 18, 2021, first stating, "Clock in for Oct 18," and then, "I use my personal time for today and my up time to cover my shift but I used it on the wrong hours. I use it my time after my shift. I got my personal time on but not my up time." (Tr. 969–970; R.S. Exh. 11.) On October 19, 2021, an individual named Jennifer Pena[31] responded, stating, "Upon review, we are not showing unpaid time off (UPT) for 10/18, however, we are showing 4 hours on 10/17. Please note, you only requested 1 hour of personal time off (PTO) on 10/18." (Tr. 970; R.S. Exh. 11, p. 8.) Pena went on to provide Smith with general information regarding payroll and paid time requests, and how to open a new HR Case through Amazon A to Z. Id. On that same day, Smith responded again, stating, "My issue was not resolved," and

> I ask for my time to be fix there was upt time taken. Someone is messing with my app i have a screen shot of notification and everything. Since I reported this its not up there nomore. I'm sending the screen shot i use upt tike for that shift n now theres more upt taken for no reason. I just recently put my direct deposit[32] up there. Ik i spoke to you about this in person already when i camr to pick up my check. The everything is getting screwed up.

(R.S. Exh. 11, p. 8.)

The next individual who responded to Smith on October 19, 2021 was Johanna Rodriguez Torres.[33] Torres told Smith, "Upon review, your time card shows that on 10/17/21 you missed your full schedule and 4 hours of UPT were deducted. On 10/18/21 you missed your shift using 1 hour of PTO and 3 hours UPT." (Tr. 972; R.S. Exh. 11.) Smith replied again on October 19, 2021, "Yes. And that would of have left me exactly 1 hour of upt time left and 6 minutes of personal time." (R.S. Exh. 11.) Sandra Rodriguez replied to Smith, stating,

> Upon review, we see you had 1:03 of Personal Time Off (PTO) and 5 hours of Unpaid Personal Time (UPT) as of 10/16. The UPT pulled on 10/17 and 10/18 caused your UPT to go into a negative value. We are partnering with site HR to review your punches on 10/16 for accuracy. We are partnering with site HR regarding your request. Your site HR team will reach out to you directly to provide an update.

(R.S. Exh. 11.) Rodriguez then wrote to DYY6, stating,

> We have reviewed the associate's case and determined that a deeper review into the facts related to this inquiry will be needed to provide an in-depth response. Please review your site queue and provide an update to the associate as soon as you have been able to gather the relevant information needed. This associate has punches on 10/16 that do not align with his scheduled work time. Please review and adjust as appropriate, refunding UPT if necessary.

(R.S. Exh. 11.)

Mirabal then reevaluated the situation, reviewing Smith's time for October 17 and 18, 2021, and responded to Smith on October 25, 2021, as follows:

> Upon review, your time card shows that on 10/17/2021 you missed your full schedule and 4 hours of UPT were deducted. On 10/18/2021 you missed your shift using 1 hour of PTO and 3 hours UPT. Before these shifts, our records show that you had 5 hours of UPT, or not enough UPT to cover the 4 hours on the 17th and 3 hours on the 18th. To resolve this issue, we recommend speaking to your direct manager or on site HR as we are not seeing where the issue is.

(Tr. 973, 1026–1027; R.S. Exh. 11, p. 8.) Mirabal testified that until she began investigating in response to Rodriguez' message on October 25, 2021, she was not aware that Smith had a negative UPT balance. (Tr. 974.) She also testified that she did not direct any manager or supervisor to have a Seek to Understand conversation with Smith regarding his UPT balance. (Tr. 974.)

As discussed above, Smith testified that at some point he received a letter dated October 27, 2021 from JFK8 HR via the A to Z app, which approved his request to transfer to a full-time position at that facility. (Tr. 282–283; GC Exh. 8.) However, Smith also testified that after receiving the letter approving his transfer request, he attempted to log onto the A to Z app to obtain information regarding his transfer, and was not able to do so. (Tr. 374; GC Exh. 8.) Smith consulted with a coworker, who told him that he had to have his manager reset his password or change his email. (Tr. 374.) Smith also called ERC on the day

[30] All irregular spelling, grammatical, capitalization, and punctuation in material quoted from R. Exh. 11 appears in the original.

[31] Mirabal testified that Pena did not work on site at DYY6. Tr. 970. Typically when an employee responded to a message they were sent in the context of a Panorama case, the response was redirected to the entity originally addressing the matter, here the HRRC Cases Team. Tr. 970.

[32] Mirabal recalled meeting with Smith in person regarding the direct deposit issue, but testified that Smith did not raise any concerns regarding UPT hours at that time. Tr. 971–972.

[33] Mirabal testified that Rodriguez Torres was not employed at DYY6 at the time. Tr. 972.

he discovered he could not log into A to Z, and spoke to an agent. (Tr. 375.) The agent stated that they couldn't determine the nature of the problem, and asked Smith to call back in 24 hours if Smith was still unable to log on. (Tr. 375.)

On October 27, 2021, Amazon HR had sent an email to Smith's personal account stating that he had a negative UPT balance, "which meets the termination threshold under Amazon's UPT attendance policy."[34] (Tr. 385–386; GC Exh. 5.) Amazon HR's email went on to state that Smith could review his "schedule, punches, and time off accruals within A to Z." (GC Exh. 5, p. 1.) Finally, the email stated that if Smith believed there was an error a discrepancy, "YOU MUST RESPOND DIRECTLY TO THIS OUTREACH VIA THIS EMAIL WITH DETAILS within 48 hours" or else "your employment will be ended." (GC Exh. 5, p. 1 (emphasis in original).)

Smith testified, however, that he did not see the October 27, 2021 email regarding his negative UPT balance until November 3, 2021. Smith testified that he did not check his personal email account often, only once or twice each week. (Tr. 386–388.) However, because the start date for his full-time position at JFK8 was coming up on November 7, 2021, "something just told me to check my Gmail or my—my email and see if…they sent me something." (Tr. 386, 387–388.) As a result, Smith checked his email on November 3, 2021, and saw the October 27, 2021 email from Amazon HR for the first time. (Tr. 388.) After viewing the October 27, 2021 Amazon HR email, Smith responded, "What is this email about? How is my time messed up." (Tr. 388; GC Exh. 5, p. 2.) However, Smith testified that when he checked his email on November 3, 2021, there was a second communication from Amazon HR attached to its October 27, 2021 email, which stated, "This letter confirms that the date of involuntary termination of your employment with Amazon.com Services LLC is October 29, 2021."[35] (Tr. 390–392; G.C. Exs. 5, 6.)

Gomez testified regarding the process effectuated by the HRRC for determining whether Smith should be discharged for negative UPT. Gomez testified that on October 29, 2021, Smith's name was included on the list he had retrieved from Panorama of employees who had negative UPT balances, and that he proceeded to conduct the research regarding Smith's negative UPT status.[36] (Tr. 1144–1145.) Gomez testified that he reviewed the case to determine whether the HRRC had sent Smith an email regarding his negative UPT balance and possible termination, and discovered that the email in evidence as General Counsel Exhibit 5 had been sent to Smith on October 27, 2021, requiring that Smith respond within 48 hours. (Tr. 1145–1146.) Gomez determined that Smith had not responded within the 48-hour period. (Tr. 1146; GC Exh. 5.) Gomez then reviewed Smith's accrual records, and determined that as of October 29, 2021, Smith had a UPT balance of negative 16 hours. (Tr. 1146-1147; GC Exh. 59.) Gomez further determined that Smith had a PTO balance of only 29 minutes, an amount that was insufficient to cover his negative UPT balance. (Tr. 1147–1148). Gomez then contacted the DLS team to determine whether Smith had any open leave of absence requests, and found none. (Tr. 1148.) Gomez further reviewed the Panorama system and the system used by ERC, and found no open cases or tickets pertaining to Smith in either platform.[37] (Tr. 1148–1149.) Gomez testified that based upon this investigation, which demonstrated that there were no barriers preventing Smith from attending work, he determined that Smith should be discharged, and submitted all of the details necessary for Smith's termination. (Tr. 1149–1150.) Gomez testified that he did not consult with his HRRC supervisors or anyone at DYY6 during this process. (Tr. 1150.) Gomez further testified that he did not know whether Smith supported the Union or engaged in any Union activity, and did not know who Smith was prior to processing his negative UPT balance on October 29, 2021. (Tr. 1152.)

Smith testified that when called ERC again in the following days because he was still unable to log onto the A to Z app, the representative informed him that he had been discharged because of his UPT balance and time card. (Tr. 383, 394.) Smith asked what was going on, and was told that there was likely an error in terms of his clocking in or out. (Tr. 383.) Smith also testified that after learning of his discharge on November 3, 2021, he contacted ERC, and reported that his time card and "the UPT thing was messed up." (Tr. 394.) The ERC representative stated that they would put in a trouble ticket, and someone would review his discharge and get back to him in a couple of days. (Tr. 394–395.) Smith never received any response from ERC. (Tr. 396.)

Smith testified that he was generally aware of UPT as a concept, as "when you, I guess, called out of work, you just don't get paid for it." (Tr. 380.) However, Smith testified that he had never received any training or instruction regarding the UPT system, including during his new employee orientation. (Tr. 380.) Smith also testified that he had never received any information regarding UPT from a supervisor or manager, and had never received Amazon's attendance policy containing information regarding UPT. (Tr. 379–383; GC Exh. 7.) Finally, Smith testified that he was never informed that he had a low UPT balance, or that there were any problems with his use of UPT during his employment at DYY6. (Tr. 383, 389-390.–

[34] This email was admitted into evidence as page 1 of GC Exh. 5. Tr. 388. Although Smith testified that he did not recognize the first page of GC Exh. 5, he stated that he received a message with the same content. Tr. 385–386.

[35] Smith testified that during this period of time, on around October 29 and 30, 2021, took 2 days off due to an adverse reaction to the COVID vaccine. Tr. 376–377. However, Smith also testified that he worked on October 30 and 31, 2021, and that at that on those two days his employee badge functioned to open the door and to scan at the assignments table. Tr. 378.

[36] Gomez testified that another HR Regional Coordinator had begun the research into Smith's negative UPT balance, and had sent out the October 27, 2021 email to Smith. Tr. 1160–1162. Gomez testified that it was fairly common for different Regional Coordinators to work on the same case. Tr. 1192–1193. Gomez stated, however, that when another Coordinator has worked on a case, the second Coordinator picking up the case conducts all of the necessary research involving the case from the beginning of the process. Tr. 1191–1192.

[37] Gomez did not review the Panorama case initiated by Smith on October 17, 2021, because as of October 29, 2021, when Gomez was investigating Smith's negative UPT balance, that Panorama case had already been closed. Tr. 1185; R.S. Exh. 11.

Decision and Analysis

A. General Principles Involving Credibility Resolutions

Evaluating certain issues of fact in this case requires an assessment of witness credibility. Credibility determinations involve consideration of the witness' testimony in context, including factors such as witness demeanor, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enf'd. 56 Fed.Appx. 516 (D.C. Cir. 2003); see also *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014). Corroboration and the relative reliability of conflicting testimony are also significant. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). It is not uncommon in making credibility resolutions to find that some but not all of a particular witness' testimony is reliable. See, e.g., *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014).

In addition, the Board has developed general evidentiary principles for evaluating witness testimony and documentary evidence. For example, the Board has determined that the testimony of an employer respondent's current employee which is contrary to the respondent's contentions in the case may be considered particularly reliable, in that it is potentially adverse to the employee's own pecuniary interests. *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); *Flexsteel Industries*, 316 NLRB 745 (1995), aff'd, 83 F.3d 419 (5th Cir. 1996). This principle applies with respect to the testimony of General Counsel witnesses Derrick Palmer, Connor Spence, Natalie Monarrez, and Janet Olmedo, all current employees of Amazon who testified in a manner contrary to Amazon's contentions in the instant case. I also note, however, that Palmer and Spence were involved in the formation of ALU and served as officers of the Union, and that Monarrez was a Union representative at the time of the hearing.

It is also well-settled that an administrative law judge may draw an adverse inference from a party's failure to call a witness that would reasonably be assumed to corroborate the party's version of events, particularly where the witness is the party's agent. *Chipotle Services, LLC*, 363 NLRB 336, 336 fn. 1, 349 (2015), enf'd. 849 F.3d 1161 (8th Cir. 2017); *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Adverse inferences may also be drawn based upon a party's failure to introduce into evidence documents containing information directly bearing on a material issue. See *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029, 1030 fn. 13 (2014). In addition, as discussed *supra*, I found it appropriate to draw an adverse inference here as an evidentiary sanction based upon Amazon's failure to comply with the Board's order to produce documents pertinent to the allegations regarding the distribution and confiscation of Union literature on June 12, 2021.

In making credibility resolutions here, I have considered the demeanor of the witnesses, the context of their testimony, corroboration via other testimony or documentary evidence or lack thereof, the internal consistency of their accounts, and the witnesses' apparent interests, if any. As a general matter, any credibility resolutions I have made are discussed and incorporated into my analysis herein.

B. The Labor Organization Status of Amazon Labor Union Pursuant to Section 2(5) of the Act

The complaint alleges that Charging Party Amazon Labor Union is a labor organization pursuant to Section 2(5) of the Act. Section 2(5) defines a "labor organization" as "any organization of any kind . . . in which employees participate" which "exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Although Amazon denied that ALU is a labor organization in its Answer, it makes no such contention in its Posthearing Brief.

The evidence demonstrates that ALU constitutes a labor organization pursuant to the statutory definition. The uncontroverted testimony of Palmer and Spence establishes that Amazon employees participated in ALU by wearing Union t-shirts, attending weekly meetings via Zoom and in-person, and by voting for Union officers and ratifying the Union's Constitution in October 2021. (Tr. 44-45, 520–522; GC Exh. 3.) Palmer and Spence's testimony that ALU was established in order to improve employee wages, benefits, and job protections and obtain a collective-bargaining agreement with Amazon is likewise unrebutted. (Tr. 43, 529; see also GC Exh. 3, Sec. 1.5.) Indeed, Amazon previously stipulated that ALU constituted a labor organization pursuant to Section 2(5) of the Act when executing Stipulated Election Agreements for representation elections at the JFK8 and LDJ5 facilities in Staten Island. (GC Exh. 2(a-d).) See *Hudson Institute of Research*, 372 NLRB No. 73 at p. 1, fn. 1 (2023), citing *Wismettac Asian Foods, Inc.*, 370 NLRB No. 62 at p. 1, fn. 1 (2020) (union's labor organization status fully litigated for summary judgment purposes where Respondent stipulated to labor organization status in underlying representation proceeding).

For all of the foregoing reasons, the evidence establishes that ALU is a labor organization within the meaning of Section 2(5) of the Act.

C. Alleged Violations of Section 8(a)(1) at the JFK8 Facility

1. The legal framework for analyzing allegedly coercive statements by supervisors and agents

Section 7, the Act's fundamental provision, states in part that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act provides that an employer may not "interfere with, restrain, or coerce employees" in the exercise of their rights to engage in activity protected by Section 7. It is well-settled that employer motive and an employee's subjective interpretation of the employer's conduct is generally "immaterial" when evaluating an alleged violation of Section 8(a)(1). *Lush Cosmetics, LLC*, 372 NLRB No. 54 at p. 3 (2023), quoting *KSM Industries, Inc.*, 336 NLRB 133 (2001); see also *Boar's Head Provisions Co.*, 370 NLRB No. 124 at p. 1, fn. 1 and at p. 16 (2021). Instead, the

Board determines whether "statements alleged to violate Section 8(a)(1) . . . have a reasonable tendency to coerce employees in the exercise of their Section 7 rights." Id. In applying this analysis, the Board "considers the total context of the alleged unlawful conduct from the viewpoint of its impact on employees' free exercise of their rights" pursuant to Section 7. *Lush Cosmetics Co.*, 372 NLRB No. 54 at p. 3, citing *American Tissue Corp.*, 336 NLRB 435, 441–442 (2001).

The Complaint in the instant case alleges that labor consultants Bradley Moss and David Acosta threatened employees on May 4, 2021, and October 31, 2021, respectively. As a general matter, threatening employees with reprisals for engaging in union or protected concerted activities coerces employees in the exercise of their rights pursuant to Section 7 of the Act. *Boar's Head Provisions Co.*, 370 NLRB No. 124 at p. 16. Threats during an organizing campaign conveying that strikes will inevitably result if the employees select a union as collective-bargaining representative violate Section 8(a)(1) of the Act. See *Smithfield Packing Co.*, 344 NLRB 1, 8 (2004), enf'd. 447 F.3d 821 (D.C. Cir. 2006); *Gold Kist, Inc.*, 341 NLRB 1040, 1041 (2004), citing *Garry Mfg. Co.*, 242 NLRB 539, 542 (1979), enf'd. 630 F.2d 934 (3rd Cir. 1980). Threats or statements conveying that support for a union is futile also violate Section 8(a)(1). See, e.g., *Sunbelt Rentals, Inc.*, 370 NLRB No. 102 at p. 1, 22 (2021); *Wellstream Corp.*, 313 NLRB 698, 706 (1994).

In addition, the complaint alleges that Moss unlawfully solicited grievances from employees with an express promise to remedy them if the employees rejected ALU as their bargaining representative. The explicit or implicit promise to remedy grievances solicited during an organizing campaign unlawfully "impresses upon employees" that "union representation is unnecessary." *Boar's Head Provisions Co.*, 370 NLRB No. 124 at p. 20, citing *Wal-Mart Stores*, 340 NLRB 637, 640 (2003). In the context of an organizing campaign, an employer's solicitation of employee grievances "raises an inference that the employer is promising to remedy the grievances," particularly where the employer has no pre-existing practice of soliciting employee grievances, or deviates from whatever practice had existed in the past. *Boar's Head Provisions Co.*, 370 NLRB No. 124 at p. 20, quoting *Garda CL Great Lakes, Inc.*, 359 NLRB 1334 (2013).

Finally, the complaint in this case alleges that Moss and Acosta interrogated employees regarding their union support and activities. For many years, the Board has evaluated allegations of coercive interrogation by analyzing whether "under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with the rights granted under the Act." *NCRNC, LLC d/b/a Northeast Center for Rehabilitation*, 372 NLRB No. 35, at p. 10 (2022), quoting *Rossmore House*, 269 NLRB 1176, 1177–1178, aff'd. 760 F.2d 1006 (1985). In order to determine whether a particular interrogation is coercive in nature, the Board considers the background to the specific interaction, the nature of the information sought, the identity of the questioner, the place and method of questioning, and the truthfulness of the employee's response. *NCRNC, LLC d/b/a Northeast Center for Rehabilitation*, 372 NLRB No. 35, at p. 10; see also *Relco Locomotives*, 359 NLRB 1145, fn. 1, 1156 (2013), aff'd. 361 NLRB 911 (2014); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). It is well-settled that such factors "are not to be mechanically applied," but serve as a framework for assessing "the totality of the circumstances" in order to analyze the statements' potentially coercive impact. *Westwood Health Care Center*, 330 NLRB at 939, quoting *Rossmore House*, 269 NLRB at 1178, fn. 20, and *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

Finally, the complaint alleges that Metro One security guards John Hill and Elena Koplevich, acting as Amazon's agents, conducted surveillance of employees' union activity and created the impression that employees' union activities were under surveillance. Both of these allegations involve the photographing, or appearance of photographing or recording, employees in connection with their activity on behalf of the Union. The Board has long held that photographing or otherwise recording employees' union activity at an employer's facility, without reasonable grounds to believe that misconduct may occur, constitutes unlawful surveillance. See *F.W. Woolworth Co.*, 310 NLRB 1197 (1993). The Board has also found that pointing a camera toward employees engaged in protected activity has a coercive effect "even if the camera was inoperative." *15th Avenue Iron Works*, 279 NLRB 643, 654 (1985), citing *Barnes Hospital*, 217 NLRB 725, 727 (1975).

2. The legal framework for analyzing alleged violations involving the distribution and confiscation of union literature

The complaint contains a number of allegations that Amazon violated Section 8(a)(1) in connection with the distribution and confiscation of ALU literature or flyers. The Complaint alleges that on May 16, 2021, security guard John Hill unlawfully told employees that they could not distribute ALU literature without Amazon's permission, and confiscated ALU literature from employees. The complaint also alleges that on June 12, 2021, Amazon's statutory supervisors Luke Wojahn, Ariana Ovadia, and Christina Stone unlawfully told employees that they could not distribute union literature in employee breakrooms, told employees that Amazon had the right to remove union literature from such areas, and confiscated union literature from employees.

It is well-established that employees are permitted to engage in solicitation and to distribute union literature during nonworking time and in nonworking areas, absent a showing of "special circumstances" necessary for the employer to "maintain production or discipline." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797, 801, 805 (1945); *Shamrock Foods Co.*, 366 NLRB No. 117 at p. 2, 23 (2018), enf'd. 779 Fed.Appx. 752 (D.C. Cir. 2019). The Board has stated that, "Interference with employee circulation of protected material in nonworking areas during off-duty periods is presumptively a violation of the Act unless the employer can affirmatively demonstrate the restriction is necessary to protect its proper interest." *Waste Management of Arizona, Inc.*, 345 NLRB 1339, 1339 fn. 2, 1346 (2005), quoting *Champion International Corp.*, 303 NLRB 102, 105 (1991). In order to overcome the presumption that a rule restricting such employee activities is unlawful, an employer "must show a compelling and legitimate business reason necessitating" the restrictions it has imposed. *Waste Management of Arizona, Inc.*, 345 NLRB at 1346, citing *Midland Transportation*, 304 NLRB 4, 5 (1991); see also *Mercedes-Benz U.S. International, Inc.*

(MBUSI), 361 NLRB 1018, 1028 (2014), enf'd. in relevant part 838 f.3d 1128 (11th Cir. 2016) (employer bears the burden of establishing "special circumstances warranting an exception to the rule that employees not on working time have the right to distribute union literature to other such employees" in a nonwork or "mixed use" area).

Consonant with the foregoing, the confiscation of union literature from nonwork areas generally constitutes a violation of Section 8(a)(1) of the Act absent a showing of special circumstances. See *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16 at p. 2, 16 (2020), remanded on other grounds, 832 Fed.Appx. 514 (9th Cir. 2020); *Shamrock Foods Co.*, 366 NLRB No. 117 at p. 2, 23. Indeed, the Board has held that it is unlawful for an employer to confiscate union literature even if the employer could under the circumstances legally prohibit its distribution. *Shamrock Foods Co.*, 366 NLRB No. 117 at p. 23, citing *Manorcare Health Services-Easton*, 356 NLRB 202, 204-205 (2010).

3. Allegations involving the conduct of labor consultants Bradley Moss on May 4, 2021 and David Acosta on October 31, 2021

a. Credibility Resolutions

Evaluating the Complaint's allegations that Moss and Acosta, as agents of Amazon, committed violations of Section 8(a)(1) requires a determination as to the relative credibility of Moss and Acosta's testimony regarding their conversations with Natalie Monarrez and Janet Olmedo, as opposed to Monarrez and Olmedo's accounts. Monarrez and Olmedo both impressed me as credible witnesses, who testified in a straightforward manner and attempted to provide accurate information to the best of their recollection in response to the questions posed to them. Furthermore, as discussed above, Monarrez and Olmedo's testimony is considered particularly reliable pursuant to Board caselaw, in that both are current employees of Amazon who testified in a manner adverse to Amazon's contentions here. *Avenue Care & Rehabilitation Center*, 360 NLRB at 152.

In addition, Monarrez and Olmedo both provided detailed, specific accounts of their conversations with Moss and Acosta, whereas Moss and Acosta's recollections of the events in question were limited to nonexistent. Moss testified that his only specific recollection of his conversation with Monarrez consisted of notes which listed general topics of discussion. (Tr. 1102, 1107; GC Exh. 36.)[38] Acosta testified that he did not recall any conversation he may have had with Olmedo. (Tr. 839–840.) Other than that, Moss and Acosta generally denied committing the violations of Section 8(a)(1) as alleged in the Complaint. (See Tr. 829–831, 1100–1102.) It is well-settled that such general denials and lack of specific recollection are insufficient to rebut more thorough and explicit testimony regarding a particular incident. See, e.g., *Pain Relief Centers, P.A.*, 371 NLRB No. 70 at p. 2, fn. 4, 14 (2022) , enf'd. 2023 WL 5380232 (4th Cir. 2023) ("detailed account" of meeting provided by employee witnesses credited where Respondent witnesses "skipped almost all of the moment-by-moment details" except for legally significant statements); *Precoat Metals*, 341 NLRB at 1150. Amazon's argument that Moss and Acosta could not have made the comments Monarrez and Olmedo attributed to them based upon their professional experience and general knowledge of the Act is not persuasive in such a context.[39] Posthearing Brief at 40, 56, 58, 63–64. Nor is Amazon's contention that Monarrez and Olmedo should not be credited because they were the only employees from JFK8 who testified that Moss and Acosta made such statements to them during individual conversations. Posthearing Brief at 41, 63.

Furthermore, Monarrez' testimony is corroborated in certain respects by the notes that Moss took during their conversation, and by email exchanges in early May 2021 between Moss, other labor consultants and admitted agents of Amazon, and Amazon statutory supervisors. (GC Exh. 30–36.) For example, Moss' notes confirm that he and Monarrez discussed gender and race discrimination issues, particularly with respect to promotions and managerial leadership at JFK8, and refer to issues with Workers Compensation. (GC Exh. 36.) These are two of the problems that Monarrez testified that she raised in response to Moss' request that she identify "three issues" which should be addressed or improved at Amazon. Tr. 488-489. The notes further confirm Monarrez' testimony that Jeff Bezos was discussed during their conversation.[40] (Tr. 492; GC Exh. 36.) In addition, Moss' email report to other labor consultants and Amazon supervisors the evening of May 4, 2021, after his conversation with Monarrez, includes "Accusations of race and gender discrimination" as a "relevant comparison[] to BHM1," or Amazon's Bessemer, Alabama facility. (GC Exh. 32.) Finally, I note that Moss admitted that he had worked at the Bessemer, Alabama facility from January through March 2021, supporting Monarrez' testimony that Moss said that he had "just come from Bessemer." (Tr. 490, 1118.) Moss further admitted, consonant with Monarrez' testimony regarding the topics discussed during their conversation, that he told Amazon employees at JFK8, "I question [Chris Smalls'] experience in running a labor organization." (Tr. 1100–1101, 1122.)

The early May email exchanges that Moss participated in further contradict certain relevant assertions that he made during

[38] Moss testified that his only recollection of his conversation with Monarrez would be contained in the notes he took during the conversation; Monarrez testified that Moss had a notebook and made written notes while they spoke. Tr. 489, 1102, 1107. While Moss did not unequivocally identify the notes entered into evidence as GC Exh. 36, the notes indicate that they memorialize a conversation with "Natalie," who would have been employed at JFK8 for 2 years as of June 2021, which is consistent with Monarrez' uncontradicted account of her employment history. Tr. 468, 491–492, 1107. Furthermore, Amazon refers to General Counsel's Exhibit 36 as Moss' notes of his conversation with Monarrez in its Posthearing Brief at pgs. 62–63.

[39] In particular, ALJs, affirmed by the Board, have repeatedly rejected the TIPS training discussed by both Moss and Acosta during their testimony as grounds for crediting employer representatives, as opposed to employees, with respect to statements allegedly violating Section 8(a)(1). Tr. 825-826, 837, 1094, 1101; see *Horshoe Bossier City Hotel & Casino*, 369 NLRB No. 80 at p. 1, fn. 4 and 9, and at p. 9–10 (2020); *Dai-Ichi Hotel Saipan Beach*, 337 NLRB 469, 470, fn. 9, 480, 482–483 (2002).

[40] The notes refer to a "Jeff Bezos Letter," and state, "too far removed to really know." GC Exh. 36.

his testimony, thereby undermining his credibility overall. For example, Moss testified that when speaking to employees at JFK8, he only asked whether they would be "willing to share…your experiences working for Amazon." (Tr. 1098.) Moss claimed that he did not initiate or discuss the issue of ALU or union representation, unless he was responding to specific questions raised by JFK8 employees. (Tr. 1100.) In fact, in the email exchanges Amazon Employee Relations Manager Elliot Jones tasks the labor consultants with obtaining specific information regarding how many and which JFK8 employees were aware of the ALU's activities, and with gauging the employees' level of interest and union support. In his email on May 2, 2021, Jones states, "it's important for us to be able to report out to the leadership how many AAs are aware of the union outside," so that future reports should indicate, "x% of AAs we engaged with during week 2 are aware of the union," out of which "% [x number] showed an interest, were simply curious without interest, etc." (GC Exh. 35.) Jones emphasizes that "senior leadership will want this specificity soon." (GC Exh. 35.) Moss quickly responds, assuring Jones that the labor consultants "will make a concerted effort this week to quantify the % of associates engaged that are aware of union activity, expressed interest, or simply curious." (GC Exh. 35.) Subsequent daily reports specify both the number of employees in a "count," and contain assessments of the employees' opinions regarding the Union and their underlying reasoning. (GC Exh. 31-34.) In addition, Moss claimed that he never raised the topic of the union campaign in Bessemer, Alabama during his conversations with employees at JFK8, because "it was never relevant." (Tr. 1107.) Despite this contention, several of Moss' reports contain information regarding "Any relevant comparisons to BHM1," or the Bessemer facility, one of which includes issues discussed during his conversation with Monarrez. (GC Exh. 31–34.) Thus, Moss' email interactions with Amazon management and other labor consultants belie his contention that he approached JFK8 employees with only open-ended inquiries regarding their experiences working at Amazon, and only discussed the Union if the topic arose in response to specific employee questions. Moss' emails also contradict his claim that he considered the union campaign at the Bessemer facility irrelevant to his work for Amazon in Staten Island. These contradictions, which involve issues addressed during Moss' conversation with Monarrez, tend to erode Moss' overall credibility as a witness.

Amazon's arguments in support of its contention that Monarrez was not a credible witness are by contrast not persuasive. Posthearing Brief at 61–63. For example, Amazon contends that Monarrez should be discredited because she provided longer and more detailed answers, and volunteered more information, in response to General Counsel's questions than counsel for Amazon's. However, the more general format of the questions posed by General Counsel in comparison to the questions asked by Amazon's attorneys naturally engendered Monarrez' lengthier responses to the former.[41] It is also clear from Monarrez' responses to General Counsel's questions that she was attempting to describe the entire course of her conversation with Moss in sequential order, resulting in a more narrative explication. (See Tr. 489–490.) Furthermore, the "fanciful details" that Amazon contends undermine Monarrez' credibility in connection with her description of Moss' remarks primarily consist of conflicting testimony between the two, and exhortations that I credit Moss' testimony based upon his professional experience as a labor consultant, despite his significant relative lack of recall of their conversation. Posthearing Brief at 62–64. Thus, for all of the foregoing reasons, I credit Monarrez' account of her May 4, 2021 conversation with Moss and of Moss' statements during their interaction.

I also credit current employee Olmedo's testimony regarding her conversation with Acosta. As discussed above, Acosta testified that he had no specific recollection of any conversation with Olmedo, so that Olmedo's testimony is effectively unrebutted. See, e.g., *Barnard College*, 367 NLRB No. 114 fn. 5 (2019) (Deputy General Counsel's testimony regarding labor-management meeting "essentially unrebutted" where Union President agreed that parties met but "could not recall any specifics about the content of the parties' discussion"). The fundamental basis of Amazon's contention that Olmedo was not a credible witness is an assertion that Acosta's blanket denials with respect to the allegedly unlawful statements should be credited based upon his career as a labor consultant. Posthearing Brief at 57–58. As discussed above with respect to the relative credibility of Monarrez and Moss, this contention is not persuasive. Furthermore, Olmedo's description of Acosta's remarks was not suspiciously truncated, given her uncontradicted testimony that their entire conversation was only three to five minutes "maximum," and that Acosta was walking down a line of employees at their work stations, speaking to each in turn. (R.S. Posthearing Br– at 57-58; see Tr. 158–159, 162–164, 166–167.)

For all of the foregoing reasons, I credit Monarrez and Olmedo's straightforward and detailed accounts of their discussions with Moss and Acosta, and of the remarks made by Moss and Acosta during those conversations. I find that Moss and Acosta's general denials, relative or complete lack of recollection, and attempted recourse to their own professional experience to be substantially less credible and, in the case of Moss, contradicted by documentary evidence.

B. Moss' Statements to Natalie Monarrez on May 4, 2021

The complaint alleges that Moss violated Section 8(a)(1) during his conversation with Monarrez on May 4, 2021, by threatening that support for ALU would be futile, disparaging ALU by referring to the Union's organizers as "thugs," coercively interrogating Monarrez, and soliciting grievances with promises to remedy them. The record evidence substantiates these

[41] For example, General Counsel asked, "Now, Ms. Monarrez, during this conversation did the subject of the COVID-19 pandemic come up?" "Did you respond?" and "Ms. Monarrez, how long did this conversation last?" Tr. 489, 491, 493. Amazon's counsel asked Monarrez, ". . . after your conversation with Mr. Moss, during the course of the union campaign, Amazon communicated repeatedly that if the ALU won the election, the company would have a duty to bargain in good faith with the ALU, correct?" "You don't recall [any] company meetings and communications where the company explained its duty to bargain in good faith . . . if the Union won the election?" and "Do you recall the company explaining . . . how the collective-bargaining process would work?" Tr. 505–506.

allegations.

The evidence demonstrates that Moss threatened Monarrez that support for ALU would be futile during their conversation on May 4. As discussed above, I have credited Monarrez' account of the conversation, and therefore credit her testimony that Moss told her that she "should not bother even getting involved" with the ALU organizing campaign, because "the Union would never happen." (Tr. 491.) Such a statement constitutes an unlawful threat that support for the Union would be futile. *Sunbelt Rentals, Inc.*, 370 NLRB No. 102 at p. –23, 22 (service manager-'s statement that "the [U]nion was never going to get in and it was never going to happen" unlawful threat of futility); *Soltech, Inc.*, 306 NLRB 269, 272 (1992) (company President's statement that "Union was not coming in," employer "was not and would not be a union company," or "would not have a union in the plant" violated Section 8(a)(1)).[42]

The record also establishes that Moss' "argument" for the futility of supporting ALU was grounded in an appeal to racial prejudice constituting unlawful disparagement of the Union, as alleged in the complaint. Section 8(c) of the Act protects an employer's expression of "any views, argument, or opinion…if such expression contains no threat of reprisal or force of promise of benefit." The Board has therefore stated that an employer may lawfully "criticize, disparage, or denigrate a union…provided that its expression of opinion does not threaten employees or other interfere with . . . Section 7 rights." See, e.g., *Tesla, Inc.*, 370 NLRB No. 101 at p. 7, quoting *Children's Center for Behavioral Development*, 347 NLRB 35 (2006). However, the Board has also held that employer statements disparaging the Union "by appealing to racial prejudice" are coercive, and violate Section 8(a)(1). *Southern Bakeries, LLC*, 364 NLRB 804, 805-806 (2016), enf. denied in relevant part 871 F.3d 811 (8th Cir. 2017) (employer memo informing employees that employer had, *sua sponte*, "raised concerns that the Local was discriminating against Hispanics through targeted grievance allegations," and thereby "accused the Union of racial discrimination," constituted unlawful disparagement); see also *Fenetrol, Inc.*, 251 NLRB 796, 798-800, 804 (1980) (employer unlawfully disparaged union via "racial remarks" to employees exhorting them to vote for favored union which "was made up of mostly minority groups" as opposed to rival union employer described as "white, Italians").

Here, the evidence establishes that Moss' advice that Monarrez should "not bother even getting involved" in the organizing campaign because "the Union would never happen" was premised on an appeal to racial prejudice and derogatory racial stereotyping. For before counselling Monarrez against becoming involved in the ALU campaign, Moss told her that the JFK8 organizing campaign, like the union campaign at Amazon's Bessemer, Alabama facility, was "not a serious union drive," but "a Black Lives Matter protest about social injustice." Moss further told Monarrez that "the guys across the street" from JFK8 "out there" were "just a bunch of thugs" who didn't know what they were doing, like the leaders of the union campaign in Bessemer. (Tr. 491.) Because, as discussed above, Monarrez offered the more reliable account of their conversation, I do not credit Moss' general assertion that he expressed doubt regarding ALU leader Chris Smalls' "experience in running a labor organization" in a racially neutral manner. (Tr. 1100–1101.) Instead, I credit Monarrez' testimony that Moss directly linked his assessment of the ALU leadership's lack of competence in labor relations and union affairs to the Black Lives Matter movement in a specifically racially derogatory way, culminating in a reference to the ALU leadership as "a bunch of thugs."[43] It is true that, almost 60 years ago, the Board adopted an ALJ decision holding that the employer did not unlawfully disparage the union by stating that the employees should "vote the damn thugs out" and telling them that the union "operated, like 'a gang of thugs.'" *Pepsi-Cola Bottling Company of Beckley, Inc.*, 145 NLRB 785, 791, 796 fn. 13 (1964). However, the uses and racial connotations of epithets change over time, and the import of such pejorative terms must be reconsidered in light of more recent history and politics, as well as the immediate context of the instant case. See *Constellation Brands, U.S. Operations, Inc.*, 367 NLRB No. 79 at p. 1, fn. 3 and at p. 8–10 (2019), enf'd. 992 F.3d 642 (7th Cir. 2021) (evaluating allegation that employer violated Section 8(a)(1) by requiring that employee remove a t-shirt stating "Cellar Lives Matter" in the context of the Black Lives Matter movement). I find that by situating what could have been a generic opinion regarding the ALU leaders' lack of labor relations experience within the context of the Black Lives Matter movement, and subsequently referring to the ALU leaders as "thugs," Moss appealed to racial prejudice and derogatory racial stereotypes in a manner which unlawfully disparaged the Union and conveyed that support for the Union was futile.

Finally, it should be noted that Moss' statements to Monarrez disparaging the Union occurred in the context of other violations of Section 8(a)(1) which occurred during the same conversation. It is well-settled that disparaging statements "must be considered in context," and that when "uttered in the context of other unfair labor practices may rise to the level of unlawful threats." *Southern Bakeries, LLC*, 364 NLRB at 805, citing *Fred Meyer Stores, Fred Meyer Stores*, 362 NLRB 698, 700–701 (2015), enf. denied in relevant part 865 F.3d 630 (D.C. Cir. 2017). Thus, disparaging statements made during "the commission of unfair labor practices" or "in response to protected concerted activity may rise to the level of unlawful threats" in and of themselves. *Fred Meyer Stores*, 362 NLRB at 700, citing *Turtle Bay Resorts*, 353

[42] Amazon contends that Moss' statement was permissible, in that a statement of futility must convey that the employer "would use unlawful means to ensure its nonunion status," in order to violate Section 8(a)(1), citing *Tesla, Inc.*, 370 NLRB No. 101 at p. 7 (2021), enf'd. in relevant part 63 F.4th 981 (2023), Court of Appeals panel opinion vacated and rehearing en banc ordered 73 F.4th 960 (5th Cir. 2023). Posthearing Br. at 64–65. However, the Board explained in that decision that the allegedly unlawful statement there—"The [Union] is a . . . two-class system where [the Union] is the only one that has a voice and not the workers"—constituted a legitimate description of a change in the relationship between the employees and the employer which would ensue if the Union prevailed in its organizing campaign pursuant to existing caselaw. *Tesla, Inc.*, 370 NLRB No. 101 at p. 7, 16. Moss' statements to Monarrez, described above, are obviously distinct from the remarks at issue in that case.

[43] I note in this respect that Chris Smalls and Derrick Palmer, two of ALU's founders and the Union's president and vice-president of organizing as of October 2021, are African-American. Tr. 43, 44–45.

NLRB 1242, 1278–1279 (2009), incorporated by reference 355 NLRB 706 (2010). Here, Moss' disparaging remarks regarding ALU took place in the context of a conversation with Monarrez which also included the unlawful solicitation of grievances with an express promise to remedy and a coercive interrogation, as discussed below. Disparagement of the Union takes on a heightened patina of coercion in such circumstances.

Thus, for all of the foregoing reasons, the evidence established that Amazon, by its agent Moss, threatened employees that support for the Union was futile and disparaged the Union via appeals to racial prejudice and derogatory racial stereotyping, in violation of Section 8(a)(1) of the Act.

The evidence further establishes that Moss solicited grievances and promised to remedy them during his conversation with Monarrez. As addressed above, the credible evidence establishes that after introducing himself, Moss told Monarrez that his work entailed speaking to Amazon employees at different facilities regarding their "concerns or questions that they had to try to make the workplace better." Moss then asked Monarrez "specifically for three issues that [she] would like to address and improve at Amazon," taking notes while she discussed issues of gender and race discrimination, lack of promotional opportunity, and issues with Amazon's Workers Compensation insurance carrier. (Tr. 488–489.) Later in the conversation, Moss told Monarrez that his "boss . . . had direct ties to Jeff Bezos," to whom she would "relay all of [Monarrez'] concerns and issues," so that "everything would be resolved and everything would be taken care of." (Tr. 492–493.) Such statements constitute an obvious solicitation of employee grievances and promise to remedy them, in violation of Section 8(a)(1). See, e.g., *Boar's Head Provisions Co.*, 370 NLRB No. 124 at p. 5, 19–20 (employer unlawfully solicited grievances where Plant Manager "discussed specific policy changes to terms and conditions of work," and Senior Vice President met with employees "to hear and try to address their complaints," noted that "the two main issues were vacation and attendance problems," and stated that "he would like to 'solve' their problems"); *Honeywell Electronic Materials Mfg., LLC*, 352 NLRB 1139, 1141 (2008) (employer unlawfully solicited grievances where plant manager "solicited [employee] to list the issues that caused the employees to seek union representation" and to meet with management "leadership team" to address them). In addition, Moss informed Monarrez during their conversation that the JFK8 employees would be receiving a 50-cent pay raise, thereby reinforcing the impression that rectifying the problems that Monarrez described during their conversation was possible.[44]

Amazon's contention that Moss' remarks in this respect were consistent with a past practice of eliciting grievances and feedback from the JFK8 employees is not supported by the evidentiary record. It is well-settled that while an employer may continue practices it had previously engaged in to solicit employee opinions and complaints regarding the workplace, unprecedented methods of doing so in the face of a Union organizing campaign are insufficient to rebut the presumption that the solicitation of grievances in such a context violated Section 8(a)(1). See *Arden Post Acute Rehab.*, 365 NLRB No. 109 at p. 2–3 (2017), enf'd. 755 Fed.Appx. 12 (D.C. Cir. 2018) (chief operations officer's questioning of employee regarding "how things were going" and promise to "follow up and look into" employee's concerns unlawful, where COO "had never previously addressed employees' complaints in this manner"); *Honeywell Electronic Materials Mfg., LLC*, 352 NLRB at 1141 (employer violated Section 8(a)(1) where plant manger's conversations with employees were "not part of any existing programs" involving solicitation of employee grievances). Moss' conversation with Monarrez was thoroughly distinct from Amazon's previously deployed techniques for soliciting employee opinions at JFK8, such as GEMBA walks, "Birthday Roundtables," and submission of employee comments for posting on the Voice of Associates (VOA) Board or via Amazon A to Z.[45] (Tr. 857–859.) Furthermore, there is no evidence that labor consultants ever participated in any of these activities. (Tr. 875–878.) Nor is there any evidence of a coordinated practice where individual managers solicited employee complaints regarding working conditions and/or terms and conditions of employment. (See, e.g., Tr. 56, 58, 574.) Thus, Moss' conversation with Monarrez did not occur in the context of a previously existing practice at JFK8 for soliciting employee complaints or feedback. As a result, Moss' remarks to Monarrez constituted an unlawful solicitation of employee grievances and promise to remedy them in violation of Section 8(a)(1).

Finally, the evidence establishes that Moss interrogated Monarrez regarding her union activities and sympathies during their conversation. I have credited Monarrez' testimony that Moss asked her whether she had joined the ALU protest organized by Chris Smalls in March 2020, whether she had joined the Union, and whether she had signed a union card. (Tr. 490.) Such questions often form the basis of an unlawful interrogation.[46] See,

[44] Amazon contends that Monarrez contradicted her own testimony by first contending that Moss was only holding a notebook and pen during their conversation, and later stating that Moss was holding a chart with financial information that indicated that she would be receiving the 50-cent pay raise. Posthearing Br. at 62. However, Monarrez testified that when discussing the pay raise, Moss "grabbed a chart with financial information on it," and not that Moss had been holding the chart throughout their conversation. See Tr. 489, 492.

[45] For example, it was clear from Christina Stone's testimony that GEMBA walks focused upon issues of safety and order, and not employees' terms and conditions of employment. Tr. 881–882. Furthermore, Stone had never attended a Birthday Roundtable, so her testimony regarding the solicitation of employee opinions at those events was purely speculative. Tr. 875–876.

[46] Moss' remarks are not comparable to the "offhand and somewhat innocuous" comments at issue in *Bozzuto's Inc. v. NLRB*, which the Second Circuit, contrary to the Board, found did not constitute a coercive interrogation. 927 F.3d 672, 685, 686-687 (2019), denying enforcement of *Bozzutto's, Inc.*, 365 NLRB 1444 (2017); see R.S. Posthearing Brief at 66. In *Bozzuto's Inc.*, a fleeting, chance encounter between an employee and a senior vice president resulted in a two-sentence interaction, where the senior vice president asked, "what's going on with this Union stuff?" and the employee responded, "I'm not going to talk about it with you." 927 F.3d at 676. In the instant case, by contrast, Moss deliberately summoned Monarrez to meet with him and asked her whether she had participated in the protest organized by Smalls, joined the Union, or signed a union authorization card. Thus, Moss' questions were part of a deliberate engagement with Monarrez initiated in order to obtain inform-

e.g., *Remington Lodging & Hospitality, LLC*, 363 NLRB 987, 987 fn. 1, 1004 (2016), enf'd. 847 F.3d 180 (5th Cir. 2017) (questioning regarding whether employees signed a union card and attended union meetings unlawful); *Portola Packaging, Inc.*, 361 NLRB 1316, 1336–1337 (2014) (questioning regarding whether employee signed union card violated Section 8(a)(1)); *TKC, A Joint Venture*, 340 NLRB 923, 924 (2003), enf'd. 123 Fed.Appx. 554 (4th Cir. 2005) (area manager's question regarding whether employee "was in the Union" unlawful interrogation).

The other factors which comprise the *Rossmore House* analysis militate in favor of a finding that Moss' questioning of Monarrez was coercive. While Moss was not a supervisor, Amazon stipulated that he worked as a labor consultant and was Amazon's agent pursuant to Section 2(13) of the Act. See, e.g., *UNF West, Inc.*, 363 NLRB 886, 887–888 (2016), enf'd. 844 F.3d 451 (5th Cir. 2016) (coercive interrogation by labor consultant violated Section 8(a)(1)); *Beverly California Corp.*, 326 NLRB 153, 157 (1998), enf'd. 227 F.3d 817 (7th Cir. 2000) (same). I have further credited Monarrez's testimony that Moss began their conversation by introducing himself as an "auditor" for Amazon and showing Monarrez an Amazon badge similar to her own. (Tr. 488, 501.) Such lack of clarity regarding Moss' role and authority at Amazon supports a finding that his questioning was coercive. Although Monarrez was not sequestered with Moss in an office at the time, she was specifically directed to meet with him, and Moss spoke with Monarrez alone in an area where managers typically conducted meetings. (Tr. 487–488.) Furthermore, their conversation was lengthy, and Monarrez testified that she felt pressure to remain with Moss for the entire discussion. (Tr. 493, 501–502.) These factors tend to establish that Moss' questioning occurred in an "atmosphere of unnatural formality," even if the two were not in an enclosed office at the time. *Westwood Health Care Center*, 330 NLRB at 939, quoting *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). In addition, Moss' questions regarding Monarrez' union membership and activities were bracketed by his unlawful solicitation of grievances and promises to remedy, as well as threats of futility and disparagement of the Union involving appeals to racial prejudice, during the same conversation. See *Boar's Head Provisions Co.*, 370 NLRB No. 124 at p. 19 (interrogation coercive where questions were "accompanied by . . . threats" of adverse action "against the employees if they supported the Union"). Furthermore, Monarrez' characterization of the conversation's tone as "friendly" does not obviate the coercive nature of Moss' questioning, as Amazon contends. Posthearing Brief at 66; see *Boar's Head Provisions Co.*, 370 NLRB No. 124 at p. 18–19 (finding coercive interrogation despite purportedly "friendly" nature of conversation); see also *Bozzuto's, Inc.*, 365 NLRB No. 146 at p. 2, fn. 6, quoting *Management Consulting, Inc.*, 349 NLRB 249, 250 fn. 6 (2007) (supervisory remarks potentially coercive regardless of supervisor's "friendship" with employee and "regardless of whether the remark was well intended").

Finally, the evidence does not establish that Monarrez was an open union supporter at the time of her conversation with Moss. Although Monarrez testified that she joined ALU in May 2021 as a representative, there is no evidence to suggest that Amazon or its managers and supervisors were aware of her activity. See *Bozzuto's, Inc.*, 365 NLRB No. 146 at p. 2–3 (employee's "leading role in the organizing campaign" irrelevant where evidence demonstrated that employee was endeavoring to "keep a low profile when engaged in union activity" "*at the time of the interrogation*") (emphasis in original). Given all of the foregoing factors, Monarrez' truthful response to Moss' questions—that she was interested in the Union but had not yet signed a union card—do not obviate the conclusion that Moss' questioning was coercive.

For all of the foregoing reasons, the evidence establishes that Moss coercively interrogated Monarrez during their May 4 conversation, in violation of Section 8(a)(1) of the Act.

C. Acosta's Statements to Janet Olmedo on October 31, 2021

The Complaint alleges that labor consultant David Acosta violated Section 8(a)(1) of the Act by informing Janet Olmedo that if the ALU campaign at JFK8 were successful, strikes would be inevitable, and by coercively interrogating Olmedo regarding her ALU sympathies during their conversation on October 31, 2021. Olmedo's credible testimony substantiates these allegations.

The evidence establishes that Acosta informed Olmedo during their conversation that if the ALU's campaign at JFK8 were successful strikes would be inevitable, in violation of Section 8(a)(1). An employer may not inform employees during an organizing campaign that if the employees select the union as their collective-bargaining representatives, strikes will inevitably result. *Smithfield Packing Co.*, 344 NLRB at 8; *Gold Kist, Inc.*, 341 NLRB at 1041. While an employer may "make a prediction" as to the impact of the employees' selecting a union as collective-bargaining representative, such a prediction "must be carefully phrased on the basis of objective fact" in order to avoid creating a coercive effect. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Acosta's remarks here ran afoul of this standard. Acosta told Olmedo, "if the union did pass . . . they would be hosting strikes and walkouts and that that would not look good for the company."[47] (Tr. 162). His comments during their brief conversation contained no objective facts which supported that assertion, nor did they constitute an attempt to accurately describe the law pertaining to strikes or collective bargaining. See *Stern Produce Co.*, 368 NLRB No. 31 at p. 3 (2019) (employer permitted to "share[] with employees a correct statement of the law" involving strikes and lockouts). Acosta's statement simply conveyed, without qualification and in unconditional terms, that if the employees selected ALU as their collective-bargaining rep-

ation, and sought more specific responses than the senior vice president's "offhand" remark at issue in *Bozzutto's Inc.*

[47] Amazon's argument that Olmedo's testimony should be discredited based upon her use of the word "hosting" to describe Acosta's statement regarding the Union's predilection for strikes and walkouts is not persuasive. Posthearing Br. at 60–61. Furthermore, contrary to Amazon's contention, the caselaw discussed herein does not require a showing that allegedly unlawful statements regarding the inevitability of strikes describe actions that the employer itself would take, as opposed to the general inevitably of strikes in the event that a union campaign is successful. Id.

resentative, the Union would conduct strikes and walkouts which "would not look good" for Amazon. This statement therefore impermissibly conveyed that strikes and walkouts were inevitable if ALU succeeded in its organizing campaign, and violated Section 8(a)(1).

The evidence further establishes that Acosta coercively interrogated Olmedo during their October 31 conversation. I have credited Olmedo's testimony that Acosta approached her at her workstation, introduced himself as Dave, and asked her whether she "knew what was going on with the Union." Tr. 155, 158. Such questioning may form the basis for a finding of an unlawful interrogation. See, e.g., *Remington Lodging and Hospitality, LLC*, 363 NLRB at 1004 (supervisor's query "[W]hat do you know about the Union" unlawful); *Connecticut Humane Society*, 358 NLRB 187, 2018 (2012) (employer coercively interrogated employee by asking "if she heard anything about the union activity"); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1121, 1122–1123 (2002), aff'd. 71 Fed.Appx. 441 (5th Cir. 2003) (supervisor coercively interrogated employee by asking whether he knew "anything about this rumor going on about the union").[48]

Other factors also support a conclusion that Acosta's questioning of Olmedo was coercive. Acosta was dressed in "street clothes," Olmedo had never seen him before and had no idea who he was, and Acosta only introduced himself as "Dave." Their conversation took place at Olmedo's work station, during work time, while she was working. (Tr. 154–155, 157–158. As with Moss' questioning of Monarrez, Acosta's interrogation was immediately followed by an unlawful threat, as discussed above, which intensified its coercive nature. *Boar's Head Provisions Co.*, 370 NLRB No. 124 at p. 19. Finally, the evidence establishes that Olmedo responded untruthfully to Acosta's question —stating that she did not know what was going on, even though she was aware of the union campaign and had signed a card— because she believed that Amazon management was not aware that she supported the Union, and was afraid of being discharged. It is well-settled that an employee's evasive or untruthful response to supervisory questioning supports a determination that questioning was impermissibly coercive. See *Kumho Tires Georgia*, 370 NLRB No. 32 at p. 5 (2020) (employee's "reluctance to answer" supervisor's questions evinces their coercive nature); *Chipotle Services*, 363 NLRB at 346; *Relco Locomotives* , 359 NLRB at 1156 (employee's untruthful answer to supervisor's query regarding his union sentiments "because he feared for his job" indicative of coercion).

For all of the foregoing reasons, the evidence establishes that Acosta coercively interrogated Olmedo on October 31, in violation of Section 8(a)(1) of the Act.

4. Allegations involving the conduct of Metro One security personnel on May 16, 2021 and May 24, 2021

A. The Agency Status of Metro One Security Personnel

The Complaint alleges that Metro One security guards John Hill and Elena Koplevich were agents of Amazon within the meaning of Section 2(13) of the Act in connection with conduct allegedly violating Section 8(a)(1). Amazon contends that Hill and Koplevich were not its agents. For the following reasons, the evidence establishes that Hill and Koplevich acted as agents of Amazon pursuant to Section 2(13) of the Act when they engaged in allegedly unlawful conduct on May 16 and May 24, 2021.

It is well-settled that the Board looks to common law agency principles in order to determine whether a particular individual is an employer's agent. See, e.g., *SAIA Motor Freight, Inc.*, 334 NLRB 979 (2001). An individual may be an agent pursuant to Section 2(13) where they have either actual or apparent authority to act on behalf of the party in question. *Cornell Forge Co.*, 339 NLRB 733 (2003). As Section 2(13) provides, however, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Ultimately with respect to an employer's agent, a finding of apparent authority turns on whether, "under all circumstances," employees "would reasonably believe" that the purported agent "was reflecting company policy and speaking and acting for management." *Pain Relief Centers, P.A.*, 371 NLRB No. 70 at p. 20, quoting *Pan-Oston Co.*, 336 NLRB 305, 305-307 (2001); see also *Kauai Veterans Express Co.*, 369 NLRB No. 59 at p. 9, fn. 4 (2020). Agency status must be established "with regard to the specific conduct that is alleged to be unlawful," and the burden of establishing agency status is on the party asserting it. *Pan-Oston Co.*, 336 NLRB at 306.

The Board has repeatedly found that security personnel at an employer's facility have acted as agents of the employer pursuant to Section 2(13). In particular, the Board has found that by "placing the guard in a position to stop persons entering the plant premises and to confiscate materials," an employer has "cloaked the guard with at least apparent authority" as its agent. *Perdue Farms*, 323 NLRB 345, 351 (1997), enf'd. in relevant part, 144 F.3d 830 (D.C. Cir. 1998); see also *T-Mobile USA, Inc.*, 369 NLRB No. 50 at p. 19-20 (2020), remanded on other grounds 6 F.4th 15 (D.C. Cir. 2021) (security guards agents of employer where they "monitor who enters and exits the property" as well as "detain people at the front desk and require identification"); *Harrison Steel Castings Co.*, 262 NLRB 450, 455, and at 455, fn. 6 (1982), remanded on other grounds 735 F.2d 1049 (7th Cir. 1984) (security guard an agent of employer where, as part of her "responsibility for maintaining the integrity of Respondent's property," she "was responsible for assuring that access to company property be confined to persons having business thereon" and "the location and means by which she exercised her authority with respect to the protection of plant property against trespass would naturally be taken as possessed of the imprimateur of Respondent").

The evidence here establishes that the security objectives set for Metro One personnel at Amazon's JFK8 facility include, "Ensure authorized persons who are allowed entry are screened," and "Keep unauthorized people from entering the property." (GC Exh. 46, p. 5.) The record consequently establishes that Metro One security guards are stationed at the entrance to and

[48] This body of caselaw does not require that unlawful questioning address the specific personal sympathies or activities of the employee involved, as Amazon claims. Posthearing Br. at 58.

exits from the JFK8 facility. Metro One security guards monitor all individuals as they enter and exit the JFK8 facility, including employees swiping their badges, and detain nonemployees at a front desk or window to speak with them before allowing or denying them entrance. Metro One security guards also routinely search employee bags and belongings as employees exit the facility after their shift ends. Under these circumstances, employees at JFK8 would reasonably believe that the Metro One security personnel were reflecting company policy and speaking and acting on behalf of Amazon pursuant to Board caselaw. As a result, and for the reasons discussed below with respect to the specific incidents involving Hill and Koplevich, I find that the security guards acted as agents of Amazon at all material times.

B. Security Guard John Hill's Conduct on May 16, 2021

The evidence establishes that, as the complaint alleges, Amazon violated Section 8(a)(1) of the Act when security guard John Hill told employees that they could not distribute ALU literature on nonwork time in a nonwork area, conducted surveillance of employees' union activities, and confiscated ALU literature on May 16, 2021. I credit the testimony of Connor Spence regarding his interaction with Hill and Hill's conduct in the first floor main breakroom of JFK8 on May 16, which is unrebutted given that Hill did not testify at the hearing.

Thus, I credit Spence's testimony that Hill asked him whether he had Amazon's permission to distribute Union flyers, and then insisted that Spence could not distribute ALU literature in the breakroom during his own break time without it. (Tr. 540–541.) The Board has repeatedly held that employers violate Section 8(a)(1) by requiring that employees obtain their permission before distributing Union literature on nonwork time and in a nonwork area. See, e.g., *Cardinal Home Products*, 338 NLRB 1004, 1005–1006, 1027–1028 (2003) (rule requiring employer approval prior to distribution of literature unlawful); *Teletech Holdings, Inc.*, 333 NLRB 402, 403–404 (2001) (rule which prohibited "distributing literature without proper authorization" violated Section 8(a)(1)). Hill's insistence that Spence needed Amazon's permission in order to distribute ALU literature in the employee breakroom while Spence was not on work time violated Section 8(a)(1).

Spence's testimony further establishes that Hill surveilled employees' union activities during this incident, by taking a picture of Spence's employee badge for the specific purpose of consulting with HR regarding Spence's distribution of ALU literature. Spence's uncontradicted testimony establishes that Hill asked Spence to produce his employee badge, which Hill then photographed. (Tr. 541–542.) Troy confirmed during his testimony regarding the incident that Hill photographed Spence's badge for the express purpose of identifying Spence to Amazon's HR personnel. (Tr. 1063–1064.) Absent a legitimate business or security objective, the photographing of employees engaged in Union activity constitutes unlawful surveillance and violates Section 8(a)(1). See *Holy Cross Health d/b/a Holy Cross Hospital*, 370 NLRB No. 16 at p. 2, fn. 3, and at p. 15 (2020); *F. W. Woolworth Co.*, 310 NLRB at 1197. Here, as in *Holy Cross Health*, Hill photographed Spence's badge specifically in order to identify Spence to HR as an employee engaged in union activity, as confirmed by Troy during his testimony. 370 NLRB No. 16 at p. 2, fn. 3 (violation where supervisor photographed employees and sent the photograph to management "in an effort to identify union supporters"). Amazon has offered no other justification for Hill's photographing Spence's badge at the time that Spence was distributing ALU literature. As a result, by photographing Spence's badge during their interaction, Hill conducted surveillance of employees' union activity, in violation of Section 8(a)(1).

Finally, the evidence establishes that Hill confiscated ALU literature during his May 16 interaction with Spence, in violation of Section 8(a)(1). Again, Spence's testimony, confirmed by his photograph of Hill holding the ALU literature, demonstrates that Hill took the Union literature that Spence had placed on the breakroom tables, and refused to return it to Spence when Spence asked Hill to do so. (Tr. 543–545; GC Exh. 11.) Thus, as discussed above, absent a showing of "special circumstances," Hill's confiscation of the ALU literature that Spence was distributing violated Section 8(a)(1). *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16 at p. 2, 16; *Shamrock Foods Co.*, 366 NLRB No. 117 at p. 2, 23.

Amazon raises several arguments to support its contention that Hill's conduct did not violate Section 8(a)(1) of the Act, none of which are compelling. Amazon primarily argues that Spence's distribution of the ALU literature was not protected pursuant to Section 7 of the Act because the flyer Spence distributed that day was "misleading." Posthearing Brief at 74–75. Specifically, Amazon contends that because the ALU flyer consisted solely of the Notice to Employees agreed upon as part of the settlement of a previous case, without the actual Informal Settlement Agreement containing a nonadmissions clause, the flyer gave the impression that Amazon had admitted to committing the unfair labor practices referred to in the Notice. However, Amazon provides no legal authority to establish that the distribution of the Notice—which contained language that Amazon had ostensibly agreed to as part of the settlement—without the Informal Settlement Agreement itself was somehow impermissibly "misleading." Nor does Amazon present cogent legal support for its contention that a determination that union literature is "misleading" or misrepresents Board processes necessarily requires a conclusion that the activity of employee distribution itself is not protected by Section 7.[49]

Amazon further contends that Hill's conduct was permissible

[49] Amazon bases this argument upon cases which address a union's distribution of altered and misleading Board documents in the context of objections to conduct affecting the results of a representation election. Posthearing Brief at 74-75; see *Ona Corp.*, 235 NLRB 595 (1978) (altered complaint which omitted material preceding Regional Director's signature regarding hearing time and place, as well as statement that allegations may be found true if not answered, constituted misuse of Board processes and objectionable conduct); *Mallory Capacitor Co.*, 161 NLRB 1510, 1511–1512 (1966) (sustaining objection that altered complaint which omitted all material above Regional Director's signature except for "alleged unlawful conduct" and "conclusory allegation" that conduct violated the Act, with a picture of Uncle Sam and the words "Uncle Sam Says 'Mallory Bosses Guilty,'" constituted misuse of Board process). They do not support a contention that the distribution of union literature itself may be unprotected based upon the literature's "misleading" depiction of Board documents. In any event, here the Board's No-

because Hill was responding to some sort of report that an employee was placing papers on the breakroom tables when he first encountered Spence in the breakroom. Posthearing Brief at 75–76. This assertion is not persuasive. While such a report may have engendered Hill's presence in the breakroom, it did not require that Hill tell Spence that Spence needed permission in order to distribute ALU literature, photograph Spence's badge, or confiscate the literature that Spence was distributing. And if Hill was in fact responding to a report of some sort of incident that he needed to investigate, he was acting within the scope of his employment and authority, despite Amazon's contentions to the contrary.[50]

Amazon's arguments to the effect that General Counsel has failed to establish that Hill was its agent pursuant to Section 2(13) of the Act are also unavailing. Posthearing Brief at 71-72. For example, Amazon contends that Spence's testimony that he told Hill, "you don't work for Amazon" establishes that Spence did not "reasonably believe" that Hill was acting and speaking for Amazon management, thereby obviating a finding of agency status. However, General Counsel need not establish that Hill was Amazon's employee in order to prove that he was Amazon's agent, only that an employee would reasonably believe under all of the relevant circumstances that Hill, as a Metro One security guard, was speaking and acting for Amazon. Amazon's claim that Spence did not reasonably conceive of Hill as acting and speaking for Respondent because he told Hill that confiscating the ALU literature was "not his job" is also unavailing. In fact, Spence was not remarking on Hill's employment and/or agency status; Spence's complete testimony was that he told Hill that, "it's not his job *to break the law*." (Tr. 543 (emphasis added).) Thus, Amazon's argument that the specific circumstances of Spence and Hill's interaction undermine General Counsel's contention that Hill, as a Metro One security guard at JFK8, was acting as an agent of Amazon within the meaning of Section 2(13), is not persuasive.

Amazon further contends in its Posthearing Brief that it subsequently repudiated any violations committed by Hill, so that further remedial action is unnecessary. Posthearing Brief at 77-79; see, e.g., *T-Mobile USA, Inc.*, 369 NLRB No. 50 at p. 1–2 (2020), citing *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1987). Pursuant to *Passavant Memorial Area Hospital*, in order to effectively repudiate unlawful conduct and thereby relieve itself of liability, an employer must repudiate the conduct in question in a timely and unambiguous manner, "specific in nature to the coercive conduct." 237 NLRB at 138-139, quoting *Douglas Division, Scott & Fetzer Co.*, 228 NLRB 1016 (1977); see also *T-Mobile USA, Inc.*, 369 NLRB No. 50 at p. 1; *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003). Repudiation further requires "adequate publication . . . to the employees involved," and "no proscribed conduct on the employer's part after the publication." *Passavant Memorial Area Hospital*, 237 NLRB at 138. Finally, "assurances to employees" that the employer will not interfere with Section 7 activity in the future are also a component of an effective repudiation. *Passavant Memorial Area Hospital*, 237 NLRB 138–139.

Amazon's actions in the wake of Hill's conduct do not satisfy this standard. The testimony of both Spence and Grabowski establishes that during their meeting, Grabowski apologized to Spence for Hill's conduct on May 16, 2021, and stated that Spence had the "right to solicit in non-working areas during non-working times, which includes the break space." Tr. 550–551, 1206.) While Grabowski's apology and confirmation of Spence's right to engage in protected activity on nonwork times in nonwork areas is in and of itself consistent with the *Passavant Memorial Area Hospital* standard, certain other components of an effective repudiation are lacking. For example, Grabowski's remarks did not include assurances that Amazon would not interfere with employees' Section 7 activities in the future. Furthermore, as discussed *infra*, the record evidence establishes that Amazon's own supervisory staff engaged in substantially similar unlawful conduct – prohibiting employees from distributing ALU literature in the breakrooms at JFK8 and confiscating ALU flyers—1(month later.

In addition, there is no evidence that any repudiation of Hill's unlawful conduct was disseminated to any employee other than Spence. Spence testified that there were around 20 employees present when Hill removed the ALU literature from the breakroom tables where Spence had placed it. (Tr. 540. However, there is no evidence that Amazon ever put its repudiation in written form, much less disseminated its repudiation to any other employees. Grabowski and Troy admitted that they never sent any written or electronic notification to employees repudiating Hill's conduct, informing employees of their Section 7 rights, or assuring employees that these rights would be respected. (Tr. 1083–1084, 1221–1222.) While Grabowski initially claimed during his testimony that he had posted a comment on the VOA board to inform employees that Hill's conduct on May 16 was unlawful, he eventually admitted that the post in question addressed a completely different incident which occurred in October 2021, and had nothing to do with the May 16 incident involving Hill and Spence.[51] (Tr. 1206–1207, 1209–1210, 1216–1218; R.S. Exh. 6.) Other posts on the VOA board which

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tice to Employees was simply distributed—unaltered—without the Informal Settlement Agreement attached. In *Novelis Corp.*, also cited by Amazon, the Board held that the "coercive effect" of other violations involving the restoration of premium and overtime pay was exacerbated and prolonged when the employer's President made "false and misleading" statements that it would be forced to rescind premium and overtime pay again if the Board found that it had been restored unlawfully pursuant to unfair labor practice charges filed by the Union. 364 NLRB 1452, 1455–1456 (2016), enf'd. in relevant part 885 F.3d 100 (2nd Cir. 2018). Thus, *Novelis Corp.* is plainly inapposite.

[50] Amazon also argues that Hill was merely collecting ALU literature from the breakroom tables because it was "abandoned," citing *Page Avejet*, 278 NLRB 444 (1986). Posthearing Brief at 77. However, there is no evidence whatsoever that Hill was removing ALU literature from the employee breakroom tables on May 16 as part of some general housekeeping activity, or because the literature was "abandoned." The evidence establishes, by contrast, that Hill entered the breakroom, told Spence he could not distribute ALU literature without prior permission, photographed Spence's badge when Spence insisted he had the legal right to distribute union literature on nonwork time in a nonwork area, and confiscated the ALU literature Spence had placed on the breakroom tables.

[51] The particular post was dated October 11, 2021, and addressed an incident the previous week, where a security guard asked Spence wheth-

ostensibly repudiated Hill's unlawful conduct on May 16 were similarly revealed to be completely unrelated to that episode.[52]

Amazon further contends that Grabowski's statements to Spence constituted an effective repudiation pursuant to *T-Mobile USA, Inc.*, 369 NLRB No. 50 (2020). Posthearing Brief at 77–79. However, that case is distinguishable in certain important respects. Whereas the employer in *T-Mobile USA, Inc.* repudiated the unlawful statement less than an hour after it occurred, Grabowski did not meet with Spence until two to three weeks after Hill's unlawful conduct on May 16, 2021.[53] 369 NLRB No. 50 at p. 1; see (Tr. 549–550). Furthermore, the employer in *T-Mobile USA, Inc.* repudiated its security guard's unlawful conduct in writing, in an email, whereas Amazon never provided any written statement repudiating Hill's behavior. 369 NLRB No. 50 at p. 1. While the incident which was repudiated in *T-Mobile USA, Inc.* involved only one employee and therefore could be repudiated by a single email sent only to that person, there is no evidence here that Amazon repudiated Hill's conduct with respect to the 20 or so employees Spence testified were present in the breakroom at the time Hill confiscated the ALU flyers. 369 NLRB No. 50 at p. 1, 11–12. Furthermore, as noted previously, Amazon's own supervisors committed similar violations of Section 8(a)(1) involving the distribution of ALU literature a month after Hill's conduct, whereas in *T-Mobile USA, Inc.*, the employer's subsequent violations occurred four months after the initial unlawful conduct, were unrelated, and constituted substantively distinct violations of the Act. 369 NLRB No. 50 at p. 1, 20. As a result, Amazon's reliance on *T-Mobile USA, Inc.* is unavailing here.

For all of the foregoing reasons, the evidence establishes that Amazon violated Section 8(a)(1) of the Act on May 16, 2021, when its agent, security guard John Hill, informed employee Connor Spence that he was not permitted to distribute ALU literature in an employee breakroom at JFK8 during nonwork time, conducted surveillance of employees' union activity by photographing Spence's badge, and confiscated ALU literature.

C. Elena Koplevich's Conduct on May 24, 2021

The evidence also substantiates the Complaint's allegation that on May 24, 2021, Amazon, by its agent security guard Elena Koplevich, created the impression that employees' union activities were under surveillance, in violation of Section 8(a)(1) of the Act. The record evidence establishes, via Connor Spence's uncontroverted testimony, that on the afternoon of May 24, 2021, ALU held a cookout for employees at its tent at the bus stop across the street from the Staten Island facility. Spence testified without contradiction that during the cookout, Koplevich, who was standing at a small fence which separates the facility's parking lot from the street, held up her phone and pointed it at the ALU organizers and employees present at the cookout for two to five minutes. As discussed above, the evidence establishes that Koplevich, as a security guard, was an agent of Amazon pursuant to Section 2(13) of the Act.[54]

It is well-settled that photographing and/or videotaping employees engaged in union activity at an employer's property without reasonable grounds to believe that misconduct may occur constitutes unlawful surveillance, even where the employees' activity is "open," "public" and "on or near" the employer's property. *F.W. Woolworth Co.*, 310 NLRB at 1197. The Board has also repeatedly held that pointing a camera of some kind toward employees engaged in protected activity has a coercive effect "even if the camera was inoperative." *15th Avenue Iron Works*, 279 NLRB at 654; see also *Barnes Hospital*, 217 NLRB 725, 725 at fn. 2, 727 (1975). Thus, by holding up her phone pointed at the employees and ALU organizers attending the cookout at the ALU tent for several minutes, Koplevich unlawfully created the impression of surveillance of their Union activity.

Despite Amazon's contentions, the evidence unequivocally fails to establish that Amazon repudiated Koplevich's conduct pursuant to *Passavant Memorial Area Hospital*. Grabowski and Troy both testified that they never met with employees to repudiate Koplevich's conduct and reiterate the employees' right to engage in Section 7 activity without the specter of coercive photography, video recording, or other surveillance. Tr. 1222-1223. Koplevich's removal from the facility, and Amazon's interactions with Metro One regarding the incident, are not relevant to the *Passavant Memorial Area Hospital* analysis, which turns on the employer's repudiation of its unlawful conduct *to the employees*, and not the employer's dealings with a contractor providing services at its facility.

For all of the foregoing reasons, the evidence establishes that Amazon violated Section 8(a)(1) of the Act on May 24, 2021, when its agent, security guard Elena Koplevich, created the impression that the employees' Union activities were under surveillance by holding up her phone and pointing it at the employees during a cookout at the ALU tent.

5. Allegations involving Derrick Palmer and Connor Spence's distribution of union literature on June 12, 2021

The complaint alleges that HR Assistant Luke Wojahn, Operations Manager Ariana Ovadia, and HR Business Partner Christina Stone violated Section 8(a)(1) of the Act in connection with Palmer and Spence's distribution of ALU literature on June 12, 2021. The complaint alleges that Wojahn unlawfully told employees that they could not distribute union literature and

er Spence was permitted to campaign in the parking lot at the Staten Island facility. Tr. 1217–1218; R.S. Exh. 6.

[52] These posts were dated July 13, 2021, October 7, 2021, and July 15, 2021. The July 13 post involved a complaint from an African-American employee who was prohibited from using the VOA Board to solicit signatures on a petition in favor of holiday pay for the Federal Juneteenth holiday. The October 7 post addressed a complaint from an employee regarding ALU solicitation in the employee breakroom. The July 15 post responded to a general complaint about Amazon's solicitation and distribution policies. Tr. 1219–1221; R.S. Exh. 6.

[53] Spence's testimony on this point was not contradicted by Grabowski. Tr. 549–550, 1205.

[54] Amazon's contentions to the contrary are meritless. Posthearing Brief at 79–81. Amazon cites to no record evidence in support of its contention that Koplevich was on a meal break or was not engaged in her regular duties at the time she pointed her phone toward the ALU organizers and employees, and Amazon's contention that it did not authorize Koplevich's conduct is not dispositive pursuant to the Board's standard for determining agency status, discussed supra.

confiscated union literature from employees. The complaint alleges that Ovadia also unlawfully confiscated ALU literature, and prohibited employees from distributing union literature on nonwork time and in a nonwork area. Finally, the complaint alleges that Stone unlawfully prohibited employees from distributing union literature by informing employees that Amazon was legally permitted to remove ALU literature from employee breakrooms.

As discussed above, employees are permitted to engage in solicitation and to distribute union literature during nonworking time and in nonworking areas, absent a showing of "special circumstances" necessary for the employer to "maintain production or discipline." *Republic Aviation Corp. v. NLRB*, 324 U.S. at 797, 801, 805; *Shamrock Foods Co.*, 366 NLRB No. 117 at p. 2, 23; *Waste Management of Arizona, Inc.*, 345 NLRB at 1339 fn. 2, 1346. In order to overcome the presumption that a rule restricting such employee activities is unlawful, an employer "must show a compelling and legitimate business reason necessitating" the restrictions it has imposed. *Waste Management of Arizona, Inc.*, 345 NLRB at 1346, citing *Midland Transportation* , 304 NLRB 4, 5 (1991). Consonant with the foregoing, the confiscation of union literature from nonwork areas generally constitutes a violation of Section 8(a)(1) of the Act absent such a showing of special circumstances. See *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16 at p. 2, 16; *Shamrock Foods Co.*, 366 NLRB No. 117 at p. 2, 23.

The record evidence substantiates the Complaint's allegations that Wojahn unlawfully told employees that they could not distribute union literature and confiscated Union literature in violation of Section 8(a)(1). Palmer testified that on June 12, during his break time at around 10:30 a.m., he was distributing ALU flyers when he saw Wojahn enter the breakroom and remove the union literature from the breakroom tables where he had placed it. Tr. 77-78. Palmer's testimony in this regard is confirmed by video of the incident in evidence as General Counsel Exhibit 39. Palmer testified that when he protested to Wojahn that Wojahn was not permitted to remove union literature, Wojahn responded that he had received a notification to do so. (Tr. 78.) Wojahn was not called to testify at the hearing, so Palmer's account of the incident is unrebutted. In addition, in a written statement provided to Amazon, Wojahn asserts that he was "notified by Stephanie Wu Sr. HRA that there were papers being distributed and left on the 3rd floor breakroom" and "asked to collect and remove those that were not in use by those in that area at approximately 10:30 a.m.," thus corroborating Palmer's testimony regarding their exchange. (GC Exh. 74(a).) Furthermore, Senior HR Assistant Jeffrey Lin's written account of the events of June 12 states that at 10:55 a.m., he and Wojahn began a "site-walk to find possible union pamphlets and materials in any of the eating areas." (GC Exh. 75(a-b).) It is undisputed that the breakroom is a nonwork area, and that all of the employees present in the breakroom were on nonwork time. Thus, it is incumbent upon Amazon to demonstrate "special circumstances" necessary to maintain "production or discipline" which warrant Wojahn's confiscation of ALU flyers.

Amazon makes several arguments in support of its contention that Wojahn's confiscation of ALU flyers and related conduct on June 12 was permissible. First, Amazon contends that Palmer and Spence's distribution of ALU literature on June 12 did not constitute protected union activity, because one of the two specific flyers they distributed was misleading. Posthearing Brief at 85–86. I have addressed this argument in connection with the complaint's allegations involving the confiscation of union literature and related conduct of security guard John Hill on May 16, 2021, above, and will not reiterate that analysis here. For all of the reasons discussed in connection with Hill's confiscation of Union literature, the evidence establishes that the contents of the ALU flyer Palmer distributed on June 12 did not remove Palmer and Spence's conduct from the ambit of Section 7's protections.

Amazon next argues that Wojahn did not unlawfully confiscate Union literature because he was merely collecting "abandoned" materials from the breakroom tables, citing *Page Avjet*, 278 NLRB 444 (1986), and *G.C. Murphy Co.*, 213 NLRB 175 (1974). Posthearing Brief at 86–88. Although Wojahn's statement indicates that he was directed by Wu to "collect and remove" ALU flyers "that were not in use by those in that area," Lin's statement regarding the incident represents that he and Wojahn embarked upon a "site-walk to find possible union pamphlets and materials in any of the eating areas." (GC Exh. 74(a), 75(a-b).) Lin's statement is also consistent with evidence in the form of Chime messages between numerous Amazon supervisors at JFK8 in June 2021 which refer to "tracking" union activity and ALU literature in the facility. (GC Exhs. 38, 41, 42.) Furthermore, the ALU flyers collected by Wojahn, and by Ovadia, as discussed below, had not been left on the breakroom tables for hours, such that they could be legitimately considered "abandoned." See *Mitchellace, Inc.*, 321 NLRB 191, 199 (1996) (no violation where supervisor left union notices on break area tables "for more than 10 hours, including through two break periods and the lunch period" before removing them). Instead, Wojahn's statement establishes that he and Lin were dispatched by Wu at the time the distribution of ALU literature occurred, because "there were papers *being distributed and left on* the 3rd floor breakroom" (emphasis added). As a result, the evidence overall establishes that Wojahn was not simply collecting abandoned Union literature, but that Amazon's supervisors "specifically targeted union literature for removal" in an unlawful manner. *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 at p. 11 (2018), enf. granted and denied in part on other grounds 803 Fed.Appx. 876 (6th Cir. 2020).

Page Avjet, Inc. and *G.C. Murphy Co.*, cited by Amazon, are inapposite for other reasons as well. For example, in *Page Avjet, Inc.*, the union literature in question was "scattered on the floor" as well as "left on the tables" in the employer's breakroom. 278 NLRB at 450. Here, by contrast, the video evidence confirms Palmer's testimony that he placed one flyer on each breakroom table only. In addition, in *Page Avjet, Inc.* the alleged violation was based upon a supervisor's admission that "on the one occasion he did pick up the union literature and place it on a table outside the break area." 278 NLRB at 450. There is no evidence in the instant record to establish that Wojahn or any other Amazon supervisor placed the ALU literature they had removed from the breakroom in another location where employees would have access to it. Nor was Wojahn's conduct an isolated incident of the removal of ALU literature, as the conduct of Ovadia and

Hill establishes. Finally, in *G.C. Murphy Co.*, the union literature presumably "abandoned" was left on the "cashier's counter" of a retail store, as opposed to a nonwork area inaccessible to the public. 213 NLRB at 176-178. As a result, that case is not pertinent to the circumstances at issue here.

Amazon also argues that no reasonable employee would find Wojahn's conduct coercive, given that Wojahn collected the ALU flyers from empty breakroom tables, as opposed to taking them directly from employees, and returned them to Palmer when Palmer asked him to do so. Posthearing Brief at 88–89. Amazon contends that Wojahn's conduct was therefore de minimis, and insufficient to form the basis for a violation. Amazon cites no legal authority to specifically establish that Wojahn's unlawful confiscation of ALU flyers was de minimis in nature because he returned them to Palmer upon request. Moreover, when confronted by Palmer regarding his removal of the Union literature, Wojahn stated that he "got a notification" to do so, and then refused to respond when Palmer asked him for the source of the "notification." Any reasonable employee in Palmer's situation would presume as a result that Wojahn was directed to remove the ALU flyers by other Amazon management. Furthermore, Palmer testified that there were approximately 50 employees in the breakroom at the time Wojahn was removing the ALU flyers. (Tr. 80.) As a result, the evidence does not establish that Wojahn's otherwise unlawful confiscation of ALU literature was de minimis in nature.

Finally, Amazon argues that Wojahn collected ALU literature from the breakroom tables pursuant to Amazon's housekeeping policy, citing *North American Refractories Co*., 331 NLRB 1640 (2000),[55] and *Mitchellace, Inc.*, 321 NLRB 191 (1996).[56] Posthearing Brief at 89–90. The evidence does not substantiate this contention. First of all, the evidence does not establish that Amazon maintained a coherent housekeeping or cleanliness policy involving its employee breakrooms. No such written policy was introduced into evidence, and HR Business Partner Christina Stone was unable to provide one to Palmer and Spence during their meeting on the afternoon of June 12. (GC Exh. 9(a) (6:03-6:23)); see *North American Refractories Co.*, 331 NLRB at 1641 ("Company policy concerning housekeeping . . . contained in the employee handbook" and "addressed frequently by management officials at employee meetings"). Furthermore, documentary evidence confirms the testimony of Monarrez and Spence that Amazon engages a cleaning contractor, ABM, to maintain the cleanliness of the JFK8 facility, including breakrooms.[57] (Tr. 495, 567; GC Exh. 65.) Thus, Monarrez, Spence, and Palmer all testified that they had never seen Amazon supervisors or managers do so. (Tr. 255, 494, 566–567.)

In addition, the record evidence relating to the series of incidents on June 12 conclusively establishes that Wojahn did not remove the ALU flyers placed in the breakroom by Palmer and Spence as part of an overall effort to clean or straighten the breakroom. As discussed above, Wojahn was specifically dispatched by Wu to go to the breakroom and remove Union literature, apparently together with Lin. Video of Wojahn removing the ALU flyers establishes that Wojahn removes *only* the flyers from the breakroom tables, ignoring bottles and other items left there. (GC Exh. 39.) Thus, as discussed above, the evidence establishes that Wojahn did not come upon union literature as part of an overall effort to clean and organize the breakroom, but "specifically targeted union literature for removal" as he had been dispatched by Wu to do. *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 at p. 11.

For all of the foregoing reasons, the evidence establishes that Wojahn confiscated Union literature on June 12, 2021, in violation of Section 8(a)(1) of the Act. The evidence further establishes that by informing Palmer that he had received a notification to remove the ALU flyers—consistent with Wu's directive—Wojahn asserted that Palmer could not distribute Union literature in the breakroom, in violation of Section 8(a)(1).

The evidence establishes that Operations Manager Ariana Ovadia unlawfully confiscated Union literature on June 12 as well. Spence's testimony that Ovadia removed ALU flyers he had placed on the breakroom tables is corroborated by video. (GC Exh. 66, 67.) Given Spence's testimony that he placed the Union literature face-up on the breakroom tables, Ovadia's contention in a statement provided to Amazon that she was merely collecting "papers" that she "noticed . . . scattered across all tables in the breakroom" is not plausible. (GC Exh. 77.) Amazon contends that Ovadia was merely collecting "abandoned" material pursuant to its housekeeping policy. Posthearing Brief at 91-–2. However, as with Wojahn, the video evidence does not show Ovadia engaging in some overall effort to clean or organize the breakroom, as opposed to specifically removing the union literature Spence had placed on the tables. Furthermore, when discussing the union literature on the breakroom table with Palmer earlier, Ovadia did not mention any sort

[55] The Board noted in *North American Refractories Co.* that no exceptions were filed to the ALJ's recommended dismissal of the allegation in that case that the respondent employer enforced its housekeeping and distribution rules in a disparate or discriminatory manner. 331 NLRB at 1640, fn. 1. As a result, that issue was never considered by the Board, and based solely upon the Board's decision in that case the ALJ's findings on the issue would lack precedential value. However, in *Ozburn-Hessey Logistics, LLC*, the Board in its decision specifically referred to *North American Refractories Co.* as "holding that an employer may lawfully maintain and enforce housekeeping rules that result in the confiscation from nonworking areas of pro-union literature left behind following break periods." 366 NLRB No. 177 at p. 11. As a result, *North American Refractories Co.* will be addressed herein.

[56] The ALJ in *Mitchellace, Inc.* cited to *Steelcase, Inc.* for the proposition that "The mere fact of a supervisor removing union literature from a break area does not constitute a violation of the Act – or rather, does not where the supervisor routinely helps keep the break area clean." *Mitchellace, Inc.*, 321 NLRB at 198, citing *Steelcase, Inc.*, 316 NLRB 1140, 1143–1144 (1995). However, the Board in *Steelcase, Inc.* stated that it had affirmed the ALJ's holding in that case that a supervisor's removal of union newsletters from tables in the employee breakroom was not unlawful "In the absence of exceptions." 316 NLRB at 1140, fn. 2. As a result, *Steelcase, Inc.* lacks precedential import in this respect.

[57] I note that Amazon's COVID-19 WHS Case Management Procedure Global, in evidence as GC Exh. 79, also refers to enhanced "cleaning and disinfection practices" conducted by "janitorial/cleaning teams," and notes that employees "are responsible for cleaning their own workstation, equipment, and tools at the start and end of their shift." GC Exh. 79, p. 5, 8. The document does not articulate any specific role for Amazon supervisors and managers in connection with cleaning measures implemented as a result of the COVID-19 pandemic.

of housekeeping policy or cleanliness standard. Instead, she told Palmer, "you're actually allowed to remove literature . . . all my lawyer [friends] said they're allowed to do that," before asking Palmer, "why do [you] hate Amazon."[58] (Tr. 85–86.) Based upon the foregoing, the evidence establishes that Ovadia prohibited employees from distributing Union literature on nonwork time and in a nonwork area, and confiscated union literature, in violation of Section 8(a)(1) of the Act.

In addition, the evidence establishes that on June 12, 2021, Christina Stone unlawfully prohibited employees from distributing union literature by telling employees that Amazon was legally entitled to remove union literature from the breakroom, as the complaint alleges. At the meeting with Palmer and Spence after Wojahn and Ovadia had removed the ALU literature, Stone told them that "the direction that all of our team members in the building follow is that whenever there's anything on our breakroom tables we typically go through GEMBAs and . . . different . . . cleaning initiatives to be sure that our building is clean." (GC Exh. 9(a) (0:58-1:10).) On June 12, the "anything" on the breakroom tables that had engendered a management response was the ALU literature placed there by Palmer and Spence. This is evident from Wojahn's statement that Wu "notified" him "that there were papers being distributed and left" in the breakroom, and "asked" him to "collect and remove those that were not in use," as well as by Lin's statement that he and Wojahn conducted a "site-walk to find possible union pamphlets and materials in any of the eating areas." (GC Exhs. 74(a), 75(a-b).) Stone's assertion that Wojahn was conducting a typical GEMBA walk to survey the area for "empty water bottles, paperwork, anything that's on, like an empty or vacant table," is directly contrary to the video evidence, which establishes that Wojahn and Ovadia removed ALU literature only. (GC Exhs. 39, 66.) Stone's contention that Wojahn and Ovadia were following a standard protocol to "clean the space" "if it's empty" is also directly contradicted by the video evidence of Wojahn removing flyers from a breakroom where employees were sitting, and even from tables where employees are seated at the time. Thus, by informing Palmer and Spence that Wojahn and Ovadia's earlier confiscation of ALU literature constituted standard Amazon protocol, Stone unlawfully asserted that Amazon was legally permitted to confiscate union literature from employee breakrooms, in violation of Section 8(a)(1).

Amazon contends that Stone's comments simply explained its permissible housekeeping policy, and did not address the ALU literature which Wojahn and Ovadia had removed from the breakroom tables. However, Stone's remarks during the meeting make clear that she was discussing the confiscation of ALU literature left by Palmer and Spence on the breakroom tables that morning. Indeed, the entire meeting was precipitated by Spence and Palmer's appearance in HR to confront management regarding, as Palmer testified, why Union literature was "being snatched" from the breakroom, and who had given Wojahn the "notification" to confiscate union literature. Stone begins her comments by stating, "I'm going to be able to speak on behalf of our team *on what's going on today*." (GC Exh. 9(a) (0:52-0:54) (emphasis added).) Stone states that "whenever there's anything on our breakroom tables we typically go through GEMBAs and . . . different . . . cleaning initiatives," where the ALU flyers were the material "on our breakroom tables" that morning. (GC Exh. 9(a) (1:01-1:09).) Later in the discussion, Stone states, "I don't have any details on the current situation, all I can let you guys know is that our team was following our standard operating procedures," again referring to the confiscation of literature earlier that day, which was purportedly effectuated in accordance with Amazon "policy." (GC Exh. 9(a) (3:46-3:54).) Thus, Stone was not describing Amazon's purported housekeeping policy in general, but was specifically addressing the earlier confiscation of ALU literature that Palmer and Spence had placed in the breakroom.

For all of the foregoing reasons,[59] the evidence establishes that on June 12, 2021, Stone prohibited employees from distributing union literature by stating that Amazon was legally permitted to remove union literature from the employee breakroom, in violation of Section 8(a)(1) of the Act.

D. Alleged Violations of Sections 8(a)(1) and (3) Pertaining to the Employment and Discharge of Daequan Smith at the DYY6 Facility

1. The legal framework

The Board analyzes cases involving employer motivation using the theoretical framework articulated in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981); see also *NLRB v. Transportation Management Corp.*, 462 US. 393, 395 (approving the *Wright Line* analysis); *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 at p. 7 (2019). Pursuant to *Wright Line*, General Counsel must satisfy their initial burden by persuading by a preponderance of the evidence that employee protected conduct was a motivating factor in the employer's adverse employment action. In order to do so, General Counsel must adduce evidence to demonstrate that the employee or employees in question engaged in union or protected concerted activity, the employer's knowledge of that activity, and anti-union animus on the part of the employer. *Adams & Associates, Inc.*, 363 NLRB 1923, 1928 (2016), enf'd. 871 F.3d 358 (5th Cir. 2017). Proof

[58] The latter query alone could be considered unlawfully coercive in the context of the ongoing ALU organizing campaign. See *Guy's Foods, Inc.*, 158 NLRB 936, 944, 946–947 (1966), enf'd. 379 F.2d 160 (D.C. Cir. 1967) (employer violated Sec. 8(a)(1) when supervisor asked employee wearing a sticker for disfavored union, "Why do you hate the Company?").

[59] All of the foregoing findings and conclusions have been made solely based upon the record evidence. However, as discussed above, I also find it appropriate to draw an adverse inference based upon Amazon's failure to comply with the Board's January 4, 2023 Order granting its Request for Special Permission to Appeal and denying the appeal on the merits. Thus, in my ruling on March 20, 2023, I found it appropriate to draw an adverse inference to the effect that if Amazon had produced the documents it refused to provide, those documents would have tended to establish that Amazon unlawfully confiscated union literature from Palmer and Spence on June 12, and unlawfully prohibited them from distributing union literature in the breakrooms. Such an adverse inference further establishes that Amazon violated Sec. 8(a)(1) by confiscating ALU flyers placed in the breakroom by Palmer and Spence on that date, and by prohibiting them from distributing union literature on nonwork time and in a non-work area.

of unlawful employer motivation may be based upon direct evidence, or may be inferred from circumstantial evidence based on the record as a whole. *Brink's, Inc.*, 360 NLRB 1206, fn. 3 (2014); *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enf'd. 184 Fed.Appx. 476 (6th Cir. 2006). Indeed, the Board has stated that "More often than not, the focus in litigation…is whether circumstantial evidence of employer animus is 'sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.'" *Tschiggfrie Properties*, 368 NLRB No. 120 at p. 1 (quoting *Wright Line*).

General Counsel's satisfaction of their initial burden pursuant to *Wright Line* establishes a violation of the Act, subject to the employer's demonstrating that "the same action would have taken place in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. In order to meet this standard, the employer must do more than assert a legitimate basis for the adverse employment action or show that legitimate reasons affected its decision. Instead, it must "persuade . . . by a preponderance of the evidence" that "the action would have taken place absent protected conduct." *Weldun International*, 321 NLRB 733 (internal quotations omitted), enf'd. in relevant part 165 F.3d 28 (6th Cir. 1998); see also *NLRB v. Transportation Management Corp.*, 462 U.S. at 401. If the evidence establishes that an employer's proffered reasons are pretextual, the employer fails by definition to meet its burden to show that it would have taken the same action absent protected activity. *Ground Zero Foundation*, 370 NLRB No. 22 at p. 7 (2020); *Hard Hat Services, LLC*, 366 NLRB No. 106 at p. 7 (2018).

2. Smith's union and protected concerted activity

The evidence establishes that Smith engaged in union activity and in protected concerted activity. There is no dispute that Smith joined the Union, signed a union authorization card, and met with other union members and organizers. Smith's uncontradicted testimony further establishes that he distributed union authorization cards, cards describing employee and Weingarten rights prepared by the union, and ALU flyers. Smith distributed these union materials to employees in the breakroom at DYY6 and at the bus stop while speaking to employees in support of the Union. (Tr. 321–330.)

The record also establishes that Smith engaged in protected concerted activity during his interaction with Area Manager Wessam Khalil, when he complained regarding the pace and intensity of work in the water spider position in early September 2021. It is well-settled that concerted activity encompasses "circumstances where individual employees seek to initiate or induce or to prepare for group action," as well as situations where an individual employee brings "truly group complaints to management's attention." *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), aff'd. 835 F.2d 1481 (D.C. Cir. 1987). Thus, the Board has held that an individual employee's complaint may be concerted in nature when it is the "logical outgrowth" of group concerns. *International Brotherhood of Teamsters, Local 70 (UPS)*, 372 NLRB No. 19 at p. 2, fn. 3, and at p. 6 (2022), quoting *Mike Yurosek & Sons, Inc.*, 306 NLRB 1037, 1038 (1992), affirmed and adopted after remand 310 NLRB 831 (1993), enf'd. 53 F.3d 261 (9th Cir. 1995); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014).

Smith's uncontroverted testimony establishes that on one particular occasion he paused while working at the water spider or unloading position because he was feeling lightheaded and fatigued after emptying a number of carts quickly. Khalil then approached Smith and told Smith, "Get back to work." Smith testified that when he told Khalil that he was tired and needed a minute to "regain himself," Khalil again told him to get back to work and pushed a cart toward him. Smith then told Khalil, "you can't have me working like a robot. I'm not a slave, you know. I'm not a robot." (Tr. 353–354.) Smith further stated to Khalil, "We're not slaves." (Tr. 342, 353–354.) I credit Smith's testimony in this respect, as Khalil did not testify, and Smith's account of this incident is otherwise unrebutted. I further credit Smith's testimony that he had participated in and heard a number of conversations with other employees regarding the pace of work at DYY6, sharing opinions and complaints that Amazon assigned employees too much work and required that they work at an inordinately rapid pace with insufficient time to recover. (Tr. 356–358.) Amazon admitted in its Answer that Khalil, an Area Manager, was a statutory supervisor and its agent at all material times. Given such circumstances, Smith's complaints to Khalil regarding the arduous nature and pace of work in the water spider position brought the ongoing concerns of a number of employees to management's attention, and therefore constituted protected concerted activity.[60]

Finally, the record establishes, via Smith's unrebutted testimony, that after Khalil told Smith to "get back to work," Smith retrieved the card he had received from the Union containing the ALU logo and describing employee rights regarding Union representation, and gave the card to Khalil. In that this card contained the ALU logo and discussed the rights of employees to union representation, Smith's presentation of the card to Khalil also constituted activity protected pursuant to Section 7 of the Act.

3. Wessam Khalil's alleged interrogation of Smith in September 2021

The evidence establishes that in September 2021 Khalil coercively interrogated Smith in violation of Section 8(a)(1), as alleged in the complaint. As discussed above, Amazon admitted that Khalil was a statutory supervisor and its agent, and Smith's testimony that Khalil acted as his direct supervisor at DYY6, including during a period of time when his regular supervisor Justin Caraballo was absent, is unrebutted.

Also unrebutted is Smith's testimony regarding his interaction with Khalil which took place in early September 2021, as Smith was concluding a conversation with three coworkers while returning from a break. Smith testified that as his conversation with his coworkers was ending, Khalil stopped Smith and asked him whether he was "with the Union." When Smith replied that he was, Khalil responded, "I'm a union buster." (Tr. 330–331, 333.) It is well-settled that such questioning may constitute the

[60] Amazon does not contend in its Posthearing Brief that Smith's conduct in this respect did not constitute concerted activity or was otherwise unprotected.

basis for a coercive interrogation. See, e.g., *Medical Center of Ocean County,*, 315 NLRB 1150, 1156–1157 (1994) (supervisor coercively interrogated employee by asking "Are you for the union?"); *Harry's Television Sales and Service*, 143 NLRB 450, 457 (1963) (service manager's question to employee "Are you with us or are you with the Union?" unlawful interrogation).

The remainder of the *Rossmore House* factors establish that Khalil's questioning of Smith was coercive. Smith's unrebutted testimony demonstrates that in the fall of 2021 Khalil was his direct supervisor, having replaced Caraballo during Caraballo's absence. See *Kumho Tires Georgia*, 370 NLRB No. 32 at p. 5 (interrogation coercive where questioner was employee's "direct supervisor"); *Spectrum Juvenile Justice Systems*, 368 NLRB No. 102 at p. 11 (2019) (questioning by employee's shift supervisor coercive). Khalil's questioning of Smith took place near the sign-in table, as he was returning to his work station; as subsequently became apparent, both the sign-in table and Smith's work station were focal points of Khalil's exercise of supervisory authority. See *Board's Head Provisions Co.*, 370 NLRB No. 124 at 18–19 (immediate supervisors' questioning on "the production floor" coercive, where the production floor was one of supervisors' "locations of authority over the employees, where it is reasonable to believe their questioning would pressure the employees to feel a duty to respond to those in positions of authority"). While Smith had engaged in Union activity, there is no evidence that Smith was an open union supporter at the time of the conversation. Indeed, Khalil's question itself—whether Smith was "with the Union"—is specifically formulated to determine whether Smith was a Union supporter. Although Smith answered truthfully, stating that he was in fact "with the Union," I do not find this factor dispositive, particularly given that Khalil's immediate response to Smith's admission was, "I'm a union buster." Any reasonable employee would find such an exchange with a direct supervisor coercive. Finally, Khalil's questioning of Smith was the precursor to his subsequent retaliatory conduct violating Sections 8(a)(1) and (3) of the Act, as discussed below.

For all of the foregoing reasons, the evidence establishes that Khalil coercively interrogated Smith in early September 2021 regarding his support for and sympathies regarding the Union, in violation of Section 8(a)(1) of the Act.

4. Khalil's alleged retaliation for Smith's union activity and protected concerted complaints

The Complaint alleges that Amazon retaliated against Smith for his Union and protected concerted activity in late October 2021 when Khalil: (i) dismissed Smith from a shift early; (ii) altered Smith's work assignments; and (iii) subjected Smith to closer supervision. The evidence, primarily the unrebutted testimony of Smith himself, substantiates these allegations. See *Mexican Radio Corp.*, 366 NLRB No. 65 at p. 19-20 (2018), enf'd. 789 Fed.Appx. 261 (2nd Cir. 2019) (crediting unrebutted employee testimony establishing threats of discharge and unspecified reprisals).

Based upon the record evidence, General Counsel has established a prima facie case that Amazon, via Khalil, took the three adverse employment actions alleged in the Complaint in retaliation for Smith's Union and protected concerted activities. The evidence, as discussed above, establishes that Smith engaged in activities on behalf of ALU, and engaged in protected concerted activity by protesting the pace of work at the water spider position. The evidence further establishes that Amazon had knowledge of Smith's Union and protected concerted activity. As discussed above, Smith confirmed that he was a Union supporter when asked by Khalil he was "with the Union" in early September 2021. Smith's protected concerted complaints about the pace of work at the water spider assignment also occurred in the context of a direct interaction with Khalil, to whom Smith eventually presented a card with the ALU logo discussing employee rights. Thus, the record demonstrates that Khalil, an admitted statutory supervisor and agent of Amazon, had knowledge of Smith's Union and protected concerted activity.

The evidence further establishes antiunion animus on the part of Amazon, and with respect to Khalil in particular. As discussed above, the evidence demonstrates that Khalil coercively interrogated Smith by asking him whether he was "with the Union" in early September, in violation of Section 8(a)(1) of the Act. See *Metro-West Ambulance Service*, 360 NLRB at 1051 (employer's other violations evince animus in connection with discipline issued to employee); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (employer's contemporaneous violations demonstrate anti-union animus). Furthermore, when Smith confirmed in response to Khalil's unlawful interrogation that he supported the Union, Khalil freely expressed his antiunion animus by informing Smith, "I'm a union buster."

The timing of the three adverse employment actions taken by Khalil against Smith further establishes that they were implemented for retaliatory reasons. Smith's testimony establishes that the three incidents at issue—where Khalil told Smith to clock out and go home early, altered Smith's work assignment, and observed Smith more closely during his shift—occurred within a month of the unlawful interrogation in September 2021. See *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117 at p. 3, fn. 12 (2021), enf'd. 41 F.4th 518 (6th Cir. 2022) (intervals of three to five weeks between discharge and filing of representation petition, unlawful threats and interrogation, and upcoming election evidence of animus); *Evenflow Transportation, Inc.*, 358 NLRB 695, 697 (2012), affirmed and adopted 361 NLRB 1482 (2014) (inference of animus appropriate based upon timing, where layoff occurred "within a few weeks of the renewal of the organizing campaign" and soon after unlawful interrogation). Furthermore, Khalil directed Smith to clock out early immediately after Smith raised his protected concerted complaints regarding the pace of work in the water spider position. In addition, according to Smith's testimony, Khalil reassigned him to the unloading or water spider position from "pick to buffer" the following day, and then watched him continuously during his shift in an unprecedented manner. Such a sequence of events tends to establish retaliatory motivation, particularly in the overall context of a union organizing campaign. See, e.g., *Starbucks Corp. d/b/a Starbucks Coffee Co.*, 372 NLRB No. 50 at p. 4, 28 (2023) (interval of 2 days "between protected activity and adverse action sufficient to infer animus"); *Santa Fe Tortilla Co.*, 360 NLRB 1139, 1141 (2014) (animus established where discharge occurred "only days" after ongoing complaints regarding employment conditions began).

For all of the foregoing reasons, General Counsel has established a prima facie case that Khalil's adverse actions against Smith in October 2021, as described above, were motivated by animus against Smith's Union and protected concerted activity.

General Counsel having established a prima facie case, it is incumbent upon Amazon to persuade by a preponderance of the evidence that Khalil took these adverse actions for legitimate, nondiscriminatory reasons. However, Amazon does not even advance any purported legitimate, nondiscriminatory rationale for Khalil's conduct. As discussed above, Khalil did not testify, and Amazon did not call any other witnesses with respect to the allegations involving Khalil's conduct. Nor is there any documentary evidence directly pertinent to these allegations. Amazon simply contends that Smith was an unreliable witness, and that his complaints regarding Khalil were uncorroborated by other employees.[61] Posthearing Brief at 17–18. Neither of these arguments is sufficient to substantiate a legitimate, nondiscriminatory reason for Khalil's various actions.

For all of the foregoing reasons, the record establishes a prima facie case that Khalil dismissed Smith from work early, altered Smith's work assignments, and subjected Smith to closer supervision in October 2021 in retaliation for Smith's Union and protected concerted activities. Amazon has failed to satisfy its burden to demonstrate that Khalil took the adverse actions at issue for legitimate, nondiscriminatory reasons. As a result, the evidence establishes that in October 2021, Amazon dismissed Smith from work early, altered Smith's work assignments, and subjected Smith to closer supervision in retaliation for Smith's Union and protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act.

5. Smith's discharge

The Complaint alleges that in late October 2021, Amazon discharged Smith in retaliation for his Union and protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act. As discussed above, the evidence demonstrates that Smith engaged in Union and protected concerted activity. The evidence further demonstrates that Wessam Khalil, an Area Manager at DYY6 and Smith's supervisor, was aware of Smith's Union sympathies and protected concerted activity. As discussed above, the evidence also establishes that Khalil coercively interrogated Smith in September 2021, and unlawfully retaliated against him in October 2021 by dismissing him from work early, altering Smith's work assignments, and subjecting him to closer supervision. Such conclusions support an overall finding of antiunion animus. *Metro-West Ambulance Service*, 360 NLRB at 1029 and at n. 2; *Lucky Cab Co.*, 360 NLRB at 274. In addition, Smith was discharged by email dated October 29, 2021, closely following Khalil's retaliatory conduct – timing which also supports the conclusion that Smith's discharge was unlawfully motivated. *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117 at p. 3, fn. 12; *Evenflow Transportation, Inc.*, 358 NLRB at 697.

Amazon, however, argues that General Counsel cannot establish a *prima facie* case that Smith was discharged in retaliation for his Union and protected concerted activity, because the record does not establish that Amazon had knowledge of Smith's Union and protected concerted activity in the context of its decision to terminate Smith's employment. Specifically, Amazon contends that the evidence overall affirmatively demonstrates a basis for negating the imputation of Khalil's knowledge of Smith's union activity to Amazon, in that Khalil—and DYY6 management generally—did not play any role in the company's decision to discharge Smith. Instead, Amazon asserts that the evidence establishes that HR Regional Coordinator Jose Gomez at its Human Resources Regional Center in Tempe, Arizona—who had no knowledge of Smith's union sympathies or activities or of Smith's protected concerted activities—investigated and processed Smith's negative UPT balance, and made the decision to discharge him. The record ultimately substantiates Amazon's contentions in this regard. As a result, General Counsel has not established a prima facie case that Smith's discharge was unlawfully motivated.

As a general matter, a statutory supervisor or agent's knowledge of an alleged discriminatee's union support and activity, or protected concerted activity, may be imputed to an employer, "unless the evidence affirmatively establishes a basis for negating such imputation." *Airgas USA, LLC,* 366 NLRB No. 92 at p. 7 (2018), enf'd. 760 Fed.Appx. 413 (6th Cir. 2019); *G4S Secure Solutions (USA) Inc.*, 364 NLRB 1327, 1330 (2016), enf'd. 707 Fed.Appx. 610 (11th Cir. 2017); see also *State Plaza Hotel*, 347 NLRB 755, 756 (2006). In past cases, the Board has found that an employer affirmatively established a basis for negating the imputation of knowledge by showing that the supervisor with knowledge of the alleged discriminatee's union or protected concerted activity did not provide that information to other management, specifically to the individual who made the decision to discharge the employee in question. See *Music Express East, Inc.*, 340 NLRB 1063, 1063–1064 (2003) (declining to impute knowledge of "low-level, part-time" supervisor that employee signed a union card to respondent, where evidence established that supervisor did not discuss the issue with General Manager who decided to discharge the employee); *Ready Mixed Concrete Co.*, 317 NLRB 1140, 1144 (1995), enf'd. 81 F.3d 1546 (10th Cir. 1996) (declining to impute supervisor's knowledge to respondent "because he testified that he did not speak with any member of supervision about [employee's] activities and that he did not take part in the decision to discharge [employee]"); see also *State Plaza Hotel*, 347 NLRB at 156 (imputing supervisor's knowledge to respondent where respondent "could easily have

[61] I have found, as discussed below, that some of Smith's testimony regarding certain employment-related issues is ultimately unreliable. However, Smith's testimony with respect to his interactions with Khalil was coherent and, as stated previously, unrebutted. And although Khalil is apparently no longer employed by Amazon, no other reason was provided for the company's failure to call Khalil as a witness. Tr. 939–940. As a result, I credit Smith's testimony regarding his interactions with Khalil. See *CNN America, Inc.*, 361 NLRB 439, 498, fn. 29, motion for reconsideration denied 362 NLRB 293 (2015), enf'd. and remanded in part on other grounds 865 F.2d 740 (D.C. Cir. 2017) (crediting witness testimony, despite "self-serving nature and lack of corroboration" where respondent failed to call manager no longer employed to contradict it); *Restaurant Horikawa*, 260 NLRB 197, 206 (1982) (finding violation based upon unrebutted testimony regardless of its "less than mechanical consistency" and lack of corroboration).

produced its managers to testify" that supervisor did not in fact discuss employee's protected activity, but failed to do so).

The record here affirmatively establishes a basis for negating the imputation of any knowledge of Smith's Union and protected concerted activity on the part of Khalil and DYY6 management to Amazon in the context of Smith's discharge. I credit the testimony of Jose Gomez, an HR Regional Coordinator at Amazon's Human Resources Regional Center (HRRC) in Tempeh, Arizona, regarding the process he followed to investigate Smith's negative UPT balance and determine whether or not Smith should be discharged. Both Gomez and Heather Mirabal, an HR Business Partner at DYY6 in the fall of 2021, credibly testified that the process for addressing negative UPT balances and possible imposition of discipline was transferred from HR at DYY6 to the HRRC as of October 24, 2021. (Tr. 911–915, 1142–1144. This testimony is confirmed by documentary evidence describing the timing of the transfer and the process for evaluating negative UPT balances after that date.[62] (See R.S. Exh. 10.) The evidence consequently establishes that subsequent to October 24, 2021, DYY6 HR personnel were not involved in the review of negative UPT balances and the consequent imposition of discipline and discharge for employees at that facility.

In addition, I credit Gomez' testimony regarding the process that he followed in order to evaluate extenuating circumstances affecting an employee's negative UPT balance, definitively calculate the negative UPT balance itself, and make a determination as to the appropriate disposition of the case, up to and including discharge. As Gomez testified, HRRC staff retrieve a daily list of employees with negative UPT balances, which is created by the Panorama platform. HRRC staff then perform research using other Amazon platforms to determine whether each listed employee has a specific barrier to attending work, including checking for relevant open tickets, Panorama cases, and ERC cases, reviewing accrual records which summarize available PTO and UPT, determining whether open leave of absence requests exist, and reviewing any employee response to the HRRC staff's email regarding the issue. Finally, based upon their investigation, HRRC staff make a decision to as to whether to terminate employment. (Tr. 1130–1140, 1155–1156, 1164–1167.)

I further credit Gomez's testimony that he followed this process when evaluating Smith's negative UPT balance and making the decision to discharge Smith in October 2021. Gomez testified that that on October 29, 2021, Smith's name was included on the daily list of Amazon employees with negative UPT balances generated by the Panorama platform. Gomez then proceeded to conduct research regarding Smith's negative UPT balance. Gomez discovered that another HR Regional Coordinator had begun researching Smith's case and had sent out the October 27, 2021 email to Smith, and that Smith had not responded within the allotted 48-hour period.[63] However, pursuant to protocol, Gomez conducted all of the necessary research involving the case from the process' inception. Thus, Gomez reviewed accrual records for Smith evincing a negative UPT balance, with insufficient PTO to cover. Gomez then contacted the DLS team and determined that there were no pending leave of absence requests for Smith. Gomez also reviewed the Panorama system for open tickets and found none for Smith,[64] nor did he find any open cases in the platform used by ERC. Gomez testified that after conducting this research, which demonstrated that there were no barriers to Smith's attending work, he determined that Smith should be discharged, and submitted all of the details necessary for the termination of Smith's employment. (Tr. 1144–1150; GC Exh. 5.)

I likewise credit Gomez' uncontradicted testimony that he did not consult with his supervisors at the HRRC, or with anyone at DYY6, while conducting research into Smith's negative UPT balance, or in making the decision to terminate Smith's employment. I further credit Gomez' testimony that at the time that he conducted the research into Smith's UPT balance and ultimately determined that Smith should be discharged, he did not know whether Smith supported the Union or had engaged in Union or protected concerted activity. (Tr. 1150, 1152.) Based upon all of the foregoing evidence, Amazon has met its burden to establish that Gomez was not aware of Smith's Union or protected concerted activity at the time that he investigated Smith's negative UPT balance and made the decision to terminate Smith's employment. I consequently find that the evidentiary record "affirmatively establishes a basis for negating" the imputation of Khalil's knowledge, and that of any other managers and supervisors at DYY6, to Amazon with respect to Smith's discharge.

[62] General Counsel argues that HR staff at DYY6 had significant discretion to determine the appropriate disciplinary action for employees with negative UPT balances. Posthearing Brief at 44–45, 108–109. However, all of the examples which General Counsel relies upon in this regard occurred before the evaluation of negative UPT balances and possible imposition of discipline or discharge was transferred to the HRRC on October 24, 2021. See GC Exhs. 18, 22 (Chime chats regarding issuance of final warnings in lieu of termination based upon negative UPT balances, dated September 9 and 29, 2021, respectively).

[63] I credit Gomez' uncontradicted testimony that it is not uncommon for one HR Regional Coordinator to "pick up" and work on a case begun by another HR Regional Coordinator. Tr. 1192–1193.

[64] I credit Gomez' testimony that he did not review the Panorama case initiated by Smith on October 17, 2021 because it had been closed by Mirabal as of October 29, 2021, when Gomez was investigating Smith's negative UPT balance. Tr. 1185; R.S. Exh. 11. Charging Party contends that Gomez' testimony should be disregarded because Amazon failed to call as a witness the HR Regional Coordinator that began work on Smith's case before Gomez, arguing that the first HR Regional Coordinator that worked on Smith's case could have seen the Panorama case initiated by Smith on October 17, 2021. Posthearing Br. at 31–32. I decline to do so given Gomez' uncontradicted testimony that picking up a negative UPT case from another HR Regional Coordinator was not an unusual occurrence, and that he repeated whatever research had been performed by the first HR Regional Coordinator who worked on Smith's case. In addition, all of the HR personnel who worked on Smith's October 17, 2021 Panorama case—at both DYY6 and the HRRC—ultimately concluded that Smith did not have sufficient UPT and PTO to cover the two shifts he missed on October 17 and 18, 2021. See R.S. Exh. 11. While the record does tend to establish that multiple punches appeared on Smith's record for October 16, 2021, there is no evidentiary basis to conclude that these punches existed as the result of some sort of retaliatory conduct. This is particularly the case given Smith's testimony regarding the ongoing problems with the functioning of his employee badge and phone, and consequent difficulties with obtaining access to Amazon A to Z and using the platform to clock in and out of work. See Tr. 292–298, 309–317, 319, 373, 408–409.

Airgas USA, LLC, 366 NLRB No. 92 at p. 7; *G4S Secure Solutions (USA) Inc.*, 364 NLRB at 1330.

General Counsel contends that Khalil's knowledge must be imputed to Amazon because Amazon failed to call Khalil as a witness to testify that he did not disseminate the information he had obtained regarding Smith's Union and protected concerted activities to other supervisors and managers. Posthearing Brief at 105–106. However, the relevant legal standard does not require that the specific supervisor with knowledge of the alleged discriminatee's Union or protected concerted activity explicitly deny communicating such information to another manager in order to "affirmatively establish[] a basis for negating" the imputation of a supervisor's knowledge to the Respondent generally. *Airgas USA, LLC*, 366 NLRB No. 92 at 7; see also *Music Express East, Inc.*, 340 NLRB at 1063–1064. In particular, in *Music Express East, Inc.*, the Board grounded its conclusion that the evidence affirmatively established a basis for obviating the imputation of knowledge in a series of inferences based upon facts gleaned from the evidentiary record, as opposed to an explicit testimonial denial by the supervisor aware of the alleged discriminatee's union activity. 340 NLRB at 1063–1064 (declining to impute knowledge based upon supervisor's expression of "support . . . or at least intent to keep an open mind regarding the Union," "low-level, part-time" status, and discussion of his own attempt to attend a union meeting with general manager only after the alleged discriminatee's discharge).

General Counsel also contends that Amazon presented no evidence sufficient to rebut the imputation of Khalil's knowledge to other management at DYY6. While that may be the case, the evidentiary record establishes that the investigation of Smith's negative UPT balance and the discharge decision itself occurred not at DYY6, but at Amazon's HRRC facility in Tempe, Arizona. Thus, the evidence establishes that: (1) Smith was included on a list of employees with negative UPT balances generated by the Panorama platform and retrieved by Gomez at the HRRC; (2) Gomez conducted the investigation into Smith's UPT balance and possible barriers to attending work based upon Amazon's other relevant platforms; and (3) Gomez made the ultimate decision that Smith's employment should be terminated without interacting with any managerial or supervisory personnel at DYY6. The evidence further establishes that Gomez had no knowledge of Smith's Union or protected concerted activity at the time that he conducted the investigation and submitted Smith's information for termination. Such evidence affirmatively establishes a basis for obviating the imputation of Khalil's knowledge of Smith's Union and protected concerted activities to Amazon in the context of Smith's discharge.

General Counsel and Charging Party make additional arguments regarding the events culminating in Smith's discharge, contending that the evidence belies Amazon's assertion that it discharged Smith based upon his negative UPT balance, and therefore tends to establish that Smith's discharge was unlawfully motivated. Because the evidence does not ultimately establish a *prima facie* case that Smith was discharged in retaliation for his Union and protected concerted activity, the burden does not shift to Amazon to establish a legitimate, nondiscriminatory rationale for Smith's discharge pursuant to the *Wright Line* analysis. Nevertheless, it is well-settled that employer knowledge of union activities "may rest upon circumstantial evidence from which a reasonable inference of knowledge may be drawn," as well as "direct evidence." See, e.g., *Evenflow Transportation, Inc*., 358 NLRB at 697, quoting *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enf'd. 97 F.3d 1448 (4th Cir. 1996). For example, knowledge may be inferred from circumstantial evidence such as the timing of the adverse employment action, the employer's "general knowledge of its employees' union activities," evidence of anti-union animus, and pretextual rationales advanced by the employer. *Evenflow Transportation, Inc.*, 358 NLRB at 697. Anti-union animus as the basis for an adverse employment action may likewise be established by circumstantial evidence, including an employer's failure to establish a legitimate, nondiscriminatory reason for its conduct. See, e.g., *Bodega Latina Corp. d/b/a El Super*, 367 NLRB No. 34 at p. 1, 14 (2018); *Lucky Cab Co.*, 360 NLRB at 275. As a result, I will address General Counsel and Charging Party's arguments in this regard.

General Counsel and Charging Party contend that Amazon deviated from its policies and typical practices in failing to provide Smith with any sort of notice regarding his negative UPT balance prior to discharging him for that reason. (GC Posthearing Br. at 42–44, 52–54, 107–109; C.P. Posthearing Br. at 20–22.) It is well-settled that an employer's unprecedented departure from its typical practices and procedures in imposing and effectuating discipline or discharge may be indicative of pretext. See, e.g., *Roemer Industries*, 367 NLRB No. 133 at p. 1, fn. 3 and at p. 16 (2019), citing *Purolator Armored v. NLRB*, 764 F.2d 1423, 1429 (11th Cir. 1985). For example, General Counsel and Charging Party argue that Caraballo's October 9, 2021 Engage conversation with Smith regarding Smith's low UPT balance, referred to in Amazon's records, never in fact took place. (Tr. 1034; C.P. Exh. 3.) Overall, the evidence tends to support this contention, in that, according to Amazon's UPT policies and Mirabal's testimony, such Engage conversations were nominally mandated when an employee's UPT balance fell below 15 hours. (Tr. 1034–1035; GC Exh. 7, p. 2.) Smith's records reveal that he had a UPT balance of 19 hours at the time that the Engage conversation with Caraballo purportedly took place, so that no Engagement prompt would have been triggered by Smith's UPT at that point. (GC Exh. 59, p. 7.) In addition, Caraballo was not called as a witness at the hearing, and Smith contended during his testimony that he was never informed by management of any issues regarding his UPT balance. (Tr. 383, 389–390.) As a result, the evidence ultimately does not establish that this Engagement took place.

General Counsel and Charging Party also argue that the evidence evinces a deviation from Amazon's typical practices because Smith did not receive the HRRC's October 27, 2021 email notifying him regarding the investigation into his negative UPT balance, and requiring that he respond within 48 hours, until after his discharge. (GC Posthearing Br. at 53–54; C.P. Posthearing Br. at 19–20.) However, Smith testified that he only checked his personal email once or twice a week, and that he only did so in late October or early November 2021 because of his ostensibly impending transfer to JFK8. (Tr. 386–388.) As a result, the evidence most plausibly establishes that Smith did not see the October 27, 2021 email within the 48-hour period allocated for a

response for this reason, and not because of any unlawfully motivated subterfuge on Amazon's part. Finally, there is no evidence in the record to suggest that Amazon treated Smith differently from any other employee, or otherwise did not follow its own customary procedures, in sending the October 27, 2021 email to Smith in connection with the HRRC's negative UPT balance investigation or in requiring a response within 48 hours. In fact, Gomez' testimony establishes the opposite. As a result, the record does not tend to demonstrate that Amazon departed from its typical policies and procedures on this point in a manner indicating that Amazon's proffered nondiscriminatory reason for Smith's discharge—his negative UPT balance—was pretextual.

General Counsel and Charging Party's arguments regarding the notification issue are further undermined by the unreliability of Smith's testimony regarding his inability to obtain employment-related information via his phone and the Amazon A to Z app, which was internally inconsistent and contradicted by other record evidence. For example, Smith testified that his phone was broken and not functioning at the inception of his employment at DYY6. (Tr. 311, 408.) However, Smith also stated that after meeting Union representatives and members during the 1st week of his employment, he was immediately able to download the Union's Telegram app and participate in group chats regarding the organizing campaign. (Tr. 320–321, 410–411.) Similarly, Smith testified that he was unable to use the Amazon A to Z app during the first two weeks of his employment, and was referred between ERC and DYY6 HR multiple times before the problem was resolved in mid- to late October 2021. (Tr. 309–317). He later claimed, however, that he discovered in early September 2021 via the Amazon A to Z app that his record had multiple punches in and out, far in excess of what would have ordinarily occurred in clocking in and out for a shift. (Tr. 397–400.) Given this contradictory testimony, Smith's assertions regarding his lack of a working phone and inability to use the Amazon A to Z app are ultimately unreliable.

Furthermore, Smith's testimony regarding his understanding of Amazon's UPT system and his ability to raise concerns regarding UPT issues was also implausible. For example, Smith testified on direct examination that his understanding of UPT during his employment at DYY6 was limited:

> Q: Are you aware of something at Amazon called unpaid time or UPT?
>
> A: Yes, now.
>
> Q: You are now aware of that? What is UPT as far as you understand it now?
> A: Basically that's when you, I guess, called out of work, you just don't get paid for it.

(Tr. 379–380.) Smith further denied receiving any training or instruction regarding Amazon's UPT system, and testified that he had never received any information regarding UPT from management or seen Amazon's attendance policy addressing UPT. (Tr. 379–383; GC Exh. 7.) Smith also claimed that he was not aware during his employment at DYY6 that he could use the Amazon A to Z app to check his UPT balance. (Tr. 390.) When asked "How did you come to learn about UPT? How did you form the understanding you now have about UPT? Where did you get those ideas from?" Smith testified that he only became aware of UPT as a basis for discipline and discharge *after* his termination, in a phone conversation with ERC. (Tr. 383.)

However, the evidentiary record overall indicates that Smith was substantially more sophisticated regarding the accrual and use of UPT than his direct testimony suggested. In particular, the evidence establishes that Smith complained to Area Manager Victor Ho regarding multiple punches on his time card for October 16, 2021, and the use of UPT to cover his missed shift on October 18, 2021. (Tr. 403–404, 410; GC Exh. 24.) Smith also initiated a Panorama case regarding the issue via Amazon A to Z, complaining of multiple punches and "missing upt time." (R.S. Exh. 11, p. 1.) Smith could not have raised these issues without obtaining information regarding his punches and UPT balance, and evaluating that information to form an opinion that the punches and UPT balance were incorrect. Indeed, in the ensuing discussion with HR regarding the Panorama case, Smith proceeded to address the UPT issue with specific, detailed calculations, responding to Johanna Rodriguez Torres' comment that he used 4 hours of UPT on October 17, 2021, and 1 hour of UPT and 3 hours of PTO on October 18, 2021, by asserting that he would have been left with "with exactly one hour of upt time left and 6 minutes of personal time." (R.S. Exh. 11, p. 8.) As a result, and for all of the reasons discussed above, I do not find that Smith's testimony regarding his lack of access to the devices and platforms typically used by Amazon to communicate with its employees at DYY6, and his purportedly inchoate understanding of Amazon's UPT system, was substantially reliable. That lack of reliability in undermines General Counsel and Charging Party's assertions that Amazon deviated in Smith's case from its typical policies and practices involving notification provided to employees regarding the accrual and use of UPT, and the evaluation of negative UPT balances.

Finally, General Counsel contends that the evidence establishes that Smith was treated differently than other employees with negative UPT balances, in that at a time relevant to Smith's discharge, other employees with significantly higher negative UPT balances were not terminated. Posthearing Brief at 56–57, 106–107; see also GC Exh. 55. It is well-settled under Board caselaw that disparate treatment of similarly situated employees who did not engage in union or protected concerted activity may constitute evidence that an employer's allegedly legitimate, nondiscriminatory justification for an adverse employment action is in fact pretextual. See, e.g., *Lhoist North America of Alabama*, 370 NLRB No. 112 at p. 1, fn. 3 and at p. 16 (2021), enf'd. 2023 WL 4679013 (11th Cir. 2023); *Pontiac Care & Rehabilitation Center*, 344 NLRB 761, 767 (2005). Here, however, both Mirabal and Gomez provided consistent, uncontradicted testimony regarding multiple nondiscriminatory reasons for disparities in accrued negative UPT balances at the time of an employee's discharge. Thus, an employee who was ultimately discharged could continue accruing negative UPT while an application for a leave of absence was being evaluated by DLS. Employees could also continue to accrue negative UPT where they were ultimately discharged for a different reason, or if they resigned before an evaluation of their negative UPT balance

could be conducted or a decision regarding discharge could be made. (Tr. 917–921; 1140–1141). General Counsel Exhibit 55, a list of discharged employees together with the negative UPT balances existing at the time of the employees' termination, provides no way of determining whether any of the circumstances described by Mirabal and Gomez were applicable.[65] As a result, this evidence does not establish any sort of disparate treatment with respect to Smith, as opposed to other employees discharged based upon a "true" negative UPT balance, which might evince retaliatory motivation.

For all of the foregoing reasons, the record evidence does not establish Amazon's knowledge of Smith's Union or protected concerted activity—a principal component of General Counsel's prima facie case—in the context of Smith's discharge. I shall therefore recommend that the allegation that Smith was discharged in retaliation for his Union and protected concerted activity in violation of Sections 8(a)(1) and (3) of the Act be dismissed.

CONCLUSIONS OF LAW

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

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

3. On May 4, 2021, at JFK8, Amazon, by its agent Bradley Moss, coercively interrogated employees regarding their union activities and union sympathies, in violation of Section 8(a)(1) of the Act.

4. On May 4, 2021, at JFK8, Amazon, by its agent Bradley Moss, made statements to employees indicating that support for the Union would be futile, in violation of Section 8(a)(1) of the Act.

5. On May 4, 2021, at JFK8, Amazon, by its agent Bradley Moss, made statements to employees disparaging the Union using appeals to racial prejudice and derogatory racial stereotyping, in violation of Section 8(a)(1) of the Act.

6. On May 4, 2021, at JFK8, Amazon, by its agent Bradley Moss, solicited employee grievances and promised to remedy them, in violation of Section 8(a)(1) of the Act.

7. On May 16, 2021, at JFK8, Amazon, by its agent John Hill, told employees that they could not distribute union literature on nonwork time and in a nonwork area, in violation of Section 8(a)(1) of the Act.

8. On May 16, 2021, at JFK8, Amazon, by its agent John Hill, conducted surveillance of employees' union activities, in violation of Section 8(a)(1) of the Act.

9. On May 16, 2021, at JFK8, Amazon, by its agent John Hill, confiscated Union literature from employees in violation of Section 8(a)(1) of the Act.

10. On May 24, 2021, at JFK8, Amazon, by its agent Elena Koplevich, created the impression that employees' union activity was under surveillance, in violation of Section 8(a)(1) of the Act.

11. On June 12, 2021, at JFK8, Amazon, by its HR Assistant Luke Wojahn, told employees that they could not distribute union literature on nonwork time and in a nonwork area, in violation of Section 8(a)(1) of the Act.

12. On June 12, 2021, at JFK8, Amazon, by its HR Assistant Luke Wojahn, confiscated union literature from employees, in violation of Section 8(a)(1) of the Act.

13. On June 12, 2021, at JFK8, Amazon, by its Operations Manager Ariana Ovadia, told employees that they could not distribute union literature on nonwork time and in a nonwork area, in violation of Section 8(a)(1) of the Act.

14. On June 12, 2021, at JFK8, Amazon, by its Operations Manager Ariana Ovadia, confiscated union literature from employees, in violation of Section 8(a)(1) of the Act.

15. On June 12, 2021, at JFK8, Amazon, by its HR Business Partner Christina Stone, prohibited employees from distributing union literature on nonwork time and in a nonwork area, in violation of Section 8(a)(1) of the Act.

16. In early September 2021, at DYY6, Amazon, by its Area Manager Wessam Khalil, coercively interrogated employees regarding their support for the Union and union sympathies, in violation of Section 8(a)(1) of the Act.

17. In late October 2021, at DYY6, Amazon dismissed Daequan Smith from his work shift early in retaliation for his support for the Union and protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act.

18. In late October 2021, at DYY6, Amazon altered Daequan Smith's work assignments for his support for the Union and protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act.

19. In late October 2021, at DYY6, Amazon subjected Daequan Smith to closer supervision in retaliation for his support for the Union and protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act.

20. On October 31, 2021, Amazon, by its agent David Acosta, told employees that if the union organizing campaign at JFK8 were successful strikes would be inevitable, in violation of Section 8(a)(1) of the Act.

21. On October 31, 2021, at JFK8, Amazon, by its agent David Acosta, coercively interrogated employees regarding their union sympathies, in violation of Section 8(a)(1) of the Act.

22. Amazon has not violated the Act in any other manner.

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

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the Act's policies.

Respondent, having unlawfully dismissed Daequan Smith from a shift early in late October 2021, must expunge any reference to the early dismissal from its files and records, and notify Smith, in writing, that it has done so and that the early dismissal will not be used against him in any way. Respondent shall also

[65] Again, the two incidents where DYY6 HR decided that employees at the facility should not be discharged despite a negative UPT balance took place before the processing of negative UPT and ensuing termination decisions were transferred to the HRRCs on October 24, 2021. Posthearing Brief at 106; see GC Exhs. 18, 22; Jt. Exh. 2.

be ordered to make Smith whole, with interest, for any loss or earnings and other benefits and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful early dismissal. *Thryv, Inc.*, 372 NLRB No. 22 (2022). Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall post an appropriate information notice, as described in the attached Appendix. This notice shall be posted in the Respondent's JFK8 and DYY6 facilities in Staten Island, New York, wherever notices to employees are regularly posted, for 60 days, without anything covering the notice or defacing its contents. In addition to the physical posting of paper notices, notices shall be distributed electronically, posted on an intranet or an internet site, and/or other electronic means, to the extent Respondent customarily communicates with its employees in such a manner. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed its JFK8 and/or DYY6 facilities, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at these locations at any time since May 1, 2021.

General Counsel requests as part of the remedy that I order a reading of the Notice to Employees and hand-delivery of the Notice to Respondent's supervisors and agents at the JFK8 and DYY6 facilities. General Counsel further requests that I order mandatory training conducted by a Board Agent regarding the National Labor Relations Act and its prohibitions against unfair labor practices for all management officials, supervisors, agents, and labor consultants at JFK8 and DYY6. As a general matter, the Board has found such extraordinary remedies appropriate where a traditional remedial order is inadequate because a respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that additional relief is necessary to "dissipate fully" the violations' "coercive effects." See, e.g., *River City Asphalt*, 372 NLRB No. 87 at p. 13 (2023), quoting *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), enf'd. in relevant part 97 F.3d 65 (4th Cir. 1996). In particular, a reading of the notice is warranted where "numerous and serious" violations render it "necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion," or where the case involves "egregious" violations. *Bodega Latina Corp. d/b/a El Super*, 367 NLRB No. 34 at p. 1, quoting *Postal Service*, 339 NLRB 1162, 1163 (2003). The Board also considers whether the respondent at issue has a history of significant violations evincing a "proclivity to violate the Act." See *Amerinox Processing, Inc.*, 371 NLRB No. 105 at p. 2 (2022), enf'd. 2023 WL 2818503 (D.C. Cir. 2023), citing *Bodega Latina Corp. d/b/a El Super*, 367 NLRB No. 34 at p. 1, fn. 4; see also *HTH Corp.*, 361 NLRB 709, 714-715 (2014), enf'd. in relevant part 823 F.3d 668 (D.C. Cir. 2016) (ordering that Notice and an Explanation of Rights be provided to all new employees, supervisors and managers "upon hire" and mailed to "new and current employees, supervisors, and managers for [a] 3-year period," given "Respondents' 10-year history of violations before [the Board] and the Federal courts" and the "egregious and pervasive violations" immediately at issue).

Given the overall size of the workforce at the JFK8 and DYY6 facilities and the number of employees involved in the violations, the evidence in this case does not establish that the unfair labor practices committed by Amazon were so numerous and pervasive that extraordinary remedies are necessary to ameliorate their coercive effect. While the record establishes that thousands of Amazon employees work at JFK8 and DYY6, the number of employees who were directly involved in or witnessed the violations at issue here was likely around a hundred or fewer. The violations committed by labor consultants Bradley Moss and David Acosta involved only the two employees they met with individually. The unlawful conduct of security guard John Hill directly involved only Connor Spence, and was observed by the 20 employees present in the breakroom at the time. The same can be said of the violations committed by Amazon supervisors Luke Wojahn, Ariana Ovadia, and Christina Stone—which directly involved Spence and Derrick Palmer, and were observed by about 50 to 70 employees in the breakroom when Wojahn and Ovadia confiscated Union literature. Finally, the number of employees who witnessed security guard Elena Koplevich point her phone at the Union activity in Amazon's parking lot is not discernable from the evidentiary record. Similarly, supervisor Wessam Khalil's unlawful conduct with respect to Daequan Smith involved only Smith, and the record does not establish that Khalil's unfair labor practices were witnessed by a significant number of employees in the context of the overall workforce at the DYY6 facility. Thus, the limited number of employees at JFK8 and DYY6 who were involved in or witnessed the unfair labor practices committed here—as compared with Amazon's overall workforce at those facilities—militates against ordering the extraordinary remedies requested by General Counsel. The record overall simply does not establish that the unfair labor practices were sufficiently pervasive to require a notice reading and other extraordinary remedies to mitigate their effects.

In addition, the evidence does not establish a recidivist history on the part of Amazon which would make the imposition of the extraordinary remedies requested here appropriate. General Counsel does not cite any decisions of the Board or of the federal courts which would establish a proclivity to violate the Act on Amazon's part. See *HTH Corp.*, 361 NLRB at 714–715 (extraordinary remedies warranted based upon respondents' "10-year history of violations" and the "egregious and pervasive violations" immediately at issue). Nor has Amazon entered into any formal settlement agreements without nonadmissions clauses, which may establish a history of recidivism. See *Amerinox Processing, Inc.*, 370 NLRB No. 105 at p. 2; *Bodega Latina Corp. d/b/a El Super*, 367 NLRB No. 34 at p. 1, fn. 4. As a result, previous unfair labor practice litigation involving Amazon does not evince the sort of recidivist history that warrants the imposition of extraordinary remedies such as a reading of the Board's notice and the other relief sought by General

Counsel.[66]

Finally, Charging Party ALU seeks an award of the litigation expenses it incurred in connection with Amazon's failure to produce all of the documents included in its privilege log which were subject to the order of Judge Carter and ultimately the Board. The Board has in the past awarded litigation expenses where a respondent "asserts frivolous defenses or otherwise exhibits bad faith in the conduct of litigation." *Veritas Health Services, Inc.*, 363 NLRB 963, 963 at fn. 5, 972 (2016), enf. denied in relevant part 895 F.3d 69 (D.C. Cir. 2018); see also *HTH Corp.*, 361 NLRB at 711-712, enf. denied in relevant part 823 F.3d 668 (D.C. Cir. 2016). As discussed supra, many of Amazon's assertions of privilege were substantiated, and Amazon produced all but two of the documents which were determined to be nonprivileged. Amazon's conduct does not therefore rise to the level of advancing "frivolous" assertions or defenses, or exhibiting bad faith in the litigation of the instant case.

For all of the reasons discussed above, I find that traditional remedies are adequate to ameliorate the coercive impact of the unfair labor practices Amazon committed, and therefore decline to order the notice reading, training and hand delivery remedies sought by General Counsel in this case. I find in addition that the award of litigation expenses sought by ALU is not appropriate.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[67]

ORDER

Amazon.com Services LLC, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their activities on behalf of and sympathies with respect to Amazon Labor Union (the Union).

(b) Making statements to employees indicating that support for the Union would be futile.

(c) Making statements to employees disparaging the Union using appeals to racial prejudice and derogatory racial stereotyping.

(d) Making statements soliciting employee grievances and promising to remedy them.

(e) Making statements to employees indicating that if the Union's organizing campaign is successful, strikes will be inevitable.

(f) Conducting surveillance of employees' union activities

(g) Creating the impression that employees'union activities are under surveillance.

(h) Prohibiting employees from distributing union literature on nonwork time and in a nonwork area.

(i) Confiscating union literature from employees.

(j) Dismissing employees from their work shift early in retaliation for the employees' support for the Union or for engaging in any other protected concerted activities.

(k) Altering employees' work assignments in retaliation for the employees' support for the Union or for engaging in any other protected concerted activities.

(l) Subjecting employees to closer supervision in retaliation for the employees' support for the Union or for engaging in any other protected concerted activities.

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

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

(a) Make Daequan Smith whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of his unlawful early dismissal in late October 2021, in the manner set forth in the remedy section of this decision.

(b) Compensate Daequan Smith for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(c) File with the Regional Director for Region 29, within 21 days copies of the of the date the amount of backpay is fixed, either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Daequan Smith's corresponding W-2 forms reflecting the backpay award.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful early dismissal of Daequan Smith, and notify Smith within 3 days thereafter in writing that this has been done and that the early dismissal will not be used against him in any way.

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

(f) Within 14 days after service by the Region, post at its JFK8 and DYY6 facilities in Staten Island, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet

[66] In addition, as General Counsel acknowledges, the training remedy that they seek has never been ordered by the Board. Posthearing Brief at 112–113. I therefore decline to include such a remedy here.

[67] 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.

site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. If Respondent has gone out of business or closed the JFK8 and/or DYY6 facilities, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 1, 2021.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. November 21, 2023

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you regarding your activities on behalf of and sympathies with respect to Amazon Labor Union (the Union).

WE WILL NOT make statements indicating that support for the Union would be futile.

WE WILL NOT make statements disparaging the Union using appeals to racial prejudice and derogatory racial stereotyping.

WE WILL NOT make statements soliciting employee grievances and promising to remedy them.

WE WILL NOT tell you that if the union organizing campaign at JFK8 is successful strikes will be inevitable.

WE WILL NOT conduct surveillance of your union activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT prohibit you from distributing union literature on nonwork time and in a nonwork area.

WE WILL NOT confiscate union literature from you.

WE WILL NOT dismiss you from your work shift early in retaliation for your support for the Union and protected concerted activities.

WE WILL NOT change your work assignments in retaliation for your support for the Union and protected concerted activities.

WE WILL NOT subject you to closer supervision in retaliation for your support for the Union and protected concerted activities.

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 make Daequan Smith whole for any loss of earnings and other benefits resulting from his unlawful early dismissal in October 2021, plus interest, and WE WILL make Daequan Smith whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful early dismissal.

WE WILL compensate Daequan Smith for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Daequan Smith's corresponding W-2 form reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the early dismissal of Daequan Smith and WE WILL notify him in writing that this has been done and that the early dismissal will not be used against him in any way.

AMAZON.COM SERVICES, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/ 29-CA-277198 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.