

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

JUICE PRESS, LLC

and

LOCAL 1181-1061, AMALGAMATED
TRANSIT UNION, AFL-CIO

and

THIERNO DIALLO, an Individual

and

CHRISTOPHER CARABALLO, an Individual

and

DANIEL MIRANDA, an Individual

And

DANIEL UVALDO, an Individual

John Mickley, Esq. and Lynda Tooker, Esq.
for the General Counsel.

*Howard Z. Robbins, Nayirie Kuyumjian,
and Dana N. Berber, Esqs.*
(*Proskauer Rose, LLP*) for the Respondent.

Richard A. Brook, Esq.
(*Meyer, Suozzi, English & Klein, P.C.*) for the Charging Party.

DECISION

Statement of the Case

BENJAMIN W. GREEN, Administrative Law Judge. This case was tried before me in Brooklyn, New York on October 4-6, 11-13, 16, 18, and 19, 2017.¹ A second amended complaint issued on August 21. The Respondent filed an answer on August 31. By a Decision

¹ All dates refer to 2017 unless stated otherwise herein.

5 on Objections, Order Consolidating Cases (Regional Order), issued on September 1, certain objections filed by Local 11181-1061, Amalgamated Transit Union, AFL-CIO (Union) to an election conducted on January 23 in Case 29-RC-190281 were consolidated with the complaint for hearing before an administrative law judge. The consolidated objections mirror those allegations in the complaint which occurred from December 22, 2016, when the petition was filed in case 29-RC-190281, to the date of the election.

10 The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by taking the following adverse employment actions against employees because of their union support and/or activities: Issuing written discipline, sending home, changing the work assignment, and discharging Tequaan Daniels; discharging Jaby Sadio; discharging Thierno Diallo; discharging Christopher Caraballo; and issuing written warnings to Daniel Uvaldo.

15 In addition, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by discharging Daniel Miranda and disciplining Uvaldo because of their protected concerted activities.

20 The complaint further alleges that the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees' union activities, including the taking of a photograph of employees talking to a Union representative; interrogating employees regarding their union activities and/or support; interrogating employees regarding whether they would reject the Union in exchange for a promise to increase their pay; soliciting employee grievances, including grievances regarding increases in pay, and promising to remedy them; promising employees unspecified benefits if they reject the Union and threatening employees with unspecified reprisals if they elect the Union; directing employees not to speak to Union representatives; and impliedly threatening employees with unspecified reprisals if they continue to speak to Union representatives.

30 As discussed at length below, I largely find that the Respondent violated the Act as alleged in the complaint. Among the adverse employment actions alleged as violations of Section 8(a)(3) and/or (1), I do not find that the Respondent unlawfully disciplined Uvaldo on July 13. Among the other alleged violations of Section 8(a)(1), I do not find that the Respondent promised employees unspecified benefits if they elected the Union or threatened employees with unspecified reprisals if they rejected the Union. I also refuse to find that each alleged act of surveillance and each alleged promise to correct employee grievances, as plead in the complaint and urged by the General Counsel, warrants the finding of a violation.

40 As part of the remedy of the Respondent's unfair labor practices, I have included the bargaining order sought by the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering posthearing briefs that were filed by the parties, I make these

Findings of Fact²

Jurisdiction

5 The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. During the year prior to the issuance of the complaint, the Respondent derived annual gross revenues in excess of \$500,000 and sold and distributed juice and food products valued in excess of \$50,000 directly to enterprises located outside the State of New York.

10 Alleged Unfair Labor Practices

The Respondent's Business Operation and Personnel

15 The Respondent has a facility in the Falchi Building, located at 31-00 47th Avenue, Long Island City, New York. The first floor of the Falchi Building contains a long corridor with various businesses that have space off the hallway. The corridor is open to the public and has tables and chairs where people can sit. The Respondent was founded in about 2010 and moved its production operation into the Falchi Building in about 2014. [Tr. 1275-1276] [JT 1] [GC 7-12]

20 The Respondent manufactures juices and food products, and sells these products at its retail locations. The number of retail locations has nearly tripled since the Respondent's inception in 2010 and numbered over 70 stores at the time of the hearing. The Respondent refers to its operation in the Falchi building as the "Commissary." The Commissary consists of a juice kitchen, prep kitchen, food kitchen, and small retail store. The food kitchen and shop are located at the front of the corridor near the main entrance. The juice and prep kitchens are located a little more than halfway down the corridor on opposite sides of the hallway. Walking down the corridor from the main entrance of the Falchi Building, the prep kitchen is on the right and the juice kitchen is on the left. [JT 1] [Tr. 91-92, 910-912, 1039-1040, 1087, 1275]

30 The Respondent's founder and part owner is Marcus Antebi. Antebi's partner is Michael Karsch. Peter Kay is the chief operating officer. Jane Waterman is the director of human resources. Mariangel Rodriguez is in-house counsel. Shawn Edelman is the food and beverage director and the highest ranking manager at the Commissary. James Asaro held the title of food and beverage director as well, but reported to Edelman and was second in command at the Commissary. Asaro is no longer employed by the Respondent and his last day of work was August 28. [Tr. 61, 68, 909] Commissary department heads include Production Supervisor Mario Guevara, Receiving Manager Julian Peters, and Food Production Manager

² Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record of this case. My factual findings are based in part on credibility determinations and, in this decision, I have credited some but not all of the testimony of certain witnesses. Credibility findings need not be all-or-nothing propositions and, indeed, it is common in judicial proceedings to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, 335 NLRB 622 (2001). A credibility determination may rely on a variety of factors, including the context of the testimony, the witness's demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 10 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003).

Simona Arsova. Guevara estimated that he supervises about 100 employees, which is more than half the Respondent's workforce at the Commissary. [Tr. 61, 758-759, 973, 1122, 1188]

5 Managers and supervisors have access to an office in the juice kitchen to use for administrative work and phone calls. However, they are often on the move between the kitchens and generally park their laptops wherever it is convenient when they need to do such work. Because the business has been growing so rapidly and new stores are opening every week, the operation is fast paced and hectic. In fact, managers rarely have time to eat lunch. Management holds a weekly meeting every Thursday at one of the long tables toward the back of the Falchi hallway. Otherwise, according to Edelman, a manager would have no reason to go 10 farther down the hallway than the juice kitchen. [Tr. 908-916, 1053, 1083, 1086, 1100-1101, 1192-1195, 1321-1323, 1378, 1413-1415, 1418, 1424, 1431]

15 The Respondent's rank-and-file employees include personnel who chop and press fruit, runners, loading dock receivers, and shipping employees. Alleged discriminatees Daniels and Diallo were runners. Runners report to Guevara and are responsible for bringing fruits and vegetables from the prep kitchen to the juice kitchen for processing. [Tr. 212-213] Alleged discriminatee Sadio reported to Guevara and was responsible for chopping food, including pineapple. [Tr. 351-352, 1195-1196] Alleged discriminatee Caraballo was a loading dock 20 receiver responsible for unloading shipments off trucks, stocking the facility, and assisting other departments as needed. Receivers report to Peters. [Tr. 403-404] Alleged discriminatees Daniel Miranda and Daniel Uvaldo (Uvaldo was still employed as of the hearing) worked in the shipping department and were responsible for picking and packing items (e.g., fruit, vegetables, cups, lids, paper bags) into trucks for distribution to the Juice Press stores. Shipping 25 department employees report to Guevara. [Tr. 505-507, 529-530, 666]

As stated in the Regional Order, upon a petition filed by the Union on December 22, 2016, and pursuant to a stipulated election agreement approved on January 5, an election by secret ballot was conducted on January 23, among employees in the following unit [GC 30 1(bbbb)]:

35 All full-time and regular part-time employees working in the back of the house, commissary kitchen, packers, transportation and maintenance departments, employed by the Employer at its Long Island facility, but excluding managers, clerical employees, professional employees, guards and supervisors as defined by the Act.

40 The tally of ballots prepared at the conclusion of the election showed that of about 192 eligible voters, 38 votes were cast for the Union petitioner, 79 votes were cast against the Union petitioner, and 3 ballots were challenged. [GC 1(bbbb)]

Asaro testified that it "was a constant struggle to hire enough employees" and "it's not that easy" to deal with employee turnover in the food business generally. [Tr. 1039-1040]

45 Edelman and Asaro testified to the Respondent's disciplinary practices at the Commissary. Managers use an online system called JotForms which can be accessed from computers or hand-held devices to record instances of discipline and discharge. These electronic records are automatically forwarded by the system to certain individuals, including

Edelman and Asaro.³ Managers and supervisors have discretion whether to issue written warnings and can consider extenuating circumstances in deciding not to do so. For example, lateness or absences might be excused due to subway problems or childcare issues and, according to Edelman, the Respondent tries “to go above and beyond to accommodate” employees. Edelman also testified that the Respondent does not normally send employees home early as a disciplinary measure unless there has been an argument and individuals need to be separated.⁴ Edelman and Asaro are the only Commissary managers who can approve the discharge of employees. In deciding whether to discharge an employee, they normally speak to the employee and supervisor involved to determine exactly what happened, consider the employee’s overall performance, and give the employee an opportunity to correct the problem. According to Edelman, “we’re trying to do everything we can to keep the employees at work.” [Tr. 74-75, 764-774, 935-937, 984-987, 1150]

The evidence includes disciplinary records from January 1, 2016 to August 19. The most common reason for the discharge of employees has been no call/no show, but several employees have received written warnings and were not discharged for that offense. [GC 5(e)-(i)] Edelman testified that employees who are a no-call/no show will at least be written up if not discharged. [Tr. 1149] It is generally understood that employees should attempt to notify their supervisors if they were going to be significantly late or absent. [Tr. 213, 407-408, 511, 529—530 +572-573, 663, 727, 943-944, 1203-1204, 1354] The employee handbook contains the following provision on attendance [R 8, R 30]:

You are expected to report to work on time. If you cannot report to work as scheduled, you should notify your Supervisor no later than 2 hours before your regular starting time. This notification does not excuse the tardiness but simply notifies your Supervisor that a schedule change may be necessary. Tardiness will result in a write up unless it is excused (at your manager’s discretion).

Chronology of Events⁵

Between about January and August 2016, Union organizer Jean Nash was involved in a campaign to organize drivers of ride-hailing companies such as Uber, Lyft and Via. Uber has a place of business in the Falchi Building and Nash engaged in organizing activity outside that location. [Tr. 83-84, 89-90]

In about August 2016, employees of the Respondent asked Nash who he was and inquired about organizing. Nash began collecting Union authorization cards from the Respondent’s employees. Ultimately, Nash stopped organizing the ride-hailing drivers and commenced a full-time campaign of the Respondent’s employees. According to Nash, he

³ JotForms prompts the user to answer certain questions. In order to print a JotForm, it must be done before clicking the button to submit it electronically. [Tr. 1324-1325]

⁴ Disciplinary records indicate that nondiscriminatee employees have been sent home for mislabeling bins [GC 5(f) p. 23]; calling a coworker “negro malo” [GC 5(f) p. 52]; sleeping on the job [GC 5(f) p. 60]; arriving four hours late to work [GC 5(f) p. 105]; arriving 2 hours late to work [GC 5(h) p. 31]; taking unauthorized breaks [GC 5(i) p. 77]; and refusing to perform an assigned task [GC 5(i) p. 123].

⁵ This section is not necessarily an exact chronology as the specific dates of certain events could not be determined. Alleged unlawful adverse employment actions are referenced in the chronology, but addressed in greater detail in the following section of the facts.

maintained a near constant presence at the Falchi Building seven days a week from morning to night (sometimes even sleeping outside) and spoke to every employee. Nash spoke to employees before their shifts, after their shifts, and while they were on their breaks. The Respondent's employees generally take ½-hour lunch breaks from 10:00 a.m. to 1:00 p.m. at a convenient time when they finish a task. [Tr. 93, 840, 869, 931, 1134-1135]

Nash testified that he met and began speaking with all of the alleged discriminatees except Miranda at the start of the organizing campaign. Among the Respondent's employees, Nash recalled speaking most with Daniels on a daily basis. Nash testified that he also spoke to Caraballo, Diallo and Sadio almost every day during their lunch breaks.⁶ Nash spoke to Uvaldo a couple of days per week. [Tr. 90-92, 124, 127, 130, 143-145, 212, 218-220, 222, 355-356 409-410] Brothers Raul Guita and Jose Guita (not discriminatees in this matter) testified that, beginning in about August or September 2016, they spoke to Nash about three or four times per week.⁷ Raul is a presser and Jose is a runner. [Tr. 711-717, 819, 822, 845, 863-865]

Between about August and October 2016, Nash collected 151 authorization cards from the Respondent's employees. [Tr. 112, 1454-1456] [U 5] Of the individuals who signed cards, I was able to identify 111 names on the list of voters the Respondent provided to the Union prior to the election.⁸ Nash testified that he was present and watched each employee sign his/her card. According to Nash, he would only give the employee an authorization card once the employee indicated a willingness to sign it and took the card right back from the employee once it was signed. Upon receipt of the signed card, Nash reviewed it to ensure it contained all the requested information. [Tr. 1454-1457, 1460-1484]

The alleged discriminatees signed authorization cards on the following dates:

Daniels	September 14, 2016	[GC 14] [Tr. 241]
Diallo	September 15, 2016	[GGC 25] [Tr. 561]
Caraballo	September 26, 2016	[GC 21] [1558]
Uvaldo	September 27, 2016	[GC 26]
Sadio	October 3, 2016	[GC 19]
Miranda	No evidence he signed a card	

Managers had different recollections of when they first learned about the Union's organizing campaign. Guevara testified that he learned of the campaign in about September or October 2016 when employees began asking him whether the Union is good. Guevara saw Nash talking to employees during that time period. Edelman and Asaro testified that they first became aware of the Union's organizing effort when they saw Union flyers. Edelman recalled

⁶ Daniels testified that he spoke with Nash during lunch about three or four times per week. [Tr. 218-220] Caraballo testified that he spoke to Nash two to three times per week. [Tr. 410] Sadio testified that he spoke to Nash about three times. [Tr. 355-356]

⁷ Raul and Jose are referred to herein by their first names to avoid confusion.

⁸ Certain employees who signed cards appear to have left the Respondent's employ before the petition was filed. The Union represented in its brief that 116 authorization cards were signed by employees on the voter list. I was not able to make out the names of some individuals on the cards and this may explain the discrepancy between my count and the Union's count. However, since I do not find the discrepancy to be legally significant, I do not address it further herein.

that employees showed managers the flyers they received from Nash in about August or September 2016. Asaro testified that he saw flyers around the building a few weeks before the election. According to Edelman, after management saw the Union flyers, he and Asaro approached Nash and asked him what this was about. Nash asked whether they were lawyers.
 5 According to Nash, Edelman answered in the affirmative, and he responded that maybe he was a lawyer, too. Nash testified that this conversation occurred on about November 6, 2016. [Tr. 107, 923, 1091-1092, 1138-1139, 1190, 1193-1194, 1216]

10 As the weather became colder, Nash increasingly moved his organizing efforts inside the Falchi Building and worked in the public corridor. Nash often spoke with employees at the tables during their breaks and saw managers (who were pointed out to him by employees) moving from one location to another. However, initially, managers did not stop near Nash or otherwise appear to pay attention to him. [Tr. 98-99, 103-106, 175-179, 1094-109]

15 Daniels testified that, beginning in about September and October 2016, managers often watched him on his lunch breaks while he was talking to Nash. Daniels generally sat at a table toward the rear of the corridor and managers (including Edelman, Asaro, Guevara and Peters) watched from where they stood near the doors of the prep/juice kitchens. According to Daniels, after October 2016, Guevara in particular (more than other managers) continued to monitor his
 20 conversations with Nash by standing nearby and watching from the “side of his eye.” Daniels did not specifically notice whether Guevara moved away or stopped watching him when Nash left the table. [Tr. 223-225, 228-230, 270]

25 Sadio testified that, on October 4, while on break, Guevara said “a lot of workers are joining the union” and asked, “are you also going to join them?” Sadio allegedly answered, “I don’t know and why are you asking me that question?”⁹ [Tr. 356-358]

30 Raul testified that, in about October 2016, Edelman said he did not “want to see me around the Union guy.” [Tr. 837] However, in an affidavit he provided to the Region, Raul stated, “I do not recall any incidents when any managers spoke to me about the union or about talking to Nash until after Tequaan Daniels was fired” [Tr. 879] [R 15 ¶ 4] Daniels was discharged on about January 11.

35 In about November, according to Sadio, Guevara approached him while he was working “[a]nd then he asked me that you still joined the Union? And I said, why you keep asking me that question, I already told you. Why you keep asking me that? Then I went away.” [Tr. 358]

40 On Thursday, November 17, 2016, Arsova took a picture of Nash sitting at a table outside the Falchi Building with Raul, Daniels, Miranda, Uvaldo, and one other Juice Press employee. The timestamp of the photograph displays a date/time of November 17, 2016 at 6:50 a.m. [TR. 1426-1428] [GC 30; R 36] Arsova testified that these particular employees are often unsupervised early Thursday mornings because their usual supervisor (Jenny Palagucchi) does not start until 9:00 a.m. and their manager (Guevara) is off most Thursdays. Therefore, other
 45 managers keep an eye on the employees. Arsova testified that she took the picture of the employees to show what they were doing while their supervisors were not present. Arsova then

⁹ Sadio and Guevara testified that they communicate with each other in English even though English is not the primary language of either of them. [Tr. 358, 368, 1220] Caraballo testified that Sadio speaks broken English, but can still be understood. [Tr. 427]

showed the photograph to Edelman and, according to Arsova, Edelman either told her he would take care of it or called Guevara (she did not recall which and Edelman did not testify regarding the conversation). [Tr. 1422-1423, 1429-1430] [GC 30]

5 When Raul went inside after Arsova took the picture, Edelman called him over. Arsova was present. Raul testified that Edelman said, “what did I tell you about talking with the guy with the union?” Arsova showed Raul the picture she had taken. Raul responded, “I’m not doing nothing wrong. I’m talking to my friend. He’s my friend.”¹⁰ [Tr. 832-836] In his affidavit, Raul described the event as follows [R 15 ¶ 6]:

10 About a week after Daniels was fired, around January 11 or 12, I was talking with Nash and my coworker Rodolpho (“Rudy”) Cartagena outside of the building at one of the outdoor tables during my lunch break. While I was sitting with them I saw Simona, one of the supervisors in the front kitchen, inside of the Falchi building holding up her phone as though she was taking a picture of us. About five minutes later, I was walking back to my work area with Cartagena and Edelman and Simona stopped us. Edelman said, what are you doing outside? I said, we were on break, we were talking, we weren't doing anything wrong. Simona then held up her phone and had a picture of me and Cartagena sitting with Nash at the table. Simona said, see I saw you outside. Edelman said, what were you doing there? I said, we were on break. Edelman said, you were taking your time. Edelman said, if it happens again I'm going to suspend you.

15 On about November 30, according to Sadio, Guevara again approached him on lunch break and asked whether Sadio liked the Union. This time, Sadio told Guevara he did like the Union. [Tr. 359]

20 In about December 2016, on Jose’s way out to break, Peters allegedly stopped him and said, “don’t listen to the union guy, that he doesn’t know what he’s talking about, that it’s not good for you. Basically telling me that they’re going to take half of my paycheck” Jose told Peters, “I don’t want to listen to it because I know the Union is not bad.” Jose testified that Nash was not present the day Peters approached him. [Tr. 717-718]

25 Beginning about December 2016, Union organizer Nicholas Hedge joined Nash at the Falchi Building one or two days per week to help organize the Respondent’s employees. [Tr. 285]

30 On December 22, the Union filed the petition in Case 29-RC-190281. [Tr. 112, 922, 925]

35 A day or two after the petition was filed, the Union requested voluntary recognition. A group of Union representatives consisting of Nash, Hedge and Executive Board Member John Deloch presented a copy of the petition to Asaro and Guevara in person at the Falchi Building. Hedge told the managers that a large percentage of employees had shown an interest in belonging to the Union and requested recognition. Asaro told Hedge they would have to get back to him. [Tr. 296, 923]

¹⁰ Neither Edelman nor Arsova testified about or specifically denied this conversation.

Jose testified that, in about late-December, where employees punch in, Guevara asked him if the Union was good. Jose explained to Guevara that the Union was good. [Tr. 719]

5 The Union increased its organizing efforts at the Falchi Building after the petition was filed. Hedge began going to the facility four or five times per week and additional Union representatives joined the campaign. [Tr. 285-286, 296-297]

10 The General Counsel presented evidence that managers increasingly monitored Union representatives speaking with employees after the petition was filed. Nash testified that managers stared at them and sat at nearby tables close enough to listen to his conversations with employees. According to Nash, managers engaged in this conduct many times, primarily while employees were on lunch breaks. Nash identified Edelman, Asaro, Peters, Guevara, and Arsova as managers who watched and listened to him talk with employees. [Tr. 106-107, 116-121] Nash further testified that, beginning in about early-January, managers started interrupting
15 his conversations with employees. For example, according to Nash, a manager would approach and say, "hi, how is the food?" Managers who interrupted Nash allegedly included Edelman, Asaro, Peters, and Guevara. [Tr. 116-117]

20 Like Nash, Hedge recalled a noticeable difference in the conduct of managers after the petition was filed. Before the petition was filed, Hedge saw managers moving through the facility and only stopping occasionally to speak with each other. After the petition was filed, according to Hedge, "they were watching us. It seemed that every time that I would look up there would be somebody standing within 15 feet of me." [Tr. 298] Hedge also recalled one
25 occasion when Arsova, from about 15 or 20 feet away, held up her phone with her arms outstretched as if to take a picture of him speaking with three employees at a table (inside the hallway between the security guard in the front and the elevator bank in the middle).¹¹ [Tr. 305-306] On another occasion, according to Hedge and Raul, they were talking near the elevators and saw what they perceived as Antebi hiding behind a wall made of milk crates (with gaps in the wooden slats that can be seen through). [Tr. 306, 836, 838-39] [R 33] Hedge described
30 the incident as follows [Tr. 306]:

35 The elevator has a -- it's kind of a wall made of slats that you can see through and we were having a conversation on one side and it just made me laugh because I looked on the other side and Marcus Antebi was just standing on the other side by himself.

When Hedge was questioned by the General Counsel as to whether Antebi was looking in his direction, Hedge answered, "No, I believe he was listening. [Tr. 307]

40 Antebi testified that he sometimes sat on the crates to use a laptop, but stopped sitting there after a water bug crawled up his leg. [Tr. 1287-89] Antebi did not indicate whether he recalled Raul and Hedge having a conversation in this area.

45 Uvaldo testified that Edelman, Asaro, or Guevara "were just looking at us" when he spoke with Nash in the winter before the election. [Tr. 697-698]

¹¹ Arsova testifies that, on a daily basis, she takes pictures at work of products, equipment and people. [Tr. 1421, 1425]

Caraballo testified that his direct supervisor, Peters, began watching him talk to Nash during lunch “once the signatures went through.” After the Union campaign began, Caraballo and the employees he eat lunch with often spoke to Nash during their breaks. Caraballo generally eat in the Falchi Building hallway with other receiving employees near the Weblin
 5 Design space (a little farther down the hallway than the juice/press kitchens). Caraballo claims that Peters would stand near the doors to the loading dock about 20 to 30 feet away and watch them talk to Nash. According to Caraballo, Peters never did this in the past. Rather, Peters was always moving around the facility and rarely stood in one place. [Tr. 416-421]

10 Caraballo further testified that, on occasions when Nash spoke to the receiving employees and left, Peters would come over and make comments as follows [Tr. 419-420]:

15 He would wait for us to finish talking to Jean. Once Jean left, then he would come to the table and he would start questioning us about what we were talking about with Jean. And then he would go on to bash the Union and say that they’re spreading lies and that if the Union were to come, then a lot of undocumented workers will lose their jobs and things of that nature that they just wanted our money. . . . And that they can’t promise us anything.”

20 With regard to questioning of employees by Peters, Caraballo testified, “he just asked what we were talking to him about, you know, or what did he say? What did you say? What’s going on? It’s, you know, anything new? You know, things like that.” In response, the employees allegedly “just agreed with whatever [Peters] was saying” and “made it seem like we were voting no.” According to Caraballo, the employees “would downplay it” by telling Peters
 25 that Nash was not telling them much. [Tr. 419-421] Caraballo recalled Peters talking to him about the Union for the first time while he was on break with receiver Hudi Kabba in late-December 2016, and described the conversation as follows [Tr. 421-422]:

30 The first time I was on break with Hudi [Kabba]. We were in the loading dock, actually, upstairs. And we were sitting down together. [Peters] came, he approached us, and he handed us some papers and he asked us if we knew what was going on with the Union. We said we heard some things. And then he's like, oh, yeah, I just want to tell you that that's, you know, is bad news. And you guys got to vote no. You know, people are going to lose their jobs. People are
 35 going to leave. You're going to lose a lot of money. They just want your money, things of that nature.¹²

40 Caraballo testified that managerial surveillance and Union related discussions with employees were not limited to Peters and did not only occur during employees’ lunch breaks. According to Caraballo, managers Guevara and Arsova also kept a close eye on employees while they were at lunch talking to Nash. Whenever a supervisor saw an employee talking to Nash, that supervisor would allegedly stop and watch. Caraballo further testified that Peters repeatedly urged employees to vote “no” against the Union, including while employees were working at the loading dock. [Tr. 421-425] In January, about a week or two before the election,
 45 Caraballo allegedly overheard Peters on the loading dock making the following comments to employees Kabba and receiving employee Ojamo James [Tr. 423]:

¹² The complaint does not allege that the Respondent, by Peters, unlawfully threatened employees with discharge and I make no finding in this regard.

5 I remember one specific time when I was – I wasn't part of the conversation itself. But I, you know, I was doing my job and I heard Julian tell Hudi and, I believe, Ojamo after all this is done, next month, you guys are gone. And at the moment, I didn't know the complete context of the conversation until I spoke with Hudi after. And I confirmed with him that it did have to do with the Union.

10 At some point in January, according to Caraballo, he and his lunch-mates started trying to avoid Peters by moving to the front of the Falchi Building hallway or outside the building altogether. Nevertheless, Peters allegedly followed the employees to the front of the building and stood about 15 feet away from them while they spoke to Nash. [489-491, 496] Caraballo testified, "Yeah, he would pace back and forth, and then he'd go like this, he'll go on the phone. This is a section of the hallway where he never stands because it's nowhere near the loading dock." [Tr. 490] While pacing, Peters "would glance at us and he would go the other way, 15 glance at us again, and just stay there until we were done talking to Jean." [Tr. 497] Caraballo further testified that Peters and Arsova (who works in the front of building) came outside to watch them when they eat outside in front of the building. According to Caraballo, "[t]he only way we could get away is if we went into the building across the street." [Tr. 496]

20 Diallo testified that, before the election, Peters and Guevara (individually, not together) often approached him after he had spoken to Nash. Peters tried to convince Diallo to vote against the Union. On one occasion before the election, Peters called him over and said, "Diallo, look, you don't have no benefit for to vote Union." Diallo allegedly responded, "Julian, I tell you I vote for Union? Tell me when did I say that? . . . What you asking me that question? . . . why 25 you pushing me? I want to know why. You're not supposed to push." Peters allegedly told Diallo he was a man and nobody could push him to do something he did not want to do. [Tr. 554-557, 594]

30 Diallo also described a conversation he and a cleaning employee named Barry allegedly had with Guevara before the election, as follows: Guevara asked, "What do you think about the Union?" Barry responded, "No. I don't know." Diallo said, "what you ask me is a big question for me. The Union is not ready to vote yet. And you ask me question, what about Union? I mean I've got to find out what it is benefit what is inconvenient from Union." Guevara then said, "[a]fter the Union they're going to find out what they're going to do for worker. If the Union win, 35 they know what to do. If the Union don't win, they know what to do." [Tr. 566-568]

40 According to Diallo, Guevara and Peters would also approach him after he spoke to Nash and pressure him to return to work even though he was not done with his break. On some of these occasions, Guevara allegedly yelled at Diallo and Diallo responded, "Mario, I'm not finished with my break. Please give me a break." [Tr. 557-559]

45 On January 5, Daniels was absent. Guevara prepared an "Employee Warning Notice Form" for Daniels that checked boxes for "first warning," "tardiness" and "failure to meet performance standards." Daniels denied he received this warning, which was a handwritten form instead of an electronic JotForm. The record contains discipline (for other employees) completed by Guevara in JotForms. [Tr. 232-233, 235] [GC 5(e)-(i), GC 15]

50 On about January 6, according to Daniels, Guevara stopped him before he could punch in and sent him home for being absent the previous day. [Tr. 232-234]

On about January 7, Guevara assigned Daniels to wash totes instead of performing his usual job responsibilities. [Tr. 236-237]

5 On about January 8, Guevara again sent Daniels home before he could punch in for work. Guevara prepared another handwritten "Employee Warning Notice Form" for Daniels with boxes checked for "second warning," "tardiness" and "failure to meet performance standards." [Tr. 237-238, 242] [GC 16]

10 On about January 11, Daniels was allegedly discharged by Guevara. [Tr. 239]

On January 12, Guevara completed a JotForm record of termination which states that Daniels "was consistently coming late to work and not showing to work, he failed to complete duties." [Tr. 1147-1148] [R 26]

15 On about January 12, Guevara directed Astephanie "Adys" Coello to prepare a handwritten "Employee Warning Notice Form" (checked "other" instead of first or second warning) which states, "we had a meeting with [Daniels] about calling out and his tardiness. Shawn and Adys was on meeting."¹³ Daniels denied that he received this form. [Tr. 1226] [GC 17] Guevara did not explain why this form was completed in addition to the standard JotForm record of termination.

20

On about January 15, Guevara allegedly questioned Sadio regarding his Union support and fired him.¹⁴ Sadio described the conversation as follows [Tr. 360-361]:

25 That day I didn't go to talk to [Guevara]. He came to talk to me when I was going to the bathroom. And he asked me again, do you still want the union? And I said, why are you asking me that? Yes I like it. Then he got mad. He went. And I went to use the bathroom. And then I came back to work, keep working. After two hours he came and said oh, we saw you with a pineapple, you got fired.

30

A record of termination prepared by Guevara states that "[Sadio] was stealing pineapples from the commissary." [R 19]

35 Raul testified that, in January before the election, Edelman and Asaro threatened him with suspension if he continued to speak with Nash. The first time, Edelman called Raul over while he was taking his break and speaking to Nash. Edelman allegedly said to Raul, "I told you the Union is bad. I don't want to see you talking to him. If I ever see you talking to him again, you're going to get suspended." Raul testified that Asaro told him the same thing a week or two later. Asaro allegedly said, "I told you the Union is bad. I don't want to see you talking to him. If I see you talking to him again, you're suspended."¹⁵ [Tr. 828-830]

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¹³ When asked about Coello's position, Asaro and Edelman initially testified that Coello was a supervisor. [Tr. 973, 1122] The record also contains discipline completed by Coello. [R 22, 28] However, Edelman subsequently testified that Coello was a team leader and Carmen Garcia was the actual supervisor. [Tr. 1161]

¹⁴ Sadio incorrectly testified that he was discharged on December 5, 2016.

¹⁵ In his affidavit, Raul stated, "between when Daniels was fired and the representation election on January 23, I remember that Asaro or Edelman came right up to me and sat with me after I was talking to Nash. I would be speaking with Nash in the common areas at the Falchi building and Nash would walk

Nash and Hedge testified that employees became much less willing to speak to them after Daniels was discharged. Some employees asked the Union representatives why Daniels and Sadio were discharged. [Tr. 121-124, 128-129, 184-186, 298-305]

5

The Respondent held meetings with employees prior to the election in which it sought to dissuade employees from voting for the Union. Two were large group meetings attended by about 125 employees. [Tr. 430-431, 1097] In addition to the large meetings, Edelman, Asaro and the appropriate department manager held several smaller meetings with groups of five to seven employees. [Tr. 1097] Guevara testified that he attended about 10 to 15 meetings regarding the Union. [Tr. 1218] In its campaign meetings, the Respondent emphasized that employees would be receiving wage raises due to statutory increases in the minimum wage without electing and paying the Union.¹⁶ Asaro testified that he and Edelman used written information provided to them as talking points or guidelines for what to discuss with employees. These materials include directives to managers to advise employees that the Union cannot guarantee job security. [Tr. 430-431, 979-981, 1097-1098] [GC 17, 25]

15

Caraballo testified that he attended the two large antiunion meetings and one small meeting with other receiving employees. According to Caraballo, at the first large meeting held in about mid-January, Edelman and Asaro said they knew about the Union and “believed that we shouldn’t vote for the Union or we should vote no”

20

Raul testified that, on about January 14 or 15, the same day as the first antiunion meeting, he overheard Guevara tell presser Felix Paredes to put the names of employees who say no to the Union in a notepad (which Paredes was holding) and, “whomever says no to the Union, you give a dollar, an extra dollar.” According to Raul, this conversation occurred where he was working. [Tr. 845-847, 876-877]

25

Raul further testified that Paredes talked to him on about three other occasions in the Falchi hallway about signing and “get[ting] an extra dollar to say no to the Union.” The first time Paredes approached Raul while he was in the corridor with his brother Jose. Within the next five days, Paredes allegedly spoke to Raul twice and repeated his request that Raul sign the notebook to oppose the Union and receive the \$1 wage increase. [Tr. 846-849, 876-877]

30

In his affidavit, Raul offered a different description of events concerning Paredes and the alleged list of employees who support the Union. Raul’s affidavit reads, in relevant part, as follows [R 15 ¶ 7]:

35

I remember attending two large staff meetings before the union election where managers talked about the union. Managers Antebi, Edelman, Guevara, and Julian Peters attended both meetings. Antebi did most of the talking at both meetings. Each meeting was with about half of the workers. They happened on different days. I believe one was about six days before the election and the other was about three days before the election: I attended both meetings, even though I

40

away. One of them would immediately approach me. They would say, what are you doing with him? He's not good. The Union is not good.” [R 15]

¹⁶ Payroll records indicate that a significant number of employees earned a higher hourly wage rate than the New York state minimum wage. [GC 5(b)]

5 was only supposed to attend one. Antebi said the same thing at both meetings. He said that he wants us to vote no. He said that the union is bad. He said that the union is going to take money from us and not get us anything in return. At both meetings, there was a notebook sitting on the table. Antebi said, whoever says no
 10 to the union, I'll give an extra dollar. At the end of both meetings, Guevara pointed to an employee named Felix (LNU). Guevara said to Felix, grab the pad of paper and write down who is against the union. Felix then went around the work area and the common areas of the Falchi building asking everyone if they were for the union. He walked up to me in the hallway after the first meeting and said, are you
 15 for the Union? I said, it's none of your business. He said, oh, you're with the-Union now? I said, I'm not signing it's none of your business. After the second meeting, I was inside of the Juice Press facility. He said, are you sure you want to be with the union? I said, it's none of your business if I want to be with the union or not. That is all I recall from the meeting. I believe I saw about half of my coworkers sign the paper that Felix was holding.

20 Jose testified that he did not attend any meetings regarding the Union because he already knew a union was very important for employees to obtain certain benefits. Jose testified on cross-examination that Peters told him such benefits were not guaranteed if the Union were elected. [Tr. 725, 731-732]

25 Jose testified that, about a week before the election, just as he was getting ready to go on break, Guevara "told me that he'll give me a raise if I don't sign with the Union." Jose told Guevara he would think about it (even though he already knew what the answer would be). [Tr. 719-720]

30 According to Jose, almost every day during the week before the election, Paredes "kept harassing me about not signing with the Union. . . . He kept telling me, 'Mario said he would give you a dollar if you decide you will not sign with the Union.'" Each time, Jose refused and said, "I know what I got to do." Jose testified that Paredes did not ask him to sign a piece of paper, but that he did have a piece of paper (white printer paper without lines) with a list of names on it. Paredes allegedly told Jose, "everybody that's on that list is going to get a dollar." Jose only saw this piece of paper from the back, but was allegedly able to see (from the light) names written on the front. [Tr. 720-724, 736-738]

35 Parades denied he made a list of employees who disliked the Union or offered them pay raises on that basis. Parades also denied he talked to Guevara about giving employees a pay raise if the rejected the Union. Indeed, Paredes denied he knew anything or talked to anyone about a union or union election.¹⁷ Conversely, Diallo and Miranda credibly testified that Paredes urged them to vote against the Union. Miranda further credibly testified that Paredes asked him
 40 three times whether he supported the Union.¹⁸ Nash credibly testified that he spoke to Paredes about the Union during the organizing campaign. According to Nash, Parades seemed

¹⁷ The Respondent's counsel attempted to use a previous statement by Paredes to resuscitate his recollection regarding an organizing effort by the Union, but Parades failed to modify his testimony.

¹⁸ The General Counsel does not contend in its brief that Paredes was an agent of the Respondent for purposes of these conversations about the Union with Miranda and Diallo. I rely on such testimony only to the extent it undermines the credibility of Paredes.

interested in the Union, but never signed an authorization card. [Tr. 513-519, 569, 1243-1245, 1258-1259, 1489]

5 On January 17, Edelman, Asaro and in-house counsel Mariangel Rodriguez held a meeting regarding the Union with receiving department employees. Caraballo recorded the meeting. [Tr. 431-446] [GC 22] Asaro told employees the minimum wage was increasing over the next three years from \$11 to \$13 to \$15 per hour and asked, "You guys make the choice; you want to give the Union your money? Or you guys want to keep the \$15 an hour more." [GC 22 p. 14] Asaro also made the following comments [GC 22 p. 15]:

10 And I just think, listen, in my heart of hearts, I believe that in the future I know in the last year not everybody that was supposed to get a raise got one. I understand that. I understand that not everybody is making what they think they deserve. But all I'm saying, we also doubled in size we opened 50 stores. So that
15 means that all the money we made in this company, we didn't make any of it, we put it all back into the company to try to make it bigger. The only thing I can tell you is that in the future, if you guys vote no, you give us a year, if we don't do right by you, the next year you can vote again. But once it's here, it's here to stay. That's it. If you guys vote no, you have a year. If after a year we don't do right by
20 you I believe in my heart of hearts that we're going to do right by everybody.

During this meeting, Asaro brought up the issue of Daniels' discharge and stated as follows [GC 22 p. 15-16]:

25 [T]hey hire this guy Tequaan to work for them now; he is on their side now. This guy came to work late or no call no show so many times. We didn't tell him he doesn't work here for no reason and that's somebody who's gonna be representing you guys if you voted in the person doesn't do a good job, who
30 comes late all the time. That's not representative of the people here. You guys come to work every day you do your job you don't want somebody like that to represent you and that's the kind of person, that's the first person they put on the payroll. The first person that they're telling to talk to you guys as one of your peers that is not the same as you, Familia, that's not the same as you. You guys come on time you do your job every day you don't want somebody who doesn't
35 do that to represent you. That's not representative of you guys.

An unidentified employee complained that employees were sent home early one day and were concerned that it was because they had been "seen talking to the union guy." Edelman responded, "[a]bsolutely not. One has nothing to do with the other. No way." Asaro
40 promised to "fix that" and assured the employees that they would be paid for the hours they lost. Peters was present during the meeting and testified that employees were paid for the lost hours.¹⁹ [Tr. 442-445, 1357-1358] [GC 22 p. 6-8, 16-17]

¹⁹ It is telling of Peters' credibility and his approach to testifying that he attempted to explain this incident involving employees being sent home early without mentioning that it came up during a meeting regarding the Union. Peters testified that he, on his own initiative, asked Edelman to compensate employees for the lost time once he (Peters) learned employees were sent home early on a day he was off. However, the audio recording is quite clear in showing that management learned about and promised to compensate employees for the hours they lost in this campaign meeting.

On January 17, the Union filed an unfair labor practice charge which alleged in part that the Respondent violated Section 8(a)(3) and (1) of the Act by cutting the hours of certain employees, including Diallo. [GC 1(x)]

5 On January 19, Antebi and Kay held a large antiunion meeting and Caraballo recorded it. [Tr. 446-448] [GC 23] Antebi testified that the “vast majority of the staff that were present that day” attended the meeting. [Tr. 1143, 1284] Antebi claimed this was the only meeting he attended in which he talked to employees about the Union. [Tr. 1284-1285] Antebi testified that he largely read from a script which was prepared in advance and reviewed by counsel, but a
10 copy of that script was not produced in response to the General Counsel’s subpoena. Prior to this meeting, Antebi did not have much contact with employees and, accordingly, introduced himself as the founder of the company. [Tr. 1296] [GC 23 p. 8] Antebi made the following comments during his prepared remarks:

15 [GC 23 p. 203]:
I know that you need to feel that you are paid fairly and treated fairly if we’re going to succeed. What I’m asking you is to let me and the rest of the Juice Press management show you over the next year that you do not need a union for us to hear you and your concerns. We intend to respond to your concerns.

20 [GC 23 p. 5]
My lawyers have told me that it’s illegal for me to make specific promises. With the election scheduled. But I ask you to please believe me and my honor. That I say that we’re going to make sure you’re paid fairly and treated fairly. We are
25 going to make sure we hear all of your concerns and that we create a mechanism for you to be responsive to those concerns. We are going to make sure we hear your concerns. And that we create a mechanism of responding to your concerns.

30 After Antebi spoke, Kay made some remarks, including the following exchange with an employee [GC 23 p. 12]:

Employee: My question is all the workers, you hear me? ...gets from people, to see the boss, we have a program to see the boss, we want this, we want that, we want that.

35 Kay: Always, always, after this is over on Monday we’re happy to sit down and the longer you people...

40 Kay: a lot of you guys see me sometimes but not all the time. I'm not here all the time. Sean and James are here all the time. Simona, other people, are here all the time, okay. But I'm always available, also, so is Marcus, okay? But I'm in here a lot more sometimes. I'm walking around all the time, a lot of you guys know me, some of you do, always grab me and say can I talk to you, can I talk to you about this. You know, you can always talk about anything alright? We can always have an open discussion about it. I think that a lot of us are very open, we're very fair
45 and understanding of what goes on. We'll always have these discussions, we may not agree every time. I'm not going to tell you bullshit right, that you know that we agree all the time, we may not agree but we're going to try to do the best. The bigger this company gets, the better it gets, the better it is for you guys, the better it is for me, for Mary Angel, for everybody, right? That's where it is. But
50 we're going to, no matter what's going to happen in the future, you're going to get it from us. You might as well not pay somebody else because you're going to get

5 the same thing, guys, the same thing. Its, the business is run by people who run
 the business, not about somebody outside. You just think you know these people
 for, you met these people in the union two weeks, three weeks. You think they
 care about you? Your family? Your paycheck? They tell you right, they're going to
 10 fight for you, your family, your money, your vacation. How do you know them?
 You met them how many times? You don't know them. You think they care about
 you so much? They care about money they're going to get from you. That's why
 they're chasing you, right? You see a dollar in the street, you run over you grab it
 15 in your pocket right? That's what they see, you guys are all one dollar to them.
 Dollar, dollar, dollar, they put it in their pocket and they get big paychecks. We
 don't take money from you guys. We pay you money. They're going to pay you
 money? No, they're going to take your money, they're going to take your money,
 that's all that's going to happen, and for what, what's going to happen out of it?
 Nothing's going to happen out of it and they won't guarantee that anything's
 going to happen out of it.

Further, Kay and Diallo had the following exchange during the meeting on January 19
 [GC p. 12-13]:

20 Diallo: I have one more question for you boss, if anything, what I see in my mind,
 one thing to give this union chance to come in, no like connections to talk, ...me
 personally when I have something to speak, I don't get a chance. When I see
 everybody together to push it maybe they want union, especially me I never had a
 union...

25 Kay: But you, why, why don't you get a chance to talk?

Diallo: Every time I want to talk, something coming up, when I want to talk, now I
 don't want to talk.

30 Kay: Absolutely, anybody can talk about anything. There's always, there's a
 wide open facility, maybe somebody can, you're busy, a lot of people are busy but
 there's always an open door that anybody can come in.

35 Caraballo testified that, before these remarks by Kay, he never heard a manager or
 supervisor mention an open door policy. [Tr. 455-456]

40 On January 23, the election was held. Although he had already been discharged,
 Daniels acted as the Union's election observer. [Tr. 299] [GC 1]

45 Diallo testified that, at some point after the election, Guevara said, "I hear what you said
 when there was the meeting." Diallo responded that he did not have anything to hide and spoke
 in public in front of the boss. Diallo testified that Guevara seemed angry at him from this day on
 in that Guevara often screamed at him. [Tr. 564-566]

Nash continued to go to the Falchi Building after the election, but went fewer days and
 for fewer hours (mostly in the mornings). [Tr. 139-140]

50 Diallo testified that he considered Nash a friend and talked to Nash several times a week
 during his breaks following the election. According to Diallo, Guevara and Peters saw him
 talking to Nash. [Tr. 571-572]

Caraballo did not recall seeing Nash for about a month or two following the election, but did start seeing him more in about March or April. Thereafter, Caraballo talked to Nash about three times per week. [Tr. 457]

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On April 7, the Respondent discharged Diallo. [Tr. 579-581]

On April 8, Guevara directed Coello to complete a “second warning” to Diallo because he “used the phone, hiding from everyone on work hour.” [Tr. 1229-1230] [GC 59(h) p. 49]

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On April 10, Guevara directed Coello to complete a record of termination for Diallo because “he used his phone while on work duty, and lateness was an issue. We spoke to him about it a lot of times.” [Tr. 1230] [R 18]

15

Antebi testified that, in about May, he started spending more time at the Falchi Building to correct certain structural issues of process flow, safety, and sanitation. For a three month period, Antebi worked full time (five or six days per week, eight to ten hours per day) in the kitchen and brought in some new equipment. Caraballo confirmed that he started seeing Antebi in the facility every day in about May when the Respondent was bringing in new equipment. [Tr. 456-458, 1280-1282, 1295]

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On May 30, 2017, Peters issued a “second warning” to Caraballo because “for the past few days Christopher Caraballo has been 20-30 min sometimes 1 hour late to work he was warn[ed] multiple times about his lateness.” [Tr. 465, 1354-1355] [GC 24]

25

Raul testified that, in about the summer, Antebi directed him not talk with Nash. Raul was allegedly finished for the day and outside the building talking to his uncle and Nash. Antebi was talking to Edelman nearby. When Nash stepped away, Antebi came over and told Raul, “I’m tired of telling you to stop talking to the guy from the Union. What did I tell you about that?” Raul responded, “I’m not going to stop talking to him.”²⁰ [Tr. 856-858]

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On a Thursday (payday) in about June, according to Jose, he was questioned by Antebi about a conversation he had with Nash. Jose was sitting in the hallway near the elevator with his girlfriend waiting for his paycheck. Other employees were present as well. Nash came by and spoke to them for about 10 or 15 minutes. After Nash left, Antebi passed by and asked employees what Nash said to them. Jose said, “nothing.” [Tr. 729-730]

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On June 12, the Respondent discharged Caraballo for leaving work early the previous day (a Sunday). [Tr. 460-462]

²⁰ In his affidavit, Raul described the incident as follows:

About a month or a month and a half ago — in late May or early June 2017 - I was sitting outside with my uncle Carlos Guitian and Nash at the tables in front of the building. Antebi and Edelman were standing by the outdoor entrance to Juice Press watching us talking. Nash walked away after a few minutes. As soon as Nash walked away, Antebi walked up to us at the table. He said, what did I tell you about talking to him? I'm tired of telling you not talk to him. I don't want to tell you again. I said, if I see you talking to him again we're going to have a big problem. Antebi then walked back up near the door and stayed standing there talking to us.

On June 19, the Respondent discharged Miranda. The record of termination states that Miranda was discharged for being “[d]isrespectful and verbally abusive towards other employees.” [R 29]

5

Uvaldo testified that, in about late-June or early-July, he and three other employees spoke to Nash near the elevators for about 30 minutes (11:00 a.m. to 11:30 a.m.) on their lunch break. While the employees were speaking to Nash, during about a seven to ten minute period, Asaro walked passed them three times. As Uvaldo was walking back to work with an employee named Jose, Asaro approached and asked them what they talked about with Nash.²¹ Uvaldo testified that he and Jose told Asaro they were talking about sports (when, in fact, they were talking about the Union).²² [Tr. 674-678]

10

On about July 6, Asaro saw Raul speaking to Nash in the hallway, called him over and accused him of taking a second break even though he took one earlier in the day. Raul denied he took a break earlier in the day. Raul testified that Asaro then asked, “what you doing talking to him? I don’t want to see you talking to him.” Raul understood Asaro to be talking about Nash and answered, “I’m not going to stop talking to him. He’s my friend.” Asaro said, “I’m going to go check the cameras.” [Tr. 853-854]

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Asaro admitted that, in about July, he mistakenly accused Raul of taking a second break.²³ Asaro testified as follows [Tr. 932]:

So it wasn't that long ago, actually. He was in the hallway, he was talking to another gentleman and this is a time when none of the other people who worked with him were taking breaks. So I didn't think he was on break. So I walked over I said, Raul, what's going on, man? You're supposed to be working, you took your break already. He goes, no, no, I'm taking my break now. I said okay, well, I don't think you are. I think you took your break already. So he went back into work and after I spoke to a few people and, you know, because I wanted to find out what happened. I found out that he was taking his break at that time. So on the way out that day I spoke to him and I said hey, I'm not – I apologize, I messed up, I didn't realize you were on break.

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²¹ Uvaldo did not identify this Jose as Jose Guita, and payroll records indicate the Respondent employed a number of employees named Jose.

²² On cross-examination, Uvaldo was presented with an affidavit in which he stated that he told Asaro what he discussed with Nash was none of his (Asaro’s) concern (instead of telling Asaro they discussed sports). According to Uvaldo, he showed a copy of the affidavit to Jose and Jose reminded him how the conversation actually transpired. [Tr. 699-703]

²³ Raul testified that he believed the conversation occurred in March or April, but Asaro testified that it occurred in July. In his affidavit, Raul stated that the conversation took place on July 6 (the same day Raul provided the affidavit). Raul described the conversation as follows in his affidavit [R 15 ¶ 13]:

Today, July 6, I was talking to Nash in the Falchi building hallway near the elevators at about 12:00 PM. James Asaro walked by me and tapped me on the stomach as I was talking to Nash. I then left Nash and walked up to Asaro, who was standing in the hallway outside of the door to the Juice Press facility. Asaro said to me, I don't want to see you talking to him anymore, even on your breaks. That was all he said. I walked away.

Asaro claimed he specifically told Raul on this occasion, "I don't care who you talk to on your break. I just want to make sure that you weren't supposed to be working." [Tr. 933] On cross-examination, Asaro admitted the "individual" Raul was speaking to was Nash. [Tr. 1008]

5

On July 13, Asaro sent Uvaldo home for arriving late. Asaro prepared a "first warning" which stated that Uvaldo "[w]as sent home for coming at 7:15 am. 1 hour and 15 min late for work." [Tr. 678-680] [GC 27]

10 **Denials and Additional Testimony by the Respondent's Witnesses**

The Respondent's managers testified that they were too busy working throughout the Commissary to engage in any prolonged observation or surveillance of employees talking to Union representatives. Asaro, Guevara and Peters testified that, in passing as they walked through the building, they saw Nash talking to employees. However, managers denied changing their busy routines or positioned themselves in such a way as to observe what Nash and employees were doing. [Tr. 921, 924, 1084, 1087-1090, 1093-1095, 1100-1101, 1191-1194, 1316-1321, 1328-1329]

Antebi testified that he began coming to the Falchi Building less often in January because he knew there were rules about what he could say to employees and he did not want to say something wrong. [Tr. 1289-1290]

Edelman denied he listened to employees speaking to Nash or approached employees to ask what they talked to Nash about. [Tr. 1095] Edelman testified that he has always (including before the petition was filed) encouraged Commissary employees to approach him with concerns and his comments to employees during the campaign to that effect were nothing new. According to Edelman, "I'm always available. It's open door. If I'm on the floor and somebody wants to talk, I have the time, absolutely. If I don't have the time, I'll tell them to stop by the office, we can schedule something it's always open door." In particular, employees requested pay raises and expressed concerns about their supervisors all the time. Edelman testified that the Respondent is "constantly giving people [wage] increases" on an individualize basis depending on their job performance and time with the company." [Tr. 1098-1100]

Asaro denied he had any individual conversations with employees about the Union before the petition was filed. [Tr. 923] Asaro also denied he heard any company representative offer employees a wage increase in exchange for voting a certain way. [Tr. 929]

Guevara denied he asked employees how they felt about the Union. Guevara testified that, in about October and September 2016, employees asked him if the Union was good and he responded that he did not know. Employees also asked Guevara whether the minimum wage was going to change in January and he told them the minimum wage was going up to \$11 per hour. Guevara denied he asked anyone to make a list of employees who did or did not support the Union and denied promising any employee a wage increase for voting a certain way. [Tr. 1190-1191, 1195, 1217-1220]

The Respondent's managers and supervisors received instructions about how to talk to employees about the Union, including a document titled The "Do's and Don'ts" During a Union Organizing Drive. [Tr. 1325-1328] [R25] The "Do's and Don'ts" including a directive that "[m]anagment should not stand silent during a union organizing drive." Managers also handed out flyers to employees regarding the Union and unionizing. [Tr. 926-927] [R 17]

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Peters denied he approached any employees to discuss the Union. According to Peters, one employee named Alvin asked him how much the Union dues would be and he told Alvin what the “Do’s and Don’ts” stated about dues.²⁴ [Tr. 1326-1328]

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Adverse Employment Actions

Tequaan Daniels

10 Daniels was hired by the Respondent as a runner on about May 30, 2016 and his schedule was 6:00 a.m. to 2:00 p.m., Wednesday through Sunday. [GC 5] The Respondent stated in its brief that “Daniels had documented issues with punctuality and attendance since the start of his employment with Juice Press.” [R. Brief p. 25] [Tr. 211-213, 234] Payroll records confirm that Daniels often arrived at work at least 15 minutes late throughout the course of his employment. Among these instances, Daniels arrived at least an hour late about seven times. [GC 5(a)] Payroll records also indicate that Daniels did not work on October 15, 15 November 6, November 23, December 4, and December 15. [GC 5(a)] [Tr. 1108] However, the Respondent’s schedules do not reflect whether Daniels was scheduled to work on these dates or, if he was scheduled, whether he called out with a valid excuse. [GC 5(c)] [Tr. 392] 20 Edelman testified that the Respondent would normally write up an employee for a no call/no show, and the Respondent’s records do not indicate that Daniels received such discipline. [Tr. 1149] [GC 5(f)-(i)]

25 Disciplinary records entered into evidence indicate that Guevara has issued discipline to employees for lateness, which generally included a description of the number of minutes the employee was late and whether he/she notified a supervisor. [GC 5(f) p. 27, 31, 70, 77]

General Counsel’s Version of Events - Daniels

30 When Daniels was hired, Guevara gave him his personal cell phone number and told Daniels to call if he was running late or could not make it to work. According to Daniels, Guevara gave him his personal number because the company’s direct line was not in service. Daniels testified that he always called Guevara when he was going to be late or absent. [Tr. 213, 234]

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In about September or October, Daniels informed Guevara he was a single-parent with childcare responsibilities which occasionally made it difficult for him to get to work on time. According to Daniels, Guevara said, “just call and let him know, and he’ll excuse me.” Guevara testified that he was aware Daniels was a single-parent with a young child and that Daniels told him on some occasions that this was the reason he was late.²⁵ [Tr. 251]

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On January 4, Daniels arrived for work on time. [GC 5(a) p. 1724]

²⁴ According to Peters, a female employee tried to ask him about the Union, but they did not discuss the matter because she did not speak much English.

²⁵ Guevara did not deny he told Daniels that such attendance problems, caused by childcare, would be excused.

On January 5, Daniels called Guevara at about 4:00 a.m. and left a voice-mail message indicating he could not come to work because his son was sick and the babysitter was not available. Daniels also sent Guevara a detailed text message. Guevara did not answer. Daniels admitted that this was unusual and noted that Guevara normally responded even on his (Guevara's) day off. Guevara did not testify as to whether he received the call and/or text from Daniels on January 5. As indicated in the chronology section, Guevara had Coello prepare a handwritten "Employee Warning Notice Form" with boxes checked for "first warning," "tardiness" and "failure to meet performance standards." Daniels denied he received a copy of the discipline.²⁶ [Tr. 232-233] [GC 15]

On January 6, Guevara stopped Daniels when he arrived for work at 5:50 a.m. and told him he was being sent home even though "he knew [Daniels] did the right thing" by calling out two hours before his shift the previous day. Guevara told Daniels that, from now on, he had to call the direct number on the website. Daniels said it was a non-working number, but Guevara just said, "I'm sorry." After he left, Daniels called the website number and confirmed it was still a non-working number. Payroll records confirm that Daniels did not work on January 6. Guevara did not address or deny this conversation. [Tr. 234-235] [GC 5 p. 1724]

On January 7, after Daniels clocked in at 6:19 a.m., Guevara told him to spend the day washing totes instead of his normal job (runner). [GC 5(a) p. 1724] The person who normally washes totes was assigned to be a runner in Daniels' place. Daniels had never been assigned to wash totes in the past. The job involves standing alone in one spot and rinsing the totes out with water. Guevara did not deny he directed Daniels to wash totes on January 7 or otherwise address this issue of a change in Daniels' assignment. [Tr. 235-237]

On January 8, Daniels arrived for work at 5:45 a.m. and an older female employee asked him to help her move 30 boxes of grapefruits that she needed to chop.²⁷ After about 30 minutes, Guevara saw Daniels helping the woman and Daniels realized he had forgotten to punch in. Daniels started walking off to punch in and Guevara asked him whether he had already done so. Daniels told Guevara, "no." Guevara said, "I've got to send you home because you didn't punch in." Daniels told Guevara "he was here" and asked Guevara to check the cameras, but Guevara insisted that Daniels go home. Guevara testified that Daniels came in an hour late, but did not specifically address where he saw Daniels, what Daniels was doing, and what, if anything, they discussed. Guevara prepared a handwritten "second warning" for Daniels that checked boxes for "tardiness" and "failure to meet performance standards." Daniels denied he received a copy of the discipline. [Tr. 237-238, 242] [GC 16]

On January 9 and 10, Daniels was scheduled to be off from work. [Tr. 239]

²⁶ Guevara did not directly testify that he gave Daniels this warning. Respondent's counsel assumed the fact when he asked Guevara, "[t]he warning that you gave him on January 5th, did that correct this behavior?" Guevara answered, "I was hoping so, but he continued to arrive late." [Tr. 1204]

²⁷ Raul testified that certain older female employees sometimes ask him or Daniels to help move boxes of produce for them. According to Raul, on a day Daniels was sent home, a woman asked Daniels to help her move boxes of tomatoes.

On about January 11, while Daniels was on his way to work, Guevara called him and said he should not come in because they were having a board meeting.²⁸ Guevara told Daniels he would call back after 12:00 p.m. Daniels did not understand what a board meeting had to do with him coming to work, but turned around and went home. After 12:00 p.m., Daniels received a call from Guevara on Raul's phone. Guevara said, "I'm sorry, I'm sorry." Daniels asked what Guevara was sorry about, but the call was disconnected. Daniels called back and Raul answered. Raul said, "he fired you." Raul corroborated this incident and specifically recalled that it occurred on a Wednesday (January 11 was a Wednesday). Guevara denied he made this call to Daniels. [Tr. 239, 843-844, 875-876, 1206]

Daniels was hired by the Union after he was discharged and, beginning about January 12, helped organize the Respondent's employees at the Falchi Building. On about January 12, Daniels went to the facility to pick up his paycheck and asked Guevara why he had been fired. Guevara just said "I'm sorry" and "rushed in the kitchen." According to Daniels, Guevara "made it seem like he was busy and he had things to do. . . . So he didn't want to really give me an explanation." [Tr. 244, 247, 1548-1549]

On January 12, Guevara completed a JotForm record of termination which states that Daniels "was consistently coming late to work and not showing to work, he failed to complete duties." [R 26] [Tr. 1147-1148]

Guevara also had Coello prepare a handwritten disciplinary form dated January 12 which states, "we had a meeting with him about calling out and his tardiness. Shawn and Adys was on meeting." [Tr. 1225-1226] [GC 17] Guevara did not explain why this form was prepared by hand in addition to the standard JotForm record of termination. Daniels denied he attended a meeting with Guevara, Edelman, or Adys on January 12. [Tr. 242-243, 1548-1549]

In a position statement dated February 27, the Respondent indicated that Daniels was terminated because of chronic lateness and unexcused absences. [GC 34 p. 3]

Payroll records reflect that a number of employees were often significantly late (15 minutes or more) and received no discipline or received discipline less than discharge. [GC 5] Such employees included Alonso Steven, Eric Peters, Isaac Torres, Lodai Richard, Mohammed Trawally, Nene Diallo, Ojamo James, Rodolfo Cartagena, and Rosa Romero.

Respondent's Version of Events - Daniels

Guevara testified that he talked to Daniels several times about lateness before giving him written warnings. According to Guevara, Daniels usually told him he was going to be late, "but he would do it after his work hours schedule of 6:00 [a.m.]" [Tr. 1203-1204]

On January 5, Guevara prepared Daniels' first warning for tardiness and failure to meet performance standards. Guevara testified that the warning was "due to lateness." When asked

²⁸ Daniels was admittedly unsure about certain dates. On rebuttal, after reviewing payroll records which show that the last day he worked was January 7, Daniels testified that he was probably discharged on January 8 (but was admittedly unclear in his recollection). [Tr. 1553-1557] Guevara testified that Daniels came to work and was sent home without being discharged on January 8 (like Daniels initially testified). Accordingly, Daniels' original recollection of the sequence of events appears to have been accurate.

by Respondent's whether the "warning you gave him on January 5th" corrected Daniels behavior, Guevara answered, "I was hoping so, but he continued to arrive late." Guevara did not indicate which specific dates were the subject of the discipline. Daniels arrived on time the previous day, January 4, and was absent on January 5. [GC 5(a); 15] [Tr. 1203-1204]

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On January 7, Daniels was late and Guevara asked him what was going on with the late arrival times. Guevara did not recall Daniels' response. Daniels clocked in at 6:19 a.m. on January 7. [Tr. 1204-1205] [[GC 5(a) p. 1724]

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On January 8, Guevara sent Daniels home before he clocked in because he arrived an hour late. Guevara prepared the second written warning (described above). [Tr. 1205] [GC 16]

Guevara denied he used Raul's phone to call Daniels on January 11.²⁹ [Tr. 1206]

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Edelman and Guevara planned to meet with Daniels on January 12 to address his attendance. Guevara testified that the meeting was about Daniels' lateness, but did not mention anything about no call/no shows. Conversely, Edelman testified that the meeting was more about no-call/no-shows than lateness. Edelman and Guevara both testified that the Respondent did not intend to terminate Daniels at this time. [Tr. 1101-1102, 1146-1147, 1174, 1202, 1226] [GC 17]

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On January 12, Edelman, Guevara and Coello waited at one of the tables near the prep/juice kitchens for Daniels to arrive for work. Daniels was 20 or 25 minutes late.³⁰ Guevara asked Daniels to join them and Daniels started yelling and cursing on his way over. Edelman testified that Daniels said, "What is this fucking bullshit about? This is fucking ridiculous. I've fucking had it. Etcetera, etcetera. Just went off." [Tr. 1102-1104, 1161, 1175] Edelman further testified as follows with regard to the alleged incident [Tr. 1104-1105]:

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Then he ended up coming over to the table and sitting down with us. Actually, we sat down and he didn't sit; he stood. So at that point in time he was very, very upset and agitated. So we started to tell him about the lateness'. He didn't want to hear about the lateness'. He didn't want to hear about the no call no shows. He was like, this is bullshit.

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This is fucking bullshit. On and on and on. He was really, really aggravated or agitated I guess. So at that point in time the goal was not to terminate him, but to let him know that he's got to make an attempt to get to work. And if he can't get to work on time via subway issues, childcare issues, whatever it is, he's got to at least text or let us know. That was the goal. . . . But because he was so aggravated and so irate about the situation and us talking to him, at that point in time, instead of me telling him that listen, this is not going to work out, I chose just to say, let's just try to diffuse the situation, and I sent him home at that point in

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²⁹ Otherwise, Guevara did not specifically testify to the events of January 11 and why Daniels was absent that day.

³⁰ Payroll records do not indicate that Daniels clocked in on January 12.

time. Just to get him out of the building away from everybody because he was very, very aggravated and agitated.

5 Guevara testified that Daniels was terminated for lateness and because “of his attitude, there was no respect towards those of us in the meeting.” [Tr. 1202] Subsequently, when asked whether he remembered the meeting with Daniels on January 12, Guevara answered, “Yes, a little. Yes. . . . With – attitude. . . . I mean, he had an attitude as if he didn’t care. He had an attitude with everyone.”

10 Once Daniels left the building, Edelman, Guevara and Coello discussed the matter and decided to terminate Daniels. Edelman testified that Guevara called Daniels later that morning and informed him that he was discharged. [Tr. 1105, 1107] Conversely, Guevara testified that Edelman told Daniels he was discharged. [Tr. 1226-1227, 1232] Edelman and Guevara both denied they knew Daniels engaged in union activity before he was discharged. [Tr. 1109, 1205]

15 Guevara testified that he had Coello prepare a discipline for Daniels after the meeting. [Tr. 1276] [R 17] Conversely, Edelman testified that Guevara had Coello prepare the discipline for Daniels in advance of the meeting. [Tr. 1144]

20 Guevara admitted that other employees he supervised had problems with lateness, including Amibel Nunez, Jaslean Quinones, Rodolfo Cartegena, and Saikou Saho. However, according to Guevara, unlike Daniels, those individuals called or texted him ahead of time to say they were going to be late.³¹ Guevara also testified that none of these individuals had a bad attitude when he discussed their lateness with them. [Tr. 1209-1212]

25 **Jaby Sadio**

Sadio was responsible for cutting food, including pineapple. He chopped about 50 or 60 cases of pineapple per day (each case containing six to nine pineapples). According to Asaro, Sadio was a good employee and firing him hurt the business.³² [Tr. 380, 1045]

The General Counsel’s Version of Events - Sadio

35 As described above, the General Counsel contends that Guevara questioned Sadio about his Union support on October 4, twice in November, and again on the day of his discharge (January 15). About two hours after the last instance of interrogation, Guevara accused Sadio of trying to steal a cup of pineapple he had given to some coworkers and fired Sadio on the spot. Sadio described his discharge as follows [Tr. 360-361].³³

³¹ Guevara has had his current phone since February and testified that the texts he received from employees should be on his phone. However, the Respondent’s counsel represented that the phone was searched for such texts and none were found. [Tr. 1221-1225]

³² Sadio testified that he was hired in 2012, but Antebi testified that the Respondent did not move into the Commissary until 2014. The General Counsel introduced into evidence a position statement of the Respondent which indicates that Sadio was hired on July 21, 2014.

³³ Sadio testified that this occurred on December 5, 2016.

So he -- he talked. He came to talk to me, and he said that "there's a pineapple in the cup" and that I want to -- "I'd like to take the pineapple home". And I told him, "No. This pineapple, I cut it because the lady wanted to try," and that's why I did. And he said, "Okay, you got fired (sic)."

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. . .

He was accusing me for that, for taking -- for trying to take the pineapple home. And I told him, "No. I never take. And I would never take a pineapple home." . . . [H]e saw me while I was putting the pineapple in the cup, and he thought that I was taking the pineapple home, and I told him, "No, I'm giving pineapple to those guests here." . . . The lady that was working next to me. . . .

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. . .

It's not even the whole pineapple. It's just a piece of pineapple that I shared with them. . . Two people. It was in a cup, and they were -- they -- it was sitting next to them, and they would eat it.

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Sadio testified that neither he nor his family like pineapple and it was not his intention to take pineapple home. Rather, he put some pineapple in a cup (about 16 ounces) and gave it to a couple of women who were working next to him. Sadio denied he filled two quart-sized containers with pineapple or put such containers in a bag. Sadio testified that the picture of the two quarts of pineapple (taken by Guevara) he allegedly tried to steal were not taken at his work station. [Tr. 361-363, 376-377, 380-381, 1110] [GC 20]

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According to Sadio, once or twice a month, he would give a cup of pineapple to a coworker. Sadio claims he did this many times in front of managers and "nobody complained." Sadio also testified that managers such as Guevara and Asaro often took pieces of fruit to eat while he was cutting it. [Tr. 381-383] Daniels testified that Sadio would give chopped fruit in a tissue or container to whomever asked for it. [Tr. 218, 263, 275]

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Asaro testified that employee Ojamo James was discharged a day after Arsova caught him stealing a package of oatmeal. However, on March 2, Arsova merely completed an "Employee Warning Form" indicating that James engaged in the infraction of "theft" when he "was caught walking out of the fridge with an oatmeal in his pocket. No permission was given for him to take this item. This was the second time within in an hour he had been caught with an item."³⁴ [GC 5(h) p. 19; GC 5(f) p. 133-134] James worked for two weeks thereafter until March 16 and the record does not contain, like for other employees who were discharged, a "record of termination" describing the reason for his separation. [GC 5(b) p. 661] Edelman testified that James was terminated, but did not recall the reason. Edelman only recalled that James tried to steal a large box of product *after* he had already been discharged. Prior to the oatmeal incident, on January 30, James had received a first warning because he "was seen on

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³⁴ The record contains Arsova's March 2 warning form to James in two different formats. One of the forms lists the warning number as "other" (as opposed to first, second, etc.) and one does not reference a warning number.

the camera in Shawn and James's office talking on the cell phone while he was supposed to be working."³⁵ [Tr. 811-812, 1007-1008, 1044-1045] [GC 5(f) p. 121]

The Respondent's Version of Events - Sadio

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On about January 15, according to Guevara, he saw Sadio place two quart-sized containers of pineapple inside a plastic bag. Asaro estimated that this amount of pineapple would cost about \$5. However, Asaro testified that the value of an item being stolen is not relevant for disciplinary purposes because it still constitutes theft. Sadio admits there would have been no work-related reason for him to place pineapple in such containers. Rather, he places pineapple in much larger bins after it is chopped. Guevara took the two containers of pineapple from Sadio and told him "he was not supposed to do that." Guevara then took a picture of the containers and sent the photo to Edelman and Asaro with a description of what transpired.³⁶ Edelman called Guevara and told him to terminate Sadio. Guevara told Sadio he was fired, and Sadio "just said, sorry," without denying he tried to take the pineapple. Edelman and Guevara testified that they did not know anything about Sadio's interest in the Union at the time of his discharge. [Tr. 375, 934, 1044, 1109-1110, 1195-1200] [GC 20]

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Guevara admitted he would eat pieces of pineapple Sadio chopped in order to determine whether it was too old to use in the products. Guevara did not just eat the pineapple because he was hungry and wanted a piece. [Tr. 1200-1201]

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The Respondent's disciplinary records include a record of termination dated August 16, 2016 which states that employee Marcos Fernandez was discharged for "stealing cashews from the commissary." Edelman testified that Fernandez was caught putting a few quarts of cashews, which cost \$18 per pound, in a knapsack. [Tr. 816] Peters testified that an individual named Jose Polanco was discharged for stealing a laptop, but there is no record of this termination. [Tr. 1383]

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Thierno Diallo

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Diallo was hired by the Respondent as a runner in 2015 and his schedule was 6:00 a.m. to 2:00 p.m., Wednesday to Sunday. [Tr. 550] Diallo lived in the Bronx and had a long commute to the Falchi Building by subway that sometimes caused him to be late. Payroll records for the period January 1, 2016 to his discharge on April 7 show that Diallo routinely arrived more than 15 minutes late to work and was absent a number of days. [GC 5(a) and

³⁵ Payroll records and schedules also indicate that James was routinely late when his starting time was 6:00 a.m. On about July 4, 2016, James was moved from a 6:00 a.m. to 7:00 a.m. start time. [GC 5(a) and 5(c)].

³⁶ Guevara testified that he sent the picture to Edelman and Asaro by text, but he does not have that text now because his old phone was damaged. He obtained a new phone in February. [Tr. 1220-1221] Asaro testified that he received a blank email from Guevara with just the picture of the two quarts of pineapple that Sadio allegedly tried to steal. After Asaro provided this testimony, the Respondent's counsel represented that the communication was actually a text which could not be found. On cross-examination, Asaro testified that he was among a group of recipients who received the picture and he did not recall whether the communication was by text or email (he merely recalled viewing the picture on his phone). [Tr. 934, 1010] Edelman testified that he and Asaro received an email or text from Guevara indicating that Sadio was putting two quarts of chopped pineapple into his bag to take home. Edelman could not find this electronic communication. [Tr. 1110]

5(b)] The record does not indicate that Diallo was ever offered a later starting time as an accommodation to correct his lateness.

Edelman testified that he was aware of another employee named Nene Diallo who, like Thierno Diallo, lived in the Bronx and struggled with a difficult commute to arrive on time. Nene often arrived more than 15 minutes late, but was never disciplined. Edelman noted that Nene “always let us know that either the trains were late, there were no trains certain days, construction, et cetera, et cetera.” [Tr. 784] [GC 5(a); 5(f)-(i)]

The General Counsel’s Version of Events - Diallo

At the start of Diallo’s employment, Guevara instructed him to call or text when he was going to be late for work. Diallo claims he always did so. [Tr. 573] A few months after Diallo started working for the Respondent, Guevara talked to him about coming in on time. Diallo explained his commute and Guevara told him to do his best not to be late. [Tr. 573-574]

On February 26, Guevara issued Diallo a “first warning” because “he arrived 40 minutes late and did not call to advise he would come late.” Diallo punched in that day at 6:45 a.m. [Tr. 637-639] [749] [R 11] [GC 5(b) p. 245]

Diallo testified that there is a location in the prep kitchen where people leave their phones to charge while they work. However, he generally charged his phone in a different place while he was on break. [Tr. 576]

Diallo is Muslim and often asked Guevara for permission to leave early on Friday to attend prayer at a nearby mosque. Guevara would generally excuse Diallo from work on Friday at about 1:30 p.m. After being released from work, Diallo performed an ablution ritual in the bathroom, clocked out, and left. [Tr. 577-579]

On about Friday, April 7, at 5:31 a.m., Diallo sent a message to Guevara that stated, “Hi good money I’m irro let’s I’m ended so bow nawo.” Diallo testified that he meant to write, “Hi, good morning. I’m sorry to late. I am in the subway now.” [Tr. 634] [R Ex. 10] Diallo got off the subway at 59th Street and Lexington Avenue in Manhattan, took a cab to the facility and arrived at 5:45 a.m. [Tr. 646] Guevara asked Diallo, “what time is it?” Guevara said it is 6:00 a.m. and Guevara said, “okay.” Diallo recalled that Guevara seemed a bit angry like he (Diallo) was late. Payroll records show that Diallo clocking in at 6:45 a.m. on April 7. [Tr. 647] [GC 5(b) p. 1193]

Later that day, Diallo’s phone was low on electrical charge by the time he intended to begin his ablution (about 1:30 p.m.) before going to prayer. Accordingly, Diallo plugged his phone in at the location in the prep kitchen where he had previously seen other people charging their phones. As Diallo was bending down to plug in his phone, Peters saw him and said, “Diallo, what are you doing over there?” Diallo said he was finished for the day and charging his phone before going to prayer. Diallo left to perform his ablution and Peters walked over to where Guevara was stationed. On Diallo’s way back from the bathroom, he told Guevara he was leaving for prayer and proceeded to clock out. However, Guevara stopped Diallo as he was leaving the facility and asked why he (Diallo) had been using his phone. [Tr. 579-581, 647] Diallo described this interaction with Guevara as follows [Tr. 582]:

He ask me, "Diallo, why using your phone?" I say, "Mario, you see me using the phone?" He say, "Why using the phone?" I say, "I need you tell me who tell you I using the phone. I never used the phone. I charging my phone." After he tell me, "No. You fire."

...

5 Yeah. After that, he follow me to the changing room. He say, "Take your stuff. Take your
stuff." I say, "Mario, why you -- why you fire me? Why I take my stuff? I di -- I need to
come back to -- we talk." After that I change my clothes, and he follow me to the
changing room like he want to fight me, and he don't have no way to fight me. After me, I
change my clothes. I take my brush. I put it in the locker, and I close my bag inside. And
10 after, I run before I leave to pray. After I say, all right, I'm good. I'm coming. I didn't talk to
him since that day. And from this, that's Friday. After Saturday, I text him, I want to come
back to work. I see like he angry for me. He didn't pick up phone. He didn't call me back,
that Saturday.

15 Guevara testified that Peters reported to him that Diallo was on his phone in the
production area and he recommended to Edelman and Asaro that Diallo be terminated. [Tr.
1206-1208, 1227-1232]

20 Asaro testified that Guevara (not Peters) saw Diallo watching a video on his phone in the
hallway and notified him of the incident. According to Asaro, a decision was made to terminate
Diallo because of extensive lateness and using the cell phone "egregiously in the hallway."
Neither Edelman nor Asaro recall Edelman being present.

25 Management did not talk to Diallo before the decision was made to terminate him. [Tr.
1035-1038, 1169-1170]

From April 8 to April 11, Diallo attempted to call and text Guevara every day, but
Guevara did not pick up the calls or respond. [Tr. 583]

30 As indicated in the chronology section, Guevara directed Coello to complete two
disciplinary JotForms regarding the incident involving Diallo's cell phone. On April 8, Guevara
directed Coello to complete a "second warning" because Diallo "used the phone, hiding from
everyone on work hour." [GC 5(h) p. 49] On April 10, Guevara directed Coello to complete
another JotForm for the "involuntary termination" of Diallo because "he used his phone while on
work duty, and lateness was an issue. [R 18] We spoke to him about it a lot of times."
35 Guevara did not explain why a warning and record of termination were prepared for the same
incident. [Tr. 965-966, 1229-1232]

40 On about April 12, Diallo went to work and attempted to clock in, but he could not do so.
Diallo went to speak to Guevara, who confirmed that Diallo was fired. Diallo asked Guevara to
tell him why he was fired, but Guevara did not answer. Guevara said, "Call me back. I want to
talk to [Asaro]." [Tr. 583-584]

45 On about April 16, Diallo returned to the facility and spoke to Asaro. Asaro told Diallo he
believed whatever Guevara told him. However, Asaro admitted that everyone (including
Guevara) knows people charge their phones where Diallo was charging his phone on April 7.
Asaro said, "Diallo, no, don't worry. I get you job back." Asaro did not call Diallo back and
would not pick up when Diallo called him. Diallo tried to call Edelman, but he would not answer
either. [Tr. 584-586]

50 A week or two later, Diallo went to the facility and spoke to Edelman. Edelman said
Guevara did not tell him why Diallo had been discharged and he would find out. Two or three

days later, Edelman called Diallo and said there was no way he could get his job back.³⁷ [Tr. 576-587]

5 The General Counsel had certain employees testify to cell phone use at the Respondent's facility. Diallo testified that he saw people charging their phones and talking on their phones. [Tr. 577] Caraballo testified that employees used their phones all the time and that he did not understand there to be a strict policy against it unless it really interfered with work. According to Caraballo, he used his phone in front of Peters and was never told not to do so. [Tr. 406-407] Miranda testified that he was told not to use his phone, but Guevara let him use it to play music with headphones. [Tr. 510-511] Uvaldo testified that he has seen employees using their phones all the time to text and make calls. [Tr. 711]

15 The Respondent's handbook includes the "use of cell phones for personal use while working" as an example of "unacceptable conduct [that] may subject the offer to disciplinary action, up to and including discharge, in the Company's sole discretion." [R 30 p. 18] Peters testified that he allows employees to go into the hallway to make short personal calls when they ask him for permission to do so. Peters requires that employees go into the corridor and remove their gloves to make calls so there is no contamination of the product. [Tr. 1337-1338]

20 The Respondent's disciplinary records show that, other than Diallo, employees Mohammed Trawally, Momou Juwara, Hudi Kabba and Ojamo James were disciplined but not discharged for using their phones. The following is a list of all discipline issued to those employees:

Name/Date	Warning Number	Written By	Exh.	Description
Trawally 12/1/16	First	Genesis Duran	5(i) p. 115	The employee was on his phone while blending soup.
Trawally 6/11/17	Sent home	Arsova	5(h) p. 42	Refused to do assigned task of making soup and was therefore sent home.
Juwara 10/21/16	First	Genesis Duran	5(f) 40	Employee showed up an hour late to work without calling it in.
Juwara 12/25/16	First	Genesis Duran	5(f) p. 39	The employee was having a phone conversation during production in the kitchen and responded to a warning with an apathetic attitude.
Juwara 1/2/17	Second	Genesis Duran	5(f) 38	Did not show up or call in
Juwara 1/22/17	Third	Genesis Duran	5(f) 37	The employee blocked an entrance way and refused to move.
Juwara 3/19/17	Third	Genesis Duran	5(f) 44	Momou is told daily to remove a watch he wears while working. The watch can easily fall into a soup kettle. He refuses to listen and is told to remove it multiple times.
Juwara	Final	Genesis	5(f)	Momou Juwara refused to obey when told not

³⁷ The record contains texts from Diallo to Edelman dated April 26 and 27 in which Diallo asked Edelman to call him. Edelman stated in response, "Sorry Diallo." Diallo testified that he received this text from Edelman after he spoke with him. [Tr. 627] [R 9]

4/7/17		Duran	44	to utilize vegetables supplied to a specific employee. He was warned but continued to do as he wished.
Kabba 1/27/17	First	Peters	5(i) p. 49	I walked into bottle room while the employees was leaned up against the wall talking on the phone. Employee already took a 30 minute break. He was not just checkin the phone quick. He was on the phone while work was supposed to be done.
Kabba 4/3/2017	Second	Peters	5(i) p. 50	at 1:40pm today hudi kabba was told to clean the area where the uniform are instead of doing that he was court sleeping on them
James 1/30/17	First	Peters	5(f) 121	Employee was seen on the camera in Shawn and James's office talking on the cell phone while he was supposed to be working.
James 3/2/17	Other	Arsova	5(h) p. 199	Was caught walking out of the fridge with an oatmeal in his pocket. No permission was given for him to take this item. This was the second time within an hour he had been caught with an item.

The Respondent's records also show that Trawally was often late, but never disciplined as a result. [GC 5(b), (d), (e)-(i)]

5 *The Respondent's Version of Events Leading to the Discharge of Thierno Diallo*

Edelman testified that Diallo came to management frequently in the lead up to the election and said "the pressers and him were all on Juice Press's side." According to Edelman, Diallo was the only employee who talked to him about the Union. [Tr. 1095]

10 Guevara testified that he spoke with Diallo many times about lateness and Diallo explained it was because the train was delayed or the alarm not going off. [Tr. 1207, 1227]

15 Peters testified that, on April 7, at about 1:30 or 1:40 p.m., he and former purchasing manager Carol Goodville saw Diallo in the pressing area while they were performing an inventory review. Diallo was lying on his back on the floor with his phone plugged into the wall. Peters saw the light of Diallo's phone go dark and Diallo stood up. Peters asked Diallo what he was doing and Diallo answered, "I'm on my phone right now. . . . I was charging my phone." Peters told Diallo he was going to have to talk to Guevara and left to do so. Peters reported the
20 incident to Guevara and Guevara said, "okay, no problem. Thank you." According to Peters, Diallo was not in a location where people usually charge their phones because it is dirty, wet, and normally blocked off by buckets stored there. [Tr. 1331-1337] [R 34]

25 According to Guevara, Diallo was terminated for lateness, taking lunch breaks longer than 30 minutes, and speaking on the telephone in the production area.³⁸ Guevara denies that,

³⁸ Neither Asaro nor the disciplinary records indicate that Diallo was discharged for taking breaks longer than 30 minutes. However, Guevara's testimony does tend to confirm Diallo's assertion that Guevara talked to him about returning from his breaks.

at the time, he knew anything about Diallo's feelings regarding the Union. [Tr. 1206-1208, 1227-1232]

Asaro testified that Diallo was terminated for lateness and using his cell phone. As noted above, Asaro believed Diallo's cell phone use was egregious because he was watching video in the hallway during his shift. Asaro claims he had a phone conversation with Diallo about a day or two after the discharge in which Diallo admitted he had been on the phone and late his last day of work. Asaro denied Diallo ever said he was simply charging the phone instead of using it. [Tr. 964-965,1013, 1035-1040]

Chris Caraballo

Caraballo was hired to work in the receiving department on May 10, 2016. His regularly scheduled days off were Sunday to Thursday. Caraballo's original schedule was 6:00 a.m. to 2:00 p.m., but was later changed to 6:30 a.m. to 2:30 p.m.³⁹ Caraballo was offered the different shift because he had difficulty arriving on time at 6:00 a.m. [Tr. 404, 1339, 1343, 1355-1356] Time records show that, from the start of his employment, Caraballo was consistently late more than 15 minutes and this continued after his start time changed from 6:00 a.m. to 6:30 a.m. He also missed several days of work. [GC 5(a) and 5(b)]

The General Counsel's Version of Events - Caraballo

Peters testified that it is common for employees to be released early, starting at about noon when work was winding down, if they do not want to stay until the end of their shifts. Initially, Peters testified that employees who wanted to leave early "definitely ought to let me know. If I'm not there, let [Guevara] know. If Guevara's not there, let . . . [Edelman] or [Asaro] know." However, Peters subsequently testified that employees notify him (not other managers) by text if they wanted to leave early on Sundays when he was off from work. When asked about specific employees who did so, Peters could only identify one recent incident in which an employee named Felix asked him to leave early on Sunday, but could not identify other instances and a search of Peters' phone did not reveal such texts. [Tr. 1344-1350]

Caraballo testified that Peters often told employees they could leave early for the day if they were done with their work. Work was generally light on Sundays in the receiving department because, until about late-May, the Respondent did not receive any deliveries. Even when the Respondent started receiving deliveries on Sundays, there were fewer deliveries than during the rest of the week. [Tr. 404-406]

Caraballo's time records indicate that he left early on Sundays as follows:

Date	Time Out
October 9, 2016	12:56 p.m.
December 4, 2016	1:01 p.m.
December 18, 2016	11:00 a.m.
December 25, 2016	10:00 a.m.
January 7	10:00 a.m.

³⁹ The Respondent's schedules do not reflect a change in Caraballo's hours. [GC 5(d)] However, a review of Caraballo's time records indicate he begin leaving at or after 2:30 p.m. in February. [GC 5(b)]

January 15	11:00 a.m.
February 5	2:11 a.m.
February 12	2:09 a.m.
March 5	1:38 p.m.
March 12	1:45 p.m.
March 19	2:06 p.m.
March 26	2:15 p.m.
April 2	2:20 p.m.
April 16	1:12 p.m.
April 23	2:05 p.m.
May 7	2:02 p.m.
May 14	1:28 p.m.
May 21	1:03 p.m.
June 11	11:33 a.m.

Peters testified that he and Edelman monitor the timesheets of employees. [Tr. 1373-1375].

5 It was Caraballo’s practice to notify Peters when he wanted to leave early if Peters was present. However, on Sundays, when Peters was off, Caraballo would leave early without telling anybody. [Tr. 404-406]

10 Caraballo did not recall seeing Nash for about a month or two following the election, but did start seeing him again in about March. Thereafter, Caraballo talked to Nash about three times per week. [Tr. 457]

15 On February 15, Caraballo received a “first warning” for taking a long lunch break after he was released for break at 11:30 a.m. and came back at 12:22 p.m. [Tr. 1351-1352] [R 20] [GC 5(f) p. 129]

20 On May 30, Peters issued Caraballo a “second warning” which indicated that “for the past few days [he] has been 20-30 min sometimes 1 hour late to work he was warn[ed] multiple times about his lateness.” [Tr. 409, 1354] [GC 24] [GC 5(h) p. 41] For the five days including and immediately preceding May 30, Caraballo’s attendance was as follows [GC 5(b)]:

Date	Time In	Time Out
May 22	6:35 a.m.	2:26 p.m.
May 23	6:50 a.m.	2:07 p.m.
May 28 (Sunday)	6:50 a.m.	1:00 p.m.
May 29	8:10 a.m.	1:02 p.m.
May 30	6:50 a.m.	2:11 p.m.

25 In about late-May or early-June, Caraballo and Nash walked by a group of managers who were having a meeting at a round table in the Falchi Building hallway. Antebi, Kay, Edelman, and Asaro were among the managers who were present, and Caraballo claims he made eye contact with them. [Tr. 456-459]

30 On Sunday, June 11, Caraballo clocked out at 11:33 a.m. and went home early without notifying a manager or supervisor. Caraballo’s work load was light that day and he finished before leaving. In fact, Caraballo helped somebody else with their work before he left.

Caraballo did not see Asaro on June 11 and he was not advised of any special project he was supposed to do.⁴⁰ [Tr. 459, 494-495, 1511-1512] [GC 5(b)]

5 On June 12, while working, Caraballo bumped into Edelman and Edelman asked what time he (Caraballo) left yesterday. Caraballo told Edelman he left at 11:30 a.m. or noon. Edelman said, "Ok, that's it. Go home. You're done. You're gone." Caraballo asked Edelman to discuss the matter in his office, but Edelman refused. [Tr. 460-461] Caraballo described the subsequent exchange as follows [Tr. 461]:

10 I said, "Listen, all due respect, ever since I started working here, Julian has always said that once I finish my job, you don't have to stick around, do nothing for the rest of the hours, we go home because our job is done." And he said, "Who said that?" and I said, "Julian." So then, he just told me to go home

15 Before Caraballo left, Peters walked by and Caraballo stopped him. Caraballo described his conversation with Peters as follows [Tr. 462];

20 I said, "Listen, I finished my work yesterday. You always said, 'Once we're done, we can go home, that's it.'" I finished my job yesterday and then he said, "Did you notify me?" and then I said, "No, I didn't. I never had to ever since I started working here. I've been working Sundays without for the past 13 months, I never had to notify anybody." And then he's like, "Come on, Chris, you've been working here over a year, you should know by now, you have to notify a supervisor before you leave."

25 On June 15, 2017, Edelman and Asaro prepared a record of Caraballo's termination which states [R 21] [Tr. 971]:

30 Christopher was already on a final warning for violating the attendance policy. On Sunday 6/11/17 Chris was nowhere to be found at 12:30PM. James was in the commissary. The Loading dock employees work from 6am - 2pm. The other two employees were still here working. When James asked the guys where he was they said he decided to go home. Basically abandoned the job. Based on the fact that he was on a final warning for attendance he was let go on Monday when he returned to work.

35 The record of termination indicates that it was prepared by Edelman and sent from Edelman's email address, but Asaro testified that he and Edelman wrote it together.

40 The Respondent's disciplinary records include a number of "final" warnings, but those records do not include a "final" warning to Caraballo. [GC 5(f)-(i)]

The Respondent's disciplinary records include the following discipline of employees who left before completing a work assignment and/or leaving without telling a supervisor [GC 5]:⁴¹

⁴⁰ According to Caraballo, employees were sometimes assigned on Sundays to special tasks other than their usual work, but they would be notified of the assignment a week in advance. [Tr. 511]

⁴¹ It was largely impossible to compare the attendance of these employees to the attendance of Caraballo because most of the employees were not listed on the Respondent's schedules. For example,

Name/ Date	Warning Number	Written By	Exh.	Description
Kristine Gil 1/18/16	First	Yonheiry Marine	5(f) p. 45	We told her twice to FIFO her section after she's done packing. She walked out of the building without doing it.
Arcenio Acevedo 3/29/16	Discharge	Denis Miranda	5(i) p.166	Abandoned work duties. After the termination of two of my employees I had to split a ro [writing off page] into the others. I assigned Arcenio Acevedo a store and he simply walked out in front of everybody and saying he wasn't going to do it. Basically, risking all the uptown stores by getting their deliveries extremely late.
Quincy August 4/26/16	First	Yonheiry Marine	5(f) p. 64	He left without packing JP04
Timothy Beasley 11/30/16	Final	Omaira Vargas	5(f) p.108	Left to cash his check without telling his supervisor left the job incompleated came back as if nothing was wrong. Was addressed about this matter did not care.
Jerald Raiford 11/30/16	Third	Omaira Vargas	5(f) p. 34	Left with other employee to cash his check without saying anything. left the job half done
Christian Romano 1/22/17	First	Tyrone Habersham	5(f) p. 24	Christian was asked prior to finishing packing his share of stores to assist other members clean and organize the cooler. He refused so multiple times and left the premises with the cooler dirty.
Elyjah Cook 1/22/17	First	Tyrone Habersham	5(f) p.101	Elyjah was asked prior to finishing packing his share of stores to assist other members clean and organize the cooler. He refused so multiple times and left the premises with the cooler dirty
Daniel Miranda 2/2/17	Second	Guevara	5(i) p. 23	Lost invoicing papers and left without telling supervisor
Isabel Sanchez 6/12/17	Final	Jose Castro	5(h) p. 51, 67	Left without completing job
Ivan Gonzalez 6/12/17	First	Denis Miranda	5(h) p. 6	At the end of shift he didn't take out bins out the truck
Jennifer Salguero 6/12/17	First	Jose Castro	5(i) p. 73	Left without doing their job
Fatoumata	Discharge	Arsova	5(e)	Comin late every single day

employees Fatoumata Kante and Quincy August arrived for work at variable or erratic times, but the schedules do not appear to reflect their scheduled arrival times. Raiford and Francois received disciplines for attendance, including no-call/no-shows. [GC 5]

Kante			p. 10	Leaving early even the job is not done Arguing with everybody Not talking orders literally doing whatever she wants
Jordan Gilliard 7/18/17	Second	Gerardo Cardenas	5(h) p. 35	Employee punched out without notifying the supervisor and left his duties unfinished such as bringing out the empty crates, organizing the work area and sweeping the tags from the floor.
Christian Packer 7/9/17	Second	Gerardo Cardenas	5(h) p. 59	- Disrespectful behavior when asked to perform assigned work duties. - Refused to finish his daily duties and walked off from his shift. - Utilized foul language and loud tone when speaking to the Supervisor - Told supervisor to stop speaking and continued to argue
London Francois 8/1/17	Final	Denis Miranda	5(h) p. 7	I had caught London Francois In the field Stealing hours 2:39 a.m., he was in Front of JP loitering around, instead doing the 4 stores he had in his truck . Then after I ask him to continue on his route and finish up , he waited awhile proceed on his route. He also gave me hard time on his whereabouts before I headed into the field. He kept telling me he was at different store, so I would arrive he then will tell me his another further store on the route. He also left. the commissary without gas / only to come back in middle route to commissary. His actions where intended to steal company hours.

The Respondent's Version of Events - Caraballo

5 Peters and Asaro testified that they spoke to Caraballo many times about his lateness before Peters disciplined him for it on May 30. Peters did not consider it a problem if employees came in ten minutes late, which was common, but Caraballo habitually arrived between 20 to 60 minutes late. Peters testified that it was his practice to show an employee his/her timesheet with lateness circled to demonstrate the problem when he talked to an employee (such as Caraballo) about attendance. [Tr. 1007, 1323, 1342-1343]

10

Although Caraballo did not recall an issue with his attendance after October 2016, text messages between Peters and Caraballo demonstrate certain questioning and criticism regarding his lateness as reflected below:

Date	Time	Description
11/1/2016	10:32 a.m.	Caraballo has not arrived for work and Peters texted, "I can't have guys on my team not showing up or calling to let me know what [is] going on." After Caraballo admitted to have been "really slacking" lately and apologized, Peters responded, "You

		good man i understand how that can be sometimes I don't care if you not here I just need to know if you're going to be here or not that's all . . . I just need you to let me know if you will be here or not."
11/29/2016	6:47 a.m.	Caraballo had not arrived to work and Peters texted, "Hey Chris I'm not sure what's going on but I need guys here if you can't make it I'll have to let you go."
12/22/2016	6:58 a.m.	Caraballo had not arrived to work and Peters texted, "Where you at." At 10:34 a.m., Caraballo responded that he drafted but failed to send a message that he was going to the doctor. Peters texted, "it's cool I just need to know what's going on."
1/8/2017	10:57 a.m.	Caraballo had not arrived to work and Peters texted, "why didn't you come in today." Caraballo explained that he was up late and had a little too much to drink for his 21st birthday the previous day. Peters responded, "Bro you can't keep doing this this the last time you do this next time I'll have to let you go."
2/26/2017 (Sunday)	8:07 a.m.	Peters texted, "How come you didn't go to work today. Caraballo responded, "I'm getting X-rays for my knee today but I wasn't sure about who I was supposed to call about the appointment since you and jerin aren't there." Peters replied, "you still had text someone because they see u not there and think you are a no call no show next time let anyone of us know my phone still work I'll let them know." Caraballo said he would "take down everyone else's number in case so it won't happen next time."
3/11/2017	7:26 a.m.	Peters texted, "How come you didn't go in today I coulda put someone else there now it's only 2 guys there today."
4/4/2017	6:05 a.m.	Caraballo notified Peters he would be absent because he was not feeling well. Peters texted, "Chris you can't hit me up 30 min before you your time to tell me you can't make it I don't understand that." Caraballo indicated he does not know how his knee will feel until he wakes up. Peters texted, "[t]hat's the thing Chris I need guys here this is a job if you can't lift I gotta move you I need guys that can lift I understand the situation but I need guys."
4/9/2017	7:11 a.m.	Peters texted, "Are you at work?" Caraballo responded, "no I overslept I'll be there in 15 minutes." Peters answers, "Come on Chris every day you are late."

On June 11, Asaro arrived for work and saw receivers Caraballo, Felix and Borig in the loading dock. The employees told Asaro they did not have much to do that day. Accordingly, Asaro allegedly told them he wanted to get some extra work done in the afternoon by cleaning out a new space in the front of the juice kitchen that had been used for storage. At about noon, Asaro saw Felix and Borig working in the juice kitchen and asked them if they were going to clean out that new room. Felix and Borig said they were going to do it right now. Asaro asked the two employees where Caraballo was, and they said he left. Asaro asked why Caraballo left, and the employees told him he was done for the day. According to Asaro, the receivers had not begun the special assignment he gave them that morning and, regardless, Caraballo should have been helping the other two employees with the work they were still doing. Asaro further

testified that an employee should not leave without telling him in the middle of a shift. According to Asaro, it was rare for employees to leave early. [Tr. 940-942, 995-996]

5 None of the managers who were called as witnesses by the Respondent testified to the specific manner in which Caraballo was discharged.

Peters and Asaro testified that they did not know anything about Caraballo's feelings regarding the Union at the time of his discharge. [Tr. 942, 1351]

10 **Daniel Miranda and Daniel Uvaldo**

Miranda and Uvaldo were employees in the Respondent's shipping department. Miranda was hired on June 24, 2014 and Uvaldo was hired in July 2016. Miranda left the Respondent's employ for about six months as a result of a car accident injury in about late-2015 and returned in about May 2016. Miranda worked Sunday through Thursday from 6:00 a.m. to 2:00 p.m. Uvaldo largely worked Monday through Friday from 6:00 a.m. to 2:00 p.m.⁴² Miranda was discharged on July 19. As of the trial, Uvaldo was still employed by the Respondent. [Tr. 506, 522, 526, 659, 1534-1535, 1540-1541]

20 Miranda and Uvaldo received orders for picking and pulling items (such as frozen fruit) from Coello and Garcia for shipment to the Respondent's stores. As noted in the chronology section, there is some ambiguity regarding Coello's position. Edelman and Asaro initially testified that Coello was a supervisor. The Respondent also introduced into evidence certain documents that purport to be discipline prepared by Coello. Nevertheless, contrary to his initial testimony, Edelman subsequently testified that Coello was a team leader and Garcia was the supervisor. [Tr. 524, 973, 1112-1113, 1122, 1161] [R 22, 28]

30 Uvaldo testified that, from the start of his employment, Miranda and Garcia fought and sometimes cursed at each other. On one occasion in early-2017, after Carmen told Miranda to hurry up, Miranda responded, "fuck you." [Tr. 690-691]

The Respondent introduced into evidence the following exhibits which purport to be written warnings for Miranda:

Date	Warning Number	Written By	Exh.	Description
7/11/2015	Other	Andrew Taylor	R 27	Employee was told a week ago that he could not hang out in the building after his shift. Today when I came in I saw him hanging out in front of the produce kitchen. 45 minutes later he was still there. When I asked Mario if he was on break he said he was done for the day. When we both went out to talk to him again about leaving I reminded him that we had this discussion last weekend and he shrugged his shoulders. This is his second warning for failure

⁴² Since July, at Uvaldo's request, he has worked Monday to Thursday instead of Monday to Friday. [Tr. 659]

				to follow procedure and insubordination.
6/16/2016	First	Omaira Vargas	R 4	No show no call
2/2/2017	Second	Guevara	R 5	Lost invoicing papers and left without telling supervisor.
4/21/17	Third	Coello	R 28	No call, No show

The Respondent introduced into evidence the following exhibits which purport to be written warnings for Uvaldo:

Date	Warning Number	Written By	Exh.	Description
4/19/2015	Second	Coello	R 22	Calling out an hour and a half after his usual shift.
7/13/2017	First	Asaro	GC 27	Was sent Home for coming at 7:15 am 1 hour and 15 min late for work
7/20/2017	Second	Asaro	R 23	Employee called out at 7:06am for his 6am shift
8/24/2017	Final	Asaro	R24	Daniel Uvaldo was scheduled to work on August 23 rd 2017 from 6am to 2pm, I received a text from Daniel at 6:18am from him letting me know he wasn't coming in.

5

The General Counsel's Version of Events - Miranda and Uvaldo

10 Miranda denied receiving any of the written warnings the Respondent introduced into evidence. [Tr. 513, 519] The General Counsel noted that there were a number of differences between the warnings allegedly issued to Miranda and other warnings in the record. The Miranda warnings used a different font than other warnings and did not contain headers and footers reflecting the date and path of the JotForm.

15 Uvaldo denied he received or was told he would receive a written warning before July. According to Uvaldo, he would notify Coello when he was going to be late and notify Guevara or Coello if he was going to be absent. [Tr. 663-664] Time records indicate that Uvaldo often arrived after 6:00 a.m. [GC 5(a)-(b)]

20 On about June 15, Garcia asked Miranda to bring her some protein bags. Miranda told her he would get them when he finished doing what he was doing. According to Miranda, Garcia called him a name in Spanish, stomped her feet, and looked mad. Uvaldo testified that he was present for this conversation and he recalled Garcia asking Miranda to bring her something. Miranda said to give him five or ten minutes because he was busy. Garcia responded, "why do you come to work for, to be lazy." Miranda said, "You're not my supervisor. 25 No one can tell me." According to Uvaldo, Miranda then walked away. [Tr. 522-523, 667-668]

30 Uvaldo testified that, the same day (June 15), on his way back from break, a coworker said Edelman was looking for him and Miranda. Uvaldo tried to find Edelman, but could not and returned to work. Uvaldo later heard Edelman shouting and described the incident as follows [Tr. 669-670]:

I was helping my coworkers stack up the frozen product and when I was helping them out Shawn was just yelling saying, "Where the Daniels at?" My coworker said, "Shawn is looking for you." I went out and he said, "Why the F are you not doing your job?" I told him, "I am doing my job. If you want you can check in the back and I'm helping the coworkers with the frozen produce." And he just started yelling at me saying, "Where is the other Daniel?" And I said, "I don't know." And he said, "Oh, what you was doing?" I was like, "I told you." When he said that I got a little nervous.

...

I remember that I told him to not yell at me because I'm not no little kid and he said that, "When I'm not here you listen to Carmen, Stephanie and Jose." And I said, "Why do we need three supervisors?" And we just kept going at it and I told him, "Do you want me to leave?" And he asked me – I mean, I said, "Do you want me to leave?" And he said, "Are you quitting?" And I said, "No. I'm asking you do you want me to leave, like go home." And he said, "Are you quitting?" I said, "No. If you don't want me to leave I'll just walk away." And I walked away.

According to Uvaldo, he later heard Edelman yelling in the shipping department and assumed he was screaming at Miranda. Uvaldo then talked to Miranda and they confirmed that Edelman was upset because he could not find them and thought they were not doing their jobs. Uvaldo testified that a supervisor named Liz told them to go talk to Edelman, but Uvaldo said, "No, because he's mad." Liz said she would ask Edelman to talk to them. [Tr. 670-671]

Uvaldo testified that he and Miranda went to speak with Edelman in his office. Uvaldo asked why Edelman yelled at him, and Edelman answered that it was because he (Edelman) was looking for Uvaldo. Uvaldo said he had finished his job and that Edelman did not have to yell at him. Uvaldo then asked why two employees, he and Miranda, needed three supervisors. Uvaldo and Miranda also asked Edelman when they would get a raise. Uvaldo said, "I've been here since a year and I haven't got no raise." Edelman said the employees would get their raises soon and they (Edelman, Uvaldo, and Miranda) would have a meeting on Tuesday with the three supervisors (Coello, Garcia, and Jose).⁴³ [Tr. 671-673, 929]

According to Miranda, on June 15, Edelman yelled at Uvaldo regarding some missing orders. Uvaldo became frustrated and told Miranda he wanted to quit. However, Miranda convinced Uvaldo to come with him to talk to Edelman and they went to his office at about 11:00 a.m. Uvaldo apologized to Edelman, but said there were too many supervisors giving them orders, with one supervisor saying one thing and another supervisor saying something else. Uvaldo said it gets confusing and asked who they should listen to. Edelman said they should have a meeting next Tuesday and discuss it. Miranda then asked whether they could receive a pay raise. Following Miranda's request, Uvaldo asked for a pay raise as well since there were now more stores and more work. Edelman said they could discuss it on Tuesday. [Tr. 522-523]

⁴³ As of the week ending Sunday, June 11, Uvaldo was earning \$9 per hour, which was \$2 per hour less than the New York state minimum wage (effective January 1). Uvaldo's wage rate was increased to the minimum wage of \$11 per hour for the week ending Sunday, June 18. Accordingly, Uvaldo apparently received a pay increase in the paycheck following the conversation he and Miranda had with Edelman on June 15. [GC 5(b) p. 3051, 3248]

Edelman admits he met with Miranda and Uvaldo about a week prior to Miranda's discharge. However, according to Edelman, Asaro was present and it was a disciplinary meeting "to have a conversation with the two of them regarding job performance, on time, lateness, their interaction with the girls in that station." Although Edelman perceived the meeting as disciplinary, he testified that, "the only thing we took out of that meeting was they had come to the meeting expecting that they were getting raises." [Tr. 1114-1115]

On Friday, June 16 (Miranda's day off), Edelman called Miranda and told him to come in Monday instead of Sunday. [Tr. 526]

On Monday, June 19, Miranda spoke to Edelman and Guevara in the Falchi hallway. [Tr. 527] Edelman testified on direct examination that he and Guevara had a disciplinary discussion with Miranda on June 19, but sent him home because Miranda smelled of marijuana and "was high as a kite." Edelman described the conversation as follows [Tr. 1111]:

A . . . At that point in time he stunk of marijuana so bad that we couldn't even sit at the table with him. So we didn't sit down with him; we actually stood because it was so bad. And then we explained to him that obviously, lateness'. He also had some complaints against him from the picking and packing team that he worked with that he was verbally abusive to them, he was screaming at them, and he was just very, very tough to work him.

Q How did Mr. Miranda respond?

A He was high as a kite so he was pretty much expressionless.

Q Did he say anything?

A No, not a word. I don't think he could if he wanted to.⁴⁴

. . .

A . . . We sent him home that day; told him cool off because he was completely high as a kite; he didn't know where he was. So we told him to go home at that point and that we'll contact him and let him know after Mario and myself discussed it.

Guevara offered no corroborating testimony regarding this alleged conversation.

Further, the General Counsel produced an audio recording to impeach Edelman's testimony. Miranda credibly testified on rebuttal that he recorded the conversation with his iPhone voice memo application and replayed the recording (from his phone) on the stand. The audio recording showed a date/time stamp of June 19, 2017, at 9:19:24, and a transcript of the recording reads as follows [GC 32]:

Edelman: Hey Danny, how are you?

⁴⁴ Edelman later testified that Miranda was "completely incoherent" throughout the meeting.

Miranda: I'm okay.

5 Edelman: Danny, so listen, you know, after talking to a lot of people, talking to a lot of staff, we're going to separate, alright, I'm going to move in another direction and do some different stuff over there. Alright?

Edelman: Nothing personal. It is what it is right now. Alright? Alright? Anything else?

10 Miranda: What you mean? Move me where?

Edelman: No, I'm, I'm letting you go.

Miranda: Are you firing me?

15 Edelman: Yeah, right now.

Miranda: Why?

20 Edelman: Huh.

Miranda: Can I know why?

Edelman: Yeah, I'm just cutting back in that position right now. I'm changing that whole entire area up, and I'm just moving everything around. I've got to change it over there, I've got to change it. It's just not working out, the way we're setting everything up just cause, the way the product is getting to the stores, the way things have gone. I've got to change everybody around over there. I've got to move that whole entire department out.

25

30

Miranda: What did I do wrong to get fired?

Edelman: You didn't do anything wrong, I just said that to you, I'm just cutting back that position; I'm cutting back a lot of those positions over there.

35

Miranda: Okay

40 Edelman: Alright? I mean if something else opens up and you want to do something else, I can give you a call but it's up to you.

Miranda: It's up to you too, I'll just be waiting.

45 Edelman: Well do you want to do something else? Or you don't want to do something else.

Miranda: I want to do something else.

50 Edelman: Do what?

Miranda: I want to do something else. I don't want to be at home.

5 Edelman: No I understand, I understand, so give me a day or two to figure out if i can use you in another spot, maybe on the loading dock with the other guys, with Julian, maybe as a runner inside the kitchen or something like that. Let me see if I can figure something else out. Listen, I don't want to fire people, it's not what I want to do but I got to change up over there, it's a mess, you know it's a mess over there. It's a mess.

10 Miranda: I guess.

Edelman: Alright?

15 Miranda: I guess.

Edelman: Alright man, alright, thank you, are you done?

Miranda: I guess

20 As discussed in the chronology section, in about late-June or early-July, Asaro questioned Uvaldo and an employee named Jose about a conversation they were having with Nash. [Tr. 674-678]

25 On July 7, 2017, Edelman completed a record of termination for Miranda which states that Miranda was discharged because he was “[d]isrespectful and verbally abusive towards other employees.” [R 29]

30 On July 11, 2017, the Respondent submitted a position statement to the Region which discussed Miranda’s discharge. The Respondent noted that Miranda had a history of written warnings and other attendance issues. However, the Respondent claimed that the final incident which broke the camel’s back and lead to Miranda’s termination occurred as follows [GC 35]:

35 On June 15, 2017, Mr. Miranda was grossly disrespectful and verbally abusive toward another Commissary employee, cursing and shouting at her. Carmen Garcia, a former employee who quit shortly following the incident, asked for Mr. Miranda’s help during her shift at the Commissary. Instead of helping his coworker, Mr. Miranda began screaming at her, shouting “I’m not doing anything. Shut the fuck up, you can’t fucking tell me what to do,” along with other profane and aggressive language. Treating a fellow employee in this disrespectful matter was in clear violation of the Juice Press Employee Handbook. (See Sections 1-6 and 5-1 of Exhibit A). Ms. Garcia informed both Shawn Edelman and James Asaro about Mr. Miranda’s hostile behavior. Mr. Miranda was subsequently terminated on June 19, 2017 for his gross misconduct in violation of Juice Press policy.

45 As indicated above, on July 13, Asaro disciplined and sent Uvaldo home for arriving late (although Uvaldo credibly testified that he never received the written warning). Uvaldo testified that he woke up at 6:30 a.m. and sent Coello a text message at about 6:35 a.m. indicating he

would be late.⁴⁵ Asaro testified that Uvaldo arrived for work at 7:15 a.m. When Uvaldo arrived, Coello told him to talk to Asaro. Asaro asked Uvaldo why he came in late. [Tr. 678-680] Uvaldo described the remainder of the conversation as follows [Tr. 680]:

5 I told him that I sent a message to Stephanie and he said that Stephanie never
told him nothing And I told him, "Oh, I could finish my job fast. You know
that." He just said, "Well, it doesn't matter about that. What matters is you have to
be here at 6:00 in the morning." And I told him, "Other people come in and you
didn't send them home." And he just told me, "Oh, you're going to get a write-up."
10 And I said, "Can I get my check, please?" He said, "No, checks are given out at
2:00 p.m."

15 Although the testimony was not entirely clear, Asaro seemed to admit he saw Uvaldo's
July 13 text to Coello on Coello's phone. Accordingly, Asaro gave his business card to Uvaldo
and directed Uvaldo to notify him (not Coello) if he was going to be late or absent. Asaro
testified that he did this because Coello was not "necessarily" a supervisor. Asaro testified that
employees generally notify their direct supervisor instead of him if they are going to be late to
work. [Tr. 989-990] [973, 1122, 1161]

20 In about mid-July, at about 6:00 a.m. or 6:30 a.m., Uvaldo notified Coello that he was
going to be absent because his wife was having emergency surgery. Uvaldo was later told he
would receive a written warning, but he did not actually receive it. The Respondent introduced
into evidence an exhibit of a warning for Uvaldo dated July 20 which states, "employee called
out at 7:06 am for his 6 am shift."⁴⁶ Asaro did not testify to this incident. [Tr. 682, 708] [R 23]

25 On August 24, 2017, Asaro prepared a "final warning" that accused Uvaldo of calling out
at 6:18 a.m. [R 24]

30 *The Respondent's Version of Events - Miranda and Uvaldo*

Edelman testified that, in about May, as he was arriving for work one day at about 6:00
a.m., he saw Miranda smoking marijuana in between the trucks in the loading dock. Edelman
allegedly asked Miranda what he was doing and Miranda apologized before going back to work.
Later, Miranda approached Edelman and apologized that he "effed up." Miranda did not receive
35 a written warning as a result of the alleged incident. Miranda denied this occurred. [Tr. 1113,
1150-1151, 1542]

40 Edelman further testified that Coello and Garcia complained about Miranda "being
uncooperative" and Uvaldo laughing about it. Miranda was particularly uncooperative about
going into the freezer. Edelman claims that Coello and Garcia reported to him that Miranda

⁴⁵ Uvaldo identified the supervisor as "Stephanie." Asaro testified that Adys Coello's full first name is Astephanie (not Adys). [Tr. 973]

⁴⁶ The date of this absence is not clear. The discipline was submitted on July 20, but Asaro signed it on July 18. Uvaldo worked a full day on both July 18 and July 20. Uvaldo was absent on July 17. [GC 5(b) p. 4206]

“would get verbally upset and almost downright abusive to the point where he would say to them like, fuck you, I’m not going in the freezer.”⁴⁷ [Tr. 1112-1115]

5 Edelman admitted that the audio recording of him separating Miranda’s employment was an accurate recording of a conversation he had with Miranda. However, Edelman did not “think” the conversation occurred the day of the termination and stated [Tr. 1177-1178]:

10 I don’t know exactly when that conversation took place . . . but I’m more apt to think that conversation took place way previous from the time that Danny was found with marijuana and smoking. . . . I don’t want to say 100 percent, but Danny worked on the loading dock. And he was moved from loading dock into shipping and receiving, into smoothie packing. So, during that whole entire transition we went above and beyond to try to find this kid some work; not to fire him and throw him out the door. So, my recollection is that that conversation
15 took place anywhere between six to nine months prior to what is being said was the termination conversation.

Edelman further testified [Tr. 1178]:

20 So, from my recollection there were numerous conversation with Danny Miranda over the last year. A lot of them were performance based. Danny has also been moved around in the commissary to numerous positions. So, there were conversations with moving him to other spots, trying to get him to show up to work, do his job, try to get him to go into another area that maybe wasn’t so
25 tasking on him, where he had to -- I mean, for lack of a better word, where he had to really think; maybe move him into a receiving position where it was more just moving product around.

30 After Miranda testified on rebuttal, the Respondent’s counsel described a method of changing the date of an iPhone voice memo by editing the recording. An iPhone voice memo can be shortened by a few seconds and this creates a new recording that is saved with the word “copy” added to the end of the title. The date displayed on the new recording will be the date the original recording was edited rather than the date the original recording was created. The title of the new recording can then be edited to remove the word “copy” and the original
35 recording deleted, giving the impression that the original was recorded on the date it was edited rather than the date it was created. However, if Miranda used this method to edit the original voice memo and change the date, he would have had to do so on June 19. Miranda denied that he did so and denied that he knew how to alter the date in this fashion. [Tr. 1520-1540]

40 After this meeting, according to Edelman, he and Guevara decided to discharge Miranda, and Guevara notified Miranda of the decision by phone. Edelman denied that the receiving employees’ request for a raise had anything to do with the decision to terminate Miranda. [Tr. 1111-1115]

⁴⁷ The Respondent asserted in its brief that Mirada made these alleged comments on June 15. However, the record contains no non-hearsay evidence that Miranda made the comments and Edelman did not testify that the alleged comments, as reported to him, occurred on a specific date.

Asaro testified that he had three or four discussions with Uvaldo regarding lateness during the two-month period before he (Asaro) left the Respondent on August 28. A “couple times,” Uvaldo allegedly texted Asaro an hour or more after he was supposed to arrive. In particular, according to Asaro, Uvaldo showed up an hour and 15 minutes late and was sent home because Asaro had already covered his shift with a different employee. Asaro explained, “I can’t just leave the station empty. So I already put another person there. I moved somebody from another station, and I didn’t need him that day. The person was already hard at work.” Asaro claimed that Uvaldo was paid for four hours of work (even though he did not work) because he came in on July 13. However, the Respondent’s payroll records do not indicate Uvaldo was paid for any hours that day. [Tr. 943-945] [GC 5(b) p. 4009]

Credibility

This case contains a number of credibility disputes and I will preliminarily address some of them here before turning to the legal analysis.

It is clear to me that Edelman gave intentionally false testimony regarding the discharge of Miranda on June 19. After Edelman listened to the audio recording, he failed to state for certain that the conversation did not take place on June 19 or provide clear testimony regarding an alternative date. Edelman merely testified that he thought the recorded conversation occurred at some point during an earlier time period when the Respondent was allegedly moving Miranda between positions due to performance issues. Edelman’s explanation in this regard was not only ambiguous and uncertain, but was inconsistent with the recorded conversation. Edelman can be heard in the voice memo stating that Miranda was being separated because he (Edelman) was “changing the entire area up” and that Miranda “didn’t do anything wrong.” Edelman was not attempting to find Miranda a new position because Miranda was having performance problems in his current one. The record is also devoid of any corroborating evidence that such a reorganization occurred or that Miranda was laid off for a brief period of time as result. Significantly, the Respondent did not attempt to solicit corroborating testimony from Guevara, and Edelman’s testimony was not consistent with the record of termination or the Respondent’s position statement explaining the termination.

Conversely, Miranda credibly testified to the date and manner of the audio recording, which contained a date stamp of June 19. Miranda was also corroborated by Raul. Although the Respondent identified a method of creating an edited copy of the recording with a new date stamp, such an edited version would have had to be created on June 19. Thus, Miranda would have had to determine on June 19, before a charge was filed and a trial was contemplated, that it would be beneficial for him to pass off a conversation which occurred months earlier as his actual discharge. This would be very quick and sophisticated thinking for someone Edelman described as “completely incoherent” and “high as a kite.” Miranda credibly denied having done so and I find the likelihood of Respondent’s theory to be extremely remote.

Edelman’s testimony with regard to Miranda’s discharge cannot be squared with the recording as merely inaccurate testimony based on a faulty recollection as opposed to an intentional fabrication of events. Edelman described Miranda on June 19 as entirely unresponsive and the recording demonstrates that the opposite was true. Edelman also claimed that the discussion started as a disciplinary meeting in which he and Guevara talked about Miranda’s lateness and mistreatment of other employees, whereas Edelman actually told Miranda he had done nothing wrong. Further, Edelman claimed, contrary to the recording, that Miranda was not fired on the spot and Guevara called to tell him by phone. In sum, Edelman’s version of events bares no relation to reality and his willingness to manufacture testimony out of

thin air “calls into question the credibility of his entire testimony.” *Shambaugh & Son, L.P.*, 364 NLRB No. 26 (2016).

5 Likewise, Edelman’s testimony regarding the discharge of Daniels was not credible. Similar to his testimony concerning Miranda, Edelman claimed that he and Guevara waited for Daniels to conduct a disciplinary meeting on June 12. Edelman further claimed that Daniels was “very, very upset and agitated,” “irate,” and cursing when he arrived. According to Edelman, Daniels said, “What is this fucking bullshit about? This is fucking ridiculous. I’ve fucking had it. Etcetera, etcetera. Just went off.” However, the Respondent’s records of the discharge make no mention of any misconduct by Daniels during a disciplinary meeting. 10 Indeed, Guevara testified that he only recalled this alleged meeting with Daniels “a little” and described Daniel’s attitude “as if he didn’t care.” Guevara’s testimony that he only had a slight recollection of the conversation in which Daniels appeared indifferent is at odds with Edelman’s description of Daniels as caring so much he completely lost his temper (which is conduct one would expect Guevara to recall more than “a little”). Edelman and Guevara also provided conflicting testimony regarding what the alleged meeting was about (lateness or no call/no shows), who notified Daniels of the discharge, and when the disciplinary record was prepared (before or after the meeting).⁴⁸ 15

20 In stark contrast to Edelman and Guevara, Daniels impressed me as a credible witness. He admittedly had a difficult time recalling certain dates, but evinced a detailed and consistent recollection of the events themselves. Daniels did not appear prone to exaggeration and provided measured, fair and honest answers in response to whomever was asking him questions (including the Respondent’s counsel). Daniels was corroborated by Raul to the extent they both testified that Guevara used Raul’s phone to fire Daniels and that Daniels was helping an older employee move produce on a day he (Daniels) was sent home for being “late” (i.e., January 8). I credit Daniels’ testimony that managers often watched him speaking to Nash. I also credit Daniels with regard to the events in January and, particularly, find that the alleged termination meeting Edelman and Guevara claim to have had with Daniels on January 12 did not occur. And although Guevara did not successfully corroborate Edelman’s testimony regarding such a meeting, Guevara’s failed attempt to do so still tends to undermine his credibility. 25 30

35 Like Daniels, Jose impressed me as a particularly credible witness with a detailed recollection of events. Jose is still employed with the Respondent and is not a discriminatee with any pecuniary interest in the proceeding. The Board has recognized that such testimony is likely to be especially reliable. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996); *PPG Aerospace Industries, Inc.*, 355 NLRB 103, 104 (2010). Jose evinced a fair, honest, and straightforward demeanor, and did not appear inclined to overreach or tailor his testimony for maximum effect. In particular, Jose credibly testified that Guevara offered him a raise if he did not sign with the Union. Meanwhile, Guevara was unconvincing in his general denial that he spoke to employees about the Union. The Respondent’s failure to ask Guevara 40

⁴⁸ Edelman claimed that Daniels was primarily being disciplined for alleged no-call/no-shows, while Guevara made no mention of no-call/no-shows. Edelman testified that no-call/no-shows would be documented with a written warning if it occurred, but Daniels had no disciplinary history of no-call/no-shows. In fact, Daniels had not been absent since December 15, 2016, and the initial discharge record refers to Daniels “calling out” (as opposed to not calling at all).

about specific instances of such interaction, raised during the General Counsel's case-in-chief, also limits my ability to favorably evaluate and credit his testimony.

5 With regard to the testimony of Sadio and Guevara, I did not find the testimony of either witness to be entirely credible. Guevara was not credible in denying he talked to employees about the Union and did not specifically deny he interrogated Sadio about his support for the Union. I found Sadio credible in his testimony regarding Guevara's interrogation of him. And although Sadio had significant difficulty recalling dates, including the date of his discharge, I credit Sadio's testimony that Guevara questioned him regarding his support for the Union on the 10 day he was discharged. It is common for witnesses to have difficulty recalling the dates of specific events, but have a clear recollection of the proximity of one event to another.

15 I also credit Sadio's testimony that he was abruptly discharged on the spot once Guevara accused him of trying to steal pineapple. Again, Sadio evinced a credible demeanor on this point. Guevara offered less compelling testimony that it was a much more deliberate process in which he took a picture (presumably with his phone) of the pineapple Sadio was attempting to steal, sent that picture to Edelman and Asaro, and heard back from Edelman with directions that Sadio be discharged. The managers did not provide consistent testimony about their electronic communication with Guevara at the time of Sadio's discharge and the 20 Respondent failed to explain why such electronic communication could not be located on at least two devices for production at trial. Sadio also credibly testified without contradiction that the picture of pineapple which Guevara allegedly sent to Edelman and Asaro was not at his (Sadio's) work station. That Guevara only took the picture at some point following the discharge in a different location would explain why the Respondent could not produce a communication between Guevara which enclosed the attached picture at the time of the termination. 25

I do credit Guevara to the extent he testified that he saw Sadio putting two quarts of pineapple in a bag. While I did not find Guevara to be, in general, a credible witness, he was most confident and detailed in describing how he came upon Sadio packing up two quarts of 30 pineapple. Meanwhile, Sadio appeared less confident and consistent on this point than in the remainder of his testimony. Sadio testified that "Guevara saw [him] putting the pineapple in the cup" and accused him of taking the pineapple home even though he told Guevara, "No, I'm giving the pineapple to those guests here." Shortly thereafter, Sadio testified that the pineapple "was in a cup" and "it was sitting next to them, and they would eat it." Thus, Sadio did not 35 clearly testify whether Guevara approached him while he (Sadio) was cutting pineapple and putting it in a cup or when Sadio's coworkers were eating the pineapple out of the cup. It was also not clear to me from Sadio's description exactly where the co-workers were located and what they were doing while this event transpired. Further, I find it somewhat odd that Guevara would even think to accuse Sadio of "taking the pineapple home" if it was being eaten out of a 40 small open cup (instead of in larger capped containers).

I credit Diallo's testimony over that of Guevara and Peters with regard to events that occurred during the campaign, but do not entirely credit Diallo with regard to the events of April 45 7 (the day he was discharged). Thus, I do not credit Diallo's testimony that he arrived on time on April 7 (he clocked in at 6:45 a.m.), and I credit Peters' testimony as to how he came upon Diallo with his phone plugged into the wall on April 7 (as Peters was more credible in his testimony on this point). However, Diallo seemed more measured and honest in testimony regarding his conversations with management during the campaign, while Guevara and Peters were not credible at all in testifying to their observation and interaction with employees 50 regarding the Union. In particular, I credit Diallo to the extent he testified that Guevara questioned him and a coworker named Barry about their thoughts regarding the Union.

Paredes was not a credible witness. He is still employed by the Respondent and appeared intent on flatly denying any knowledge about the Union, the organizing campaign, and the election, while other witnesses (Nash, Miranda, and Diallo) credibly testified that Paredes spoke to them about the Union on several occasions. The Respondent's counsel tried to resuscitate Paredes' testimony in this regard with a prior statement, but was unable to do so. Throughout his testimony, Paredes evinced a smirking and evasive demeanor that did not indicate he was taking the proceedings seriously. In particular, I credit Jose's testimony that Paredes repeatedly asked him, during about the week before the election, to commit to voting "no" against the Union and receive a wage increase of \$1.

I also credit Raul to the extent he testified that he heard Guevara direct Paredes to solicit the names of employees who opposed the Union and give those employees a wage increase. Like Jose, Raul was still employed by the Respondent when he testified and has nothing to gain from this proceeding. Nevertheless, Raul was not as credible as Jose. Raul seemed to conflate or exaggerate certain events in a manner that was inconsistent with his pre-trial affidavit, and was unclear as to when they occurred. However, Raul was able to recall Arsova (admittedly) taking a picture of employees and Guevara's use of his (Raul's) phone to discharge Daniels (credibly testified to by Daniels). Further, Jose credibly testified that Guevara and Paredes (separately) asked him to oppose the Union and receive a pay raise, which provides a context that tends to support Raul's testimony. Meanwhile, Paredes and Guevara were not credible witnesses. Faced with imperfect testimony by Raul that is, nevertheless, somewhat supported by the credible testimony of Jose, and testimony by Guevara and Paredes which is less credible than that of Raul, I find that Guevara told Paredes to obtain the names of employees who would oppose the Union and receive a wage increase.

Other than the date (July 6), I credit Raul's testimony that Asaro directed him not to speak with Nash. Asaro admits he interrupted Raul's conversation with "another gentleman" and accused Raul of taking a second break. However, Asaro offered no explanation why he thought Raul was on a second break or what would compel him to render such an accusation. It is more likely that Asaro had an adverse reaction to seeing Raul speaking to a Union representative and took action to stop it (as described by Raul). I also find it telling of Asaro's credibility that he sought to minimize any appearance that he was intruding upon the union activity of an employee by not admitting (until asked directly on cross-examination) to whom Raul was talking. Raul's affidavit, introduced by the Respondent, is also consistent with his testimony.⁴⁹

Peters and Caraballo offered dramatically different testimony regarding their interaction following the filing of the petition. Caraballo claimed that Peters constantly monitored employees while they were speaking to Nash and regularly approached employees to question them about their conversations with Nash. Meanwhile, with one exception, Peters denied he ever approached an employee to discuss the Union. Peters testified that he was asked a question about union dues by one employee and provided information in "The 'Do's and Don'ts' During a Union Organizing Drive." However, the "Do's and Don'ts" Peters admittedly relied upon includes a directive that "[m]anagement should not stand silent during a union organizing drive." Further, Jose (a particularly credible witness) testified that Peters made comments to

⁴⁹ I do not rely on the affidavit alone as substantive evidence, but note that it corroborates Raul's credible non-hearsay testimony regarding this conversation.

him which were similar to those attributed to Peters by Caraballo, while Peters struck me as a witness who attempted to inaccurately purge his testimony of any reference to the Union (see example, fn. 19). Accordingly, I generally credit Caraballo with regard to Peters' observation and questioning of employees who spoke to Nash.

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I also credit Caraballo to the extent he testified that Asaro did not give him and his coworkers a direction to perform a specific work assignment at the end of the day on June 11. Unlike other incidents when employees have been discharged for insubordination, Caraballo's record of termination makes no mention of him being given or disobeying such a directive. The omission is particularly striking since the Respondent attempted to exaggerate Caraballo's misconduct in the same record of termination by inaccurately claiming that he was on a final warning. It does not seem likely that the Respondent would exaggerate the basis for discipline in one respect while simultaneously failing to note obvious misconduct in another respect. Further, Edelman (who did not deny he was the manager who discharged Caraballo) did not testify that Caraballo was discharged for insubordination (as opposed to leaving early).

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Finally, based upon the foregoing and other considerations, including the demeanor of the witnesses, I note that I generally found Daniels, Jose, Miranda, Uvaldo, Nash, and Hedge more credible than Edelman, Asaro, Guevara, and Peters.

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Analysis and Conclusions

Alleged Violations of Section 8(a)(1) of the Act which did not involve Adverse Employment Actions by the Respondent

25

Surveillance of Employees in the Falchi Building Hallway

The General Counsel contends that the Respondent's managers engaged in surveillance of its employees' union activities in the Falchi Building hallway. The Board has held that "an employer's mere observation of open, public union activity on or near its property does not constitute surveillanace." *Washington Fruit and Produce Co.*, 343 NLRB 1215, 1217 (2004). However, an employer engages in unlawful surveillance when its agents position themselves in an irregular manner that does not serve a legitimate business purpose and "constitute[s] more than ordinary or casual observation of public union activity." *Sands Hotel & Casino, San Juan*, 306 NLRB 172, 172, fn.5 and fn.6 (1992). To determine whether the observation of union activity was casual or coercive, the Board considers such indicia as the departure of the observer from his/her normal practice, the frequency and duration of the observation, the proximity of the observer to the union activity, and whether the observation occurred in the context of other coercive conduct. *Aladdin Gaming, LLC*, 345 NLRB 585 (2005); *Brown Transportation Corp.*, 294 NLRB 969, 971-972 (1989). A manager need not be in a position to hear what employees are discussing if, for example, they are in a position to see the exchange of documents (such as authorization cards). *Simon Debartolo Group*, 357 NLRB 1887, 1896 (2011) (watching employees through a glass window gave employer the opportunity to observe their interaction with the union representatives and see whether any documents were being exchanged). Indeed, the mere act of monitoring employees' union activity can contribute to an "atmosphere of fear and intimidation." *The Smithfield Packing Co., Ind.*, 344 NLRB 1, 163 (2004). Ultimately, the determination as to whether an employer has engaged in unlawful surveillance is an objective one based on the totality of the circumstances. *Sage Dining Services, Inc.*, 312 NLRB 845, 856 (1993); *Brown Transportation Corp.*, 294 NLRB 969, 971-972 (1989).

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Here, the Respondent does not dispute that, before the Union began organizing employees, managers had little time to sit or stand in one place. Further, the Respondent does not contend that managers would have any legitimate business reason for stationing themselves at locations where they could observe employees interacting with Union representatives. Rather, the Respondent's managers simply denied they ever engaged in such conduct.

I credit testimony that the Respondent's managers took time out of their busy schedules after the petition was filed to position themselves near employees who were speaking with Nash. In particular, I credit testimony that managers who engaged in such conduct included Edelman, Asaro, Guevara, Peter, and Arsova. This change in the regular routine of managers was out of the ordinary. Although it is not clear whether managers always stationed themselves in such a way as to hear what employees were discussing with Union representatives, they were often close enough to view employee interaction with Nash and observe whether documents were being prepared or exchanged between them. Nash also credibly testified that managers sometimes approached and interrupted his conversations with employees. In the case of receiving employees, Peters followed up on his observation of employees with, as discussed more fully below, the unlawful interrogations of employees about their conversations with Nash.⁵⁰ And although we do not know exactly how many times managers engaged in the observation of employees' conversations with Union representatives, it was a new practice which occurred with sufficient regularity to be noticeable. It is also fair to conclude that a reasonable employee would feel particularly reluctant to speak with Union representatives under the watchful eye of management after Daniels and Sadio were unlawfully discharged because of their union activities (discussed below). Under the totality of the circumstances, I concluded that the Respondent violated Section 8(a)(1) of the Act by engaging in the surveillance of employees' union activities. See, e.g., *Methodist Hospital of Kentucky, Inc.*, 318 NLRB 1107, 1133-1134 (1995); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 503 (1995); *Trump Plaza Hotel and Casino*, 310 NLRB 1162 (1993).

Arsova Photograph of Employees Speaking to Nash

I do not find, as alleged, that Arsova engaged in surveillance by taking a picture of employees talking to Nash on November 17 at 6:50 a.m. The Board has generally held that photographing public union activity on or near an employer's property amounts to more than mere observation "because such pictorial record keeping tends to create fear among employees of future reprisals." *Washington Fruit and Produce Co.*, 343 NLRB 1215, 1217 (2004). Therefore, "the Board requires an employer engaged in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees." *Washington Fruit and Produce Co.*, 343 NLRB 1215, 1217 (2004) quoting *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997). Here, Arsova provided undisputed testimony that the employees in the picture were unsupervised on the day and time in question. The employees appeared to be taking a break shortly after they arrived for work and well before such breaks

⁵⁰ Although the complaint does not specifically allege that Peters engaged in unlawful surveillance, the evidence indicates he did and the surveillance of other managers would have a greater coercive impact in the context of Peters' activity.

are normally taken (beginning at about 10:00 a.m.). Accordingly, the Respondent demonstrated that Arsova had a reasonable basis for taking the picture to record what appeared to be employee misconduct while their direct supervisors were not present.

5 My finding would be different if I were to credit Raul's testimony that Edelman directed him not to speak with Nash after Arsova took the picture of employees. However, I decline to do so. Raul stated in his affidavit that no manager made such a statement to him until after Daniels was discharged. Further, in his affidavit, Raul did not indicate that Edelman said anything to him about Nash or the Union. Rather, Edelman questioned Raul about why he was
10 outside and for how long. Thus, I do not find that Arsova's photograph in conjunction with Edelman's questioning was anything more than a proper investigation of what reasonably appeared to be employee misconduct.

15 *The January 17 and January 19 Meetings – Solicitation of Grievances, including Complaints concerning Increases in Pay, and Promises to Remedy those Grievances*

The General Counsel contends that the Respondent's managers solicited employee grievances, including complaints concerning increases in pay, and promised to remedy those grievances if employees rejected the Union. The Board has long held that an employer violates
20 Section 8(a)(1) of the Act by promising an increase in wages or benefits if employees reject union representation. See *20th Century Glove Co., Inc.*, 165 NLRB 781 (1967). An employer may be found to have made such an unlawful promise even if it does not specifically commit to granting employees a particular improvement in wages or benefits so long as the totality of the circumstances indicate a willingness to address employee dissatisfaction without union
25 representation. *Multi-Ad Service, Inc.*, 331 NLRB 1226, 1227, 1241 (2000).

In campaign meetings, managers told employees it was important they feel fairly paid and treated, and requested one year from a "no" vote to improve. In the January 17 meeting with receiving department, Asaro said "not everybody that was supposed to get a raise got one" and "I understand that not everybody is making what they think they deserve." Asaro went on to say, "[t]he only thing I can tell you is that in the future, if you guys vote no, you give us a year, if
30 we don't do right by you, the next year you can vote again." In the larger meeting on January 19, Antebi told employees, "I know that you need to feel that you are paid fairly and treated fairly if we're going to succeed. What I'm asking you is to let me and the rest of the Juice Press
35 management show you over the next year that you do not need a union for us to hear you and your concerns. We intend to respond to your concerns." The Board has found similar comments violative of the Act. See *St. Francis Hospital*, 263 NLRB 834, 851 (1982) (employer's basic theme was that wage complaints would be favorably resolved if employees rejected the union and gave the employer a year to improve); *Royal Petroleum Corp.*, 243 NLRB 508, fn.2
40 (employer's speech conveyed a promise of future benefits if the employees were to abandon their Union support for one year).

Management readily advised employees that they could not lawfully make specific promises, but strained to convince employees that their concerns would receive new and more
45 favorable consideration following a vote against the Union. See *Majestic Star Casino, LLC*, 335 NLRB 407, 408 (2001) (statement by employer that it could not make promises did not prevent the finding of a violation where employer also told employees it would look into their concerns). At the January 19 meeting, Antebi stated:

50 My lawyers have told me that it's illegal for me to make specific promises with the election scheduled. But I ask you to please believe me and my honor. That I say

that we're going to make sure you're paid fairly and treated fairly. We are going to make sure we hear all of your concerns and that we create a mechanism for you to be responsive to those concerns. We are going to make sure we hear your concerns. And that we create a mechanism of responding to your concerns.

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It is important to note that the Respondent specifically stated that it would implement *new* initiatives during the year after employees reject union representation. The Respondent did not simply argue that union representation was unnecessary because management has always been willing to listen to employee concerns and improve employee wages on an ad hoc basis.⁵¹ See *Aldworth Co., Inc.*, 338 NLRB 137, 142-143, 149 (2002). Further, management did not limit comments to an explanation of minimum wage increases over the next three years, but suggested that the Respondent had additional discretion to make adjustments to employee pay. Indeed, several employees were already earning more than the minimum hourly wage and Antebi assured employees the Respondent would hear "all of your concerns."

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Based upon the foregoing, I find that the Respondent, by Antebi and Asaro, violated Section 8(a)(1) of the Act by soliciting employee grievances, including concerns regarding increases in pay, and promising to remedy them if they rejected the Union.

20 *Interrogation of Employees by Peters*

The General Counsel contends, and I find, that the Respondent, by Peters, violated Section 8(a)(1) of the Act by interrogating employees regarding their union activities. The Board recently explained the *Rossmore House* standard for evaluating the lawfulness of an interrogation under the totality of the circumstance. *Bristol Industrial Corp.*, 366 NLRB No. 101 (June 7, 2018) citing *Rossmore House*, 269 NLRB 1176, 1178 (1984). The Board stated in *Bristol Industries*:

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This inquiry involves a case-by-case analysis of various factors, including (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity, (2) the nature of the information sought, (3) the identity of the interrogator, (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)." The Board also considers whether or not the interrogated employee is an open and active union supporter. See, e.g., *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 7 (2016), enfd. in relevant part 871 F.3d 811 (8th Cir. 2017). These factors "are not to be mechanically applied"; they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, 269 NLRB at 1178 fn. 20.

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⁵¹ The General Counsel contends that Kay violated the Act by soliciting grievances and impliedly promising to remedy them. I disagree. Kay's comments were more a reflection of management's position regarding its current practices without a promise of future benefits, in stating, "I think that a lot of us are very open, we're very fair and understanding of what goes on. We'll always have these discussions. We may not agree every time. I'm not going to tell you bullshit right, that you know that we agree all the time, we may not agree but we're going to try to do the best." Rather, it was Antebi and Asaro who stretched the bounds of legality by endeavoring to assure employees that their working conditions would change for the better if they voted "no."

As discussed in the credibility section, I credit Caraballo's testimony that Peters questioned him and other receiving employees on a number of occasions about their conversations with Nash. Peters was a highly placed department head within the Commissary's managerial structure and the direct supervisor with disciplinary authority over the employees he was questioning. Meanwhile, the employees whom Peters questioned felt compelled to agree with what he said and minimize what they discussed with Nash. See *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007) (employee attempts to conceal their union activity weighs in favor of finding an interrogation unlawful). The interrogations by Peters also occurred in the context of other unfair labor practices, including illegal surveillance of employees' union activities and the unlawful discharge of employees. Under the totality of the circumstances, Peters' persistent questioning of employees would tend to restrain, coerce, or interfere with the exercise of their rights under the Act. Accordingly, I find that the Respondent, by Peters, violated Section 8(a)(1) of the Act by interrogating employees regarding their union activities.

Interrogations, Promises and Threats by Guevara and Paredes

As the General Counsel contends, I find that Guevara unlawfully interrogated employees Sadio, Jose, Diallo, and Barry about their union activities. I also find that Guevara and Paredes (at Guevara's direction) interrogated employees Jose and Raul about their Union support and promised them wage increases if they rejected the Union. I do not find, as the General Counsel asserts, that Guevara promised employees Diallo and Barry unspecified benefits if they rejected the Union and threatened them with unspecified reprisals if they elected the Union.

As discussed in the credibility section, I credit Sadio's testimony that Guevara questioned him four times regarding his support for the Union. Like Peters, Guevara is a highly placed manager and direct supervisor with disciplinary authority over Sadio. In fact, Guevara unlawfully discharged Sadio (discussed below) the same day Guevara questioned him regarding his Union support. Sadio expressed displeasure at being interrogated by Guevara and initially refused to disclose his pronion sentiments. See *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007). The interrogation also occurred in the context of other unfair labor practices during the Respondent's antiunion campaign. Accordingly, I find that Guevara violated Section 8(a)(1) of the Act by interrogating Sadio regarding his Union support.

I have also credited Jose's testimony that Guevara offered him a raise if he rejected the Union. The law is clear that a promise or grant of benefits to employees to dissuade them from supporting a union violates section 8(a)(1) of the Act. *Capital EMI Music, Inc.*, 311 NLRB 997 (1993). Further, although the comment by Guevara was not couched as a question, it had the same coercive effect of an interrogation in requiring Jose to state a position on the Union in order to obtain the benefit. See *Westwood Health Care Center*, 330 NLRB 935, 941, fn.21 (2000). The fact that Jose was inclined to equivocate and not immediately tell Guevara his intentions tends to support a finding that Guevara's conduct was coercive. Accordingly, I find that Guevara violated Section 8(a)(1) of the Act by interrogating Jose regarding his Union support and offering him a wage increase if he rejected the Union.

I further find that the Respondent, by Guevara and Paredes, violated Section 8(a)(1) of the Act by interrogating employees regarding their willingness to oppose the Union and offering employees a wage increase for doing so. As discussed in the credibility section, I credit Jose's testimony that Paredes asked him several times during the week prior to the election to vote "no" and receive a \$1 wage increase from Guevara. I have also credited Raul's testimony that he heard Guevara direct Paredes to convey such an offer to employees. Thus, Guevara imbued Paredes with actual authority to act as the Respondent's agent with regard to the

interrogation of employees regarding their opposition to the Union and promise of a wage benefit for doing so. *Albertson's Inc.*, 307 NLRB 787 (1992); *Tyson Foods*, 311 NLRB 552, 556 (1993). As noted above, such conduct is unlawful.

5 Finally, I find that the Respondent, by Guevara, unlawfully interrogated Diallo and Barry regarding their Union support. As referenced in the credibility section, I credit Diallo's testimony that Guevara questioned him and a coworker named Barry regarding their thoughts about the Union. Diallo and Barry both equivocated and evinced discomfort answering the question one way or the other. Guevara added to the pressure and coerciveness of the interaction by
10 indicating that the results of the Union election would have some sort of consequences as to what the Respondent was going "to do for [the] worker." Under the circumstances, I find that Guevara's interrogation of Diallo and Barry violated Section 8(a)(1) of the Act.

15 I do not deem it necessary to find, as the General Counsel urges, that Guevara promised some sort of benefit and made some sort of threat in his conversation with Diallo and Barry, independent of the unlawful interrogation discussed above. The testimony of Diallo was ambiguous and it is not clear what Guevara meant when he said, "[a]fter the Union they're going to find out what they're going to do for worker. If the Union win, they know what to do. If the Union don't win, they know what to do." As indicated above, the statement by Guevara would
20 tend to emphasize that the Respondent was extremely concerned about Union support among employees and that the result of the election would have some sort of consequence for employees. However, I find the statement too vague to constitute an unlawful promise or threat.

25 *Antebi Eavesdropping on Raul Guita and a Union Representative, Interrogation of Employees, and Direction to Raul Guita not Speak with a Union Representative*

30 The General Counsel contends that Antebi acted unlawfully when he engaged in surveillance of a conversation between Raul and Hedge, interrogated a group of employees, directed Raul to stop speaking with Nash, and impliedly threatened Raul with unspecified reprisals if he continued to speak with Nash. Other than his alleged surveillance of Raul and Hedge, I find that Antebi violated the Act as alleged.

35 I do not find that Antebi engaged in surveillance by attempting to overhear a discussion between Raul and Hedge near the elevator bank of the Falchi Building prior to the election. Antebi testified that he sometimes sat in that area to work and the record does not indicate he followed Raul and Hedge to the area in an attempt to overhear their conversation. Hedge and Raul saw Antebi standing (as opposed to sitting), but that Antebi may have stood up is not conduct that strikes me as particularly out of the ordinary. Hedge specifically testified that he did not see Antebi looking in their direction and it was not clear that Antebi was situated in a
40 position to hear what Hedge and Raul were saying or see what they were doing. The record also failed to establish that Antebi was situated near Hedge and Raul for long. Accordingly, upon the totality of the circumstances, I will dismiss the allegation that the Respondent, by Antebi, violated Section 8(a)(1) of the Act by engaging in surveillance of the conversation between Hedge and Raul. See, e.g., *Westpac Electric, Inc.*, 321 NLRB 1322, 1381 (1996).

45 I do find that Antebi, on a Thursday in about June, unlawfully interrogated employees about their discussion with Nash. Jose credibly testified in significant detail and without contradiction to an incident in which he (with his girlfriend) and other employees were talking to Nash while waiting by the elevator for their paychecks. After Nash left, Antebi came by and
50 asked employees what Nash said to them. As the founder of the business who does not normally speak to employees, except at a large meeting in which he committed an unfair labor

practice, Antebi would present an imposing and intimidating antiunion figure. Antebi's opposition to the Union was widely disseminated and Jose did not feel comfortable disclosing what employees discussed with Nash. Further, the coercive impact of the exchange was likely to be enhanced by the unlawful and contemporaneous discharge of Caraballo in about the same month. Accordingly, I find that the Respondent, by Antebi, violated Section 8(a)(1) of the Act by interrogating employees regarding their union activities.

I also find that Antebi, in about the summer, violated the Act by directing Raul not to speak with Nash. *North Hills Office Services, Inc.*, 344 NLRB 1083 (2005) (supervisor violated Section 8(a)(1) of the Act by directing employee not to speak with union organizer). Antebi allegedly told Raul he was tired of telling him to stop speaking to "the guy from the Union." The testimony is somewhat perplexing because Raul did not clearly testify that Antebi previously directed him not to speak with Nash. Further, it was not my impression of Raul, as a witness, that he could entirely segregate what was said in a conversation with one manager versus another. However, Antebi was not called upon to deny the conversation and Raul's testimony was consistent with his affidavit. Accordingly, I credit Raul.

Having credited Raul, I agree with the General Counsel that Antebi's conduct was coercive. It had the characteristic of unlawful surveillance to the extent Antebi went out of his way to approach and comment on Raul's conversation with Nash, thus effectively notifying the employee that his union activity was being observed. It also had the characteristic of an unlawful threat to the extent a directive from Antebi, the founder of the company, could be expected to be enforced through discipline or discharge. That Caraballo was contemporaneously terminated for talking to Nash (discussed below) would tend to confirm that serious disciplinary consequences would result if Raul continued to do so himself. Accordingly, I find that the Respondent, by Antebi, violated Section 8(a)(1) of the Act by directing Raul not to speak with a Union representative and impliedly threatening Raul with unspecified reprisals if he continued to do so.

Asaro Interrogation of Employees and Direction that Raul Guita Stop Speaking to a Union Representative

The General Counsel contends, and I find, that Asaro violated Section 8(a)(1) of the Act by interrogating employees Uvaldo and coworker named Jose regarding a conversation with Nash in late-June or early-July. Asaro did not specifically deny or address the incident and I credit Uvaldo. Three times during a ten-minute period, Asaro walked by and stared at a group of employees (including Uvaldo and Jose) who were on their break speaking with Nash. On their way back from break, Uvaldo and Jose were stopped by Asaro, who asked them what they discussed with Nash. Asaro was second in command at the Commissary and the employees did not tell Asaro the truth about what they discussed. That Antebi had asked a group of employees the same question would also tend to enhance the impression that the Respondent was concerned at the highest levels about their conversations with Nash. In addition, Asaro's questioning of employees occurred shortly after the discharge of Caraballo. Based upon the foregoing, and the totality of the circumstances, I find that the Respondent, by Asaro, violated Section 8(a)(1) of the Act by interrogating employees regarding their union activities.

The General Counsel also contends, and I find, that Asaro violated Section 8(a)(1) of the Act by, on July 6, interrupting Raul while he was speaking to Nash in the hallway and directing him to stop talking to Nash. As discussed in the credibility section, I credit Raul's testimony regarding his exchange with Asaro on July 6. Asaro admitted he saw Raul speaking with Nash and erroneously accused him of taking a second break, but offered no explanation why he

(Asaro) mistakenly believed it was Raul's second break. Asaro's unexplained display of hostility toward Raul for talking to Nash smacks of harassment toward an employee exercising his Section 7 rights. And although Asaro did not expressly threaten Raul with discipline, the firm directive would imply such a consequence for defying it. That the incident occurred shortly after Antebi engaged in similar conduct and Caraballo was discharged for engaging in the same type of union activity would also tend to enhance employees' perception that talking to Nash, in violation of a managerial directive, would lead to discipline. Accordingly, I find that the Respondent, by Asaro, violated Section 8(a)(1) by directing Raul not to talk to a Union representative.⁵² See *North Hills Office Services, Inc.*, 344 NLRB 1083 (2005)

Alleged Adverse Employment Actions in Violation of Section 8(a)(3) and/or (1) of the Act

Tequan Daniels Discipline, Sending Home, Reassignment, and Discharge

The General Counsel contends that the Respondent discharged Daniels because of his Union activities. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), "the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of employee union activity." *Baptistas Bakery, Inc.*, 352 NLRB 547, 549, fn.6 (2008). The elements of the General Counsel's initial burden "are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer." *Auto Nation, Inc.*, 360 NLRB 1298, 1301 (2014). While the second step of a *Wright Line* analysis is necessary in "mixed-motive" cases where some valid rationale contributed to the alleged unlawful action, such an analysis is not necessary if the Respondent's stated reason for discharging the discriminatee has been rejected as entirely pretextual. *Parkview Lounge, LLC*, 366 NLRB No. 71 (Apr. 26, 2018); *K-Air Corp.*, 360 NLRB 143, 144 (2014). An employer's antiunion motivation may be established by evidence such as managerial admissions of hostility toward employee union activities, the timing of an adverse action, departures from past practice, disparate treatment of discriminatees, shifting, inconsistent or irrational explanations for the treatment of discriminatees, evidence that the employer's proffered explanation of the adverse action is pretext, and other contemporaneous unfair labor practices. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 14 (May 31, 2018); *Novato Healthcare Center*, 365 NLRB No. 137 (Sep. 29, 2017); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

Here, Daniels spent significant time prior to his discharge speaking to Nash while managers watched him do so. Accordingly, Daniels engaged in union activities and the Respondent was aware of it.

I also find the evidence sufficient to establish that antiunion animus was a significant motivating factor in the Respondent's quick succession of adverse employment actions against Daniels. As discussed above, the Respondent admittedly opposed the Union and engaged in extensive violations of Section 8(a)(1) of the Act in the course of its campaign.

The Respondent also demonstrated a discriminatory motivation in how it treated Daniels following the filing of the petition and in comparison to other employees. Throughout his

⁵² The complaint does not plead and the General Counsel does not otherwise contend that Asaro's conduct, like Antebi's, amounts to an unlawful threat. Accordingly, I do not address it as such.

employment, Daniels was often late. However, he was not disciplined until after the Union filed a petition and was discharged shortly before he had an opportunity to vote in the election. Although Guevara generically testified that Daniels failed to call before he was going to be late, Guevara offered no explanation why such conduct was excused in advance of the petition and grounds for discipline thereafter. Further, the record contains significant evidence that other employees were not disciplined for attendance infractions. Guevara claimed that, unlike Daniels, other employees notified him if they were going to be late or absent. However, Daniels was more credible in testifying that he did notify Guevara of attendance issues and the Respondent was unable to produce texts to Guevara from other employees to confirm that Daniels was less vigilant in notifying Guevara of lateness and absences.

Guevara failed to offer a legitimate explanation why he sent Daniels home on January 6 and January 8 and assigned Daniels to wash totes on January 7.⁵³ Edelman testified that childcare issues are an extenuating circumstance for purposes of attendance and that employees are not normally sent home as a form of discipline unless there is some practical reason for doing so (e.g., employees who had an altercation needed to be separated). I credit Daniels' testimony that he provided timely notice to Guevara of such a childcare issue on January 5. Further, Daniels credibly testified without contradiction that Guevara admitted the same and, nevertheless, offered a nonsensical rationale for sending Daniels home on January 6 (i.e., on January 5, Daniels failed to call a non-working number, which had never been used, to say he would be absent). Meanwhile, Guevara offered the perplexing testimony that Daniels was disciplined on January 5 for "lateness" even though Daniels was absent (not late) on January 5 and arrived to work on time on January 4. Guevara also failed to deny or explain why, on January 7, he had Daniels switch assignments with the employee who washed totes. Finally, I credit Daniels' testimony regarding the events that occurred on January 8 and note that Guevara did not use the JotForm to discipline Daniels or include in the disciplinary form any details of his (Daniels) alleged lateness that day. Given that Guevara, twice, took the unusually punitive step of sending Daniels home, it is particularly surprising that Guevara did not (as in other written warnings) include any details or explanation of those decisions.

The Respondent's failure to present Daniels with discipline and give him an opportunity to correct the alleged problem (in accordance with the Respondent's practice, as described by Edelman) is also evidence of an intent to create a false narrative of employee misconduct. See *Lord Industries, Inc.*, 207 NLRB 419, 422 (1973).

Despite the Respondent's effort to build a paper trail in advance of Daniels' discharge, its discharge of Daniels was obviously pretextual. The Respondent admits that Daniels would not have been discharged for attendance if he did not engage in misconduct during a meeting on January 12. However, the record of termination that Guevara prepared for Daniels on January 12 states only, "he was consistently coming late to work and not showing to work, he failed to complete duties" (without any mention of a meeting). The disciplinary form that Guevara had Coello complete, dated January 12, states only, "we had a meeting with [Daniels] about calling out and his tardiness." In a position statement submitted to the Region during the investigation, the Respondent attributed Daniels' discharge to his lateness and unexcused absences. None of these writings refer to any alleged misconduct by Daniels during a meeting as a reason for his termination. Perhaps upon the realization that poor attendance (including

⁵³ Guevara did not indicate how late Daniels allegedly arrived on January 6 or specifically dispute the details that Daniel provided regarding the events of that day.

that of Daniels) was routinely excused, it was only at trial that the Respondent concocted the claim that Daniels was insubordinate during a disciplinary meeting. As discussed in the credibility section, I am entirely comfortable finding that such a meeting did not occur.⁵⁴ The Respondent's shifting, inconsistent and pretextual rational for Daniels' discharge are strong evidence that the actual reason is discriminatory.

In sum, evidence of the Respondent's coercive antiunion conduct in the course of its campaign, the timing of its quick succession of adverse employment actions against Daniels (following the petition and before the election), disparate treatment of Daniels before and after the filing of the petition, disparate treatment of Daniels compared to other employees, and shifting and deficient explanations by the Respondent for its conduct, establish a prima facie case that antiunion animus was a substantial motivating factor in the discipline, sending home, reassignment, and discharge of Daniels.

The Respondent did not establish a *Wright Line* defense with regard to the Daniels allegations. The Respondent admits that Daniels would not have been discharged if he had not engaged in alleged misconduct during a meeting that did not, in fact, occur. Since the Respondent's stated reason for discharging Daniels is pure pretext, there is no need to conduct a mixed-motive analysis to determine if the Respondent would have discharged Daniels regardless of his union activities. *Parkview Lounge, LLC*, 366 NLRB No. 71 (Apr. 26, 2018); *K-Air Corp.*, 360 NLRB 143, 144 (2014). Further, since the Respondent did not make any effort to explain why Daniels was assigned to wash totes on January 7, a *Wright Line* defense cannot be established with regard to that allegation either.

Unlike Daniels' discharge and reassignment, the Respondent's written warnings and decisions to send him home require a mixed-motive review. Guevara has issued discipline to certain employees when they come in late, particularly if the lateness occurred without notifying a supervisor in advance. However, a mixed-motive analysis requires little more discussion than what has been addressed above with regard the General Counsel's prima facie case. Edelman testified that employees are not normally sent home for being late and Guevara did not effectively explain why he sent Daniels home on January 6 and 8. Daniels credibly testified that he always called Guevara in advance of his lateness and to the specific events in January. However, even if I were to accept Guevara's testimony that Daniels had a habit of not calling in advance, the Respondent failed to explain why such conduct was excused before the petition was filed and a basis for discipline thereafter. The Respondent also failed to establish through the introduction of appropriate texts that nondiscriminatees were excused from disciplined if they provided notice and routinely disciplined if they failed to do so.

Based upon the foregoing, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining, sending home, reassigning and discharging Daniels because of his union activities.

Jaby Sadio Discharge

⁵⁴ It is particularly telling that the electronically dated record of termination makes no reference to a meeting. The handwritten disciplinary record, though dated January 12, could have been created later. Further, we know from Miranda's audio recording that this Respondent was not above concocting an entirely false narrative regarding an alleged discharge meeting.

The General Counsel contends that the Respondent discharged Sadio because of his Union support and union activities. As discussed in the credibility section, I credit Sadio's testimony that Guevara questioned him regarding his Union support on about four occasions. On the last two occasions, including the day of Sadio's discharge, Sadio told Guevara he liked the Union. Accordingly, I find that the Respondent was aware of Sadio's pronoun sentiments.

I also find the evidence sufficient to conclude that antiunion animus was a significant motivating factor in Sadio's discharge. The Respondent was concerned enough about possible union representation of its employees to engage in contemporaneous conduct which violated Section 8(a)(3) and (1) of the Act. Most noteworthy, Guevara expressed a particular interest in Sadio's support for the Union by questioning him about it multiple times, including the day Sadio was discharged. The timing of Sadio's discharge - the same day Sadio confirmed his Union support in response to an unlawful interrogation and shortly before he had an opportunity to vote in the election - strongly suggests a discriminatory intent.

It is also significant that Guevara discharged Sadio on the spot without consulting Edelman or Asaro (see credibility section). Edelman and Asaro were the only managers at the Commissary with authority to discharge employees and Asaro testified that Sadio was a good employee whose separation hurt the company. That Guevara rushed to discharge Sadio without going through the standard procedure of consulting upper management is particularly significant evidence that Guevara was harboring an unlawful predisposition to remove him and less concerned about other legitimate business considerations. See *Dayton Tire & Rubber Co.*, 216 NLRB 1003, 1015 (1975).

The Respondent relies on an incident involving the theft of a package of oatmeal by nondiscriminatee Ojamo James as evidence of consistent treatment and lawful intent, but I view the James incident differently. On March 2, Arsova issued James an "employee warning form" for "theft" of a package of oatmeal, which was the "second time within an hour he had been caught with an item." Thus, James was not disciplined the first time he was caught stealing and was not (like Sadio) discharged on the spot by a department manager the second time he was caught stealing (even though James had received a recent warning for using his cell phone on working time). In fact, James continued to work for two weeks after the incident of theft and, unlike for other employees who have been terminated, the Respondent did not complete a "record of termination" indicating that James was discharged for theft. Further, Edelman did not recall that James was discharged for theft. Rather, Edelman's only recollection of a theft associated with the discharge of James was that James attempted to steal something *after* he had already been terminated. Thus, the evidence indicates that the Respondent's treatment of James was far different than Guevara's sudden discharge of Sadio, and such disparate treatment supports (rather than undermines) the finding of a discriminatory motive.

Based upon the foregoing, the General Counsel established a prima facie case that a significant reason for the Respondent's discharge of Sadio was his support for the Union.

Having found that the General Counsel made out a prima facie case, I turn to the Respondent's *Wright Line* defense and reject it. With regard to theft, the evidence includes a single record of termination dated August 16, 2016, which states that employee Marcos Fernandez was discharged for "stealing cashews from the commissary." Edelman testified that Fernandez was caught putting a few quarters of cashews (which cost \$18 per pound) in a knapsack. Peters testified that an employee named Jose Polanco was fired for stealing a laptop, but we have no documentary confirmation of the same and the theft of a computer is not, in my opinion, comparable to the theft of two quarts of pineapple among the 50 or 60 cases of

5 pineapple that Sadio chopped each day. The Respondent's handbook does not require the discharge of an employee for theft (it being discretionary) and the evidence indicates that at least one employee (James) was not discharged for two incidents of theft in quick succession. Accordingly, the Respondent did not prove that Sadio would have been discharged regardless of his Union support. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Sadio because of his Union support.

Thierno Diallo Discharge

10 The General Counsel contends that Diallo was discharged in violation of Section 8(a)(3) and (1) of the Act because of his union activities, and I agree. Diallo spoke at the January 19 meeting as reflected in the audio recording and his comment was favorable to union representation. I credit Diallo's testimony that Guevara subsequently told him he heard what Diallo said at the meeting. Further, I credit Diallo's testimony that Peters and Guevara both
15 spoke to him about the Union and watched him while he was speaking with Nash. Diallo was also referenced as an alleged discriminatee in a charge filed by the Union on January 17. Accordingly, I find that the Respondent was aware of Diallo's union activities.

20 It should also be noted that Diallo reacted adversely when Peters attempted to convince him to vote against the Union and when Guevara stated that he heard what Diallo said at the January 19 meeting. Thus, although Diallo did not specifically tell managers that he supported the Union (beyond his comment on January 19), he did not deny that he supported the Union and was not particularly receptive to the Respondent's antiunion message.

25 I find the evidence sufficient to conclude that antiunion animus was a significant motivating factor in Diallo's discharge. The Respondent moved uncommonly fast in discharging Diallo. Peters saw him with his phone plugged in at about 1:30 a.m. and Diallo was discharged minutes later. Edelman testified that either he or Asaro would normally speak to the employee and supervisor involved in a disciplinary matter, but neither Edelman nor Asaro spoke to Diallo
30 or Peterson before the decision was made to discharge Diallo.⁵⁵ Perhaps as a result, Asaro somehow came away with the erroneous conclusion that Diallo had been watching a video in the hallway even though Peters saw Diallo in a different location (not the hallway) and only briefly saw the light of the phone before Diallo shut it off. Here, the Respondent's rush to discharge Diallo upon exaggerated claims of misconduct without thoroughly investigating the matter to obtain the actual facts, in contrast to standard practice, is evidence of its desire to
35 capitalize upon a possible instance of employee misconduct to justify an unlawful discharge. *Novato Healthcare Center*, 365 NLR No. 137(Sep. 29, 2017) (employer talked to only one supervisor and unlawfully terminated employee immediately without fully investigating what occurred); *Midnight Rose Hotel & Casino, Inc.*, 342 NLRB 1003, 1005 (2004) (employer relied
40 on single report to immediately and unlawfully discharge an employee without conducting a full investigation).

45 The record also includes significant evidence of disparate treatment. Four employees other than Diallo were disciplined for using the phone on working time, but none were discharged. Of those employees, Mohammed Trawally was not discharged even though he was often late and subsequently disciplined for insubordination. Momou Juwara was not

⁵⁵ Likewise, Guevara did not talk to Diallo until after the decision had already been made to discharge him.

discharge even though he received warnings for attendance issues (including a no-call/no-show) before and after the phone incident and had multiple warnings for insubordination. James was not discharged even though, as discussed in the section regarding Sadio, he was subsequently caught stealing. Finally, Kabba was not discharged even though he was subsequently caught sleeping at work. In addition to these individuals who received discipline for using their phones, witnesses credibly testified that other employees used their phones with impunity.

It is also noteworthy that Peters specifically directed employees to leave the production area and use their phones in the hallway in order to avoid any contamination of the product. Trawally and Juwara were not discharged even though they were seen using their phones during production. Trawally “was on his phone while blending soup.” Meanwhile, Asaro exaggerated the severity of Diallo’s use of a phone “egregiously in the hallway,” which is where employees are directed to use their phones by Peters.⁵⁶

Edelman testified that the Respondent does “everything we can to keep the employees at work” and will normally give an employee an opportunity to correct misconduct (as it did with employees other than Diallo), but the Respondent took a disparately harsh and abrupt approach toward Diallo. Such an approach supports the finding of an unlawful intent.

In addition to the disparity of the Respondent’s treatment of Diallo and nondiscriminatees, as with Daniels, the evidence indicates the Respondent largely ignored Diallo’s lateness and attendance issues before the Union arrived on the scene.

I am mindful that the record does not include an obvious triggering event in the nature of union activity that occurred shortly before Diallo’s discharge. Further, unlike the General Counsel, I do not view Diallo’s comment at the January 19 meeting as an obvious full-throated endorsement of the Union. However, Diallo did suggest at the January 19 meeting that employees might have a reason to support the union and generally rebuffed managerial efforts to convince him to vote against the Union. After the election, Diallo continued to speak with Nash in public on a regular basis. The Respondent certainly understood, based on statements made during the campaign, that they were only guaranteed a union-free workforce for one year following the election and were susceptible to union organizing thereafter. The Respondent also demonstrated a continued interest in Nash’s postelection interaction with employees and engaged in coercive conduct toward employees who maintained a relationship with Nash (i.e., managers interrogated employees regarding discussions with Nash and directed Raul to stop speaking with Nash). Accordingly, I do not find it surprising that the Respondent attempted to abruptly and prematurely capitalize on an instance of arguable misconduct to terminate an employee, like Diallo, who maintained a relationship with Nash following the election.

Based upon the foregoing, I find that the General Counsel established a prima facie case that Diallo’s Union support and/or union activities were a significant motivating reason for his discharge.

I also reject the Respondent’s *Wright Line* defense. Perhaps realizing that employees have not been discharged for using their phone, the Respondent places great reliance on Diallo’s lateness, including his lateness on April 7. However, the disciplinary record completed

⁵⁶ That Diallo did not actually use the phone in the hallway is irrelevant since Asaro thought Diallo used the phone in the hallway and claimed to discharge him on that basis.

the day after Diallo's discharge made no mention of lateness. The issue of lateness was not referenced until April 10, when Guevara had Coello complete a new and different record of termination. Further, as discussed in previous sections of this decision, employees are rarely disciplined much less discharged for lateness, particularly if they notify their supervisor.

5 Edelman specifically testified that Nene Diallo, who (like Diallo) had a difficult commute from the Bronx, was excused from lateness because he kept his supervisor apprised of delays. It is undisputed that, on April 7, Diallo texted Guevara at 5:31 a.m. (before his starting time) on his way to work. The text was not understandable because of numerous typos, but Asaro did not bother to ask Diallo what he meant to say in the text. Beyond Diallo's individual lateness on 10 April 7, the Respondent did not establish that Diallo's attendance was worse than other employees who were not known to associate with Nash or worse than Diallo's own previous attendance which was accommodated until he persisted in associating with Nash after the election. Further, while other employees (e.g., James) were given the opportunity to adjust their starting times if they were chronically late, Diallo was offered no such accommodation in 15 advance of his discharge. In fact, he was discharged without any discussion of his attendance at all. While I do not doubt that the Respondent would have preferred Diallo to improve his attendance and not use (or charge) his phone while he was supposed to be working, the Respondent failed to establish that it regularly discharged employees for such offenses or that it did, in fact, consider lateness to be anything more than an afterthought in its decision to 20 discharge Diallo. Accordingly, the Respondent did not establish that it would have discharged Diallo regardless of his union activities.

Based upon the foregoing, I find that the Respondent discharged Diallo because of his Union support and/or union activities in violation of Section 8(a)(3) and (1) of the Act.

25 **Christopher Caraballo Discharge**

I view Caraballo's discharge in much the same way I view Diallo's discharge and find the former, like the latter, unlawful. As discussed in the credibility section, I have credited 30 Caraballo's testimony that Peters took a particular interest in watching employees he supervised (including Caraballo) while they talked to Nash and questioned employees regarding their conversations with Nash. Accordingly, I find that the Respondent was aware of Caraballo's union activities. The questioning of employees about their conversation with a Union representative in the context of antiunion campaign, along with the Respondent's other violations of Section 8(a)(1) and (3) of the Act, also demonstrate antiunion animus. 35

Like Diallo, the Respondent's discharge of Caraballo was abrupt and, accordingly, suspicious. On June 12, Edelman asked Caraballo what time he left the previous day and his normal quitting time. Presumably, Edelman heard from Asaro that Caraballo left early on June 40 11. When Caraballo answered honestly, Edelman discharged him on the spot. Caraballo asked Edelman to discuss the matter in his office and advised Edelman that Peters always told employees they could leave once they finish their work. However, Edelman refused to discuss the issue with Caraballo and discharged him without talking to Peters. Edelman took this course of action even though Peters testified that he and Edelman monitor the timesheets of employees, which show that Caraballo often left early on Sunday. Further, if Edelman had 45 taken the time to speak with Peters and review Peters' texts, he would have learned that Caraballo did not notify Peters when he left early on Sundays. Edelman, himself, testified that the Respondent's practice was to conduct a more thorough investigation of employee misconduct and make every effort to keep employees at work. Edelman's failure to do so in this instance suggests a discriminatory motive. 50

Three days later, Edelman and Asaro prepared a record of termination which states that Caraballo was already on a “final warning for violating the attendance policy” and was discharged for leaving early “while other employees were still working.” In fact, Caraballo was not on a final warning. He received a “first warning” for coming back 22 minutes late from his break months earlier on February 15 and a “second warning” for attendance. The evidence contains a number of disciplinary records that are identified as “final” warnings (as opposed to first, second, third, etc.), but Caraballo’s warnings were not. It is an undisputed practice in the receiving department that some employees stay to work while others leave once the workload starts to dwindle and it is undisputed (as Asaro admitted) that the workload was light on June 11. The record of termination contains no mention of a special assignment from Asaro and, for reasons discussed in the credibility section, I credit Caraballo’s testimony that he received none. The record of termination merely states that Caraballo left while other employees were still working. Thus, the Respondent was incapable of articulating an accurate and valid reason for Caraballo’s discharge. The pretextual nature of the Respondent’s stated reasons for discharging Caraballo warrants an inference of discriminatory intent.

A review of the disciplinary records show that employees other than Caraballo received discipline less than discharge for leaving early without completing their work in violation of a direct order or without notifying a supervisor. Two employees were discharged, in part, for leaving without finishing their work (Acevedo and Kante), but both employees were overtly insubordinate in the process. Acevedo, a driver, refused an assignment to make certain deliveries and walked out, which (according to the discharge notice) had a dramatic impact on certain stores. Kante was only discharged after engaging in an array of misconduct, such as “arguing with everybody,” “not taking orders” and “literally doing whatever she wants.” I do not find the discharge of Acevedo or Kante to be situations that were similar to the discharge of Caraballo. Rather, the disciplinary records generally show that Caraballo was treated more harshly than other employees and such disparate treatment reflects a discriminatory motive.

As with Diallo, I am mindful that the record does not include an obvious triggering event in the nature of union activity that occurred shortly before Caraballo’s discharge.⁵⁷ However, like Diallo, Caraballo did continue talking to Nash on a regular basis after the election and, as discussed above, the Respondent demonstrated a continued interest in and hostility toward employee interaction with Nash. Accordingly, I do not find it surprising that the Respondent sought to abruptly and prematurely capitalize on an instance of “misconduct” to terminate an employee, like Caraballo, who maintained a relationship with Nash following the election.

Based upon the foregoing, I find that the General Counsel established a prima facie case that Caraballo’s union activity was a significant motivating reason for his discharge.

I reject the Respondent’s *Wright Line* defense for reasons already discussed above. I do not doubt that the Respondent would have preferred Caraballo to improve his attendance and to have returned from break in a timely fashion (on the one instance he failed to do so). However, Caraballo was not discharged for those deficiencies and the record did not demonstrate that he did anything out of the ordinary on the day he was discharged. He left early without notifying Peters in a manner that was consistent with his known practice. The

⁵⁷ I do not find it particularly significant that Caraballo walked by a meeting of managers in late-May or early-June as management was in a position to see Caraballo talking to Nash over the course of several preceding months.

record does not indicate that Caraballo left the remaining employees with work they were incapable of performing as work was admittedly light that day. Even if Caraballo could be faulted for leaving early on June 11, the Respondent rushed to discharge him in a manner that was out of the ordinary. Edelman refused to discuss the matter with Caraballo or Peters, failed to review Caraballo's payroll records for Sundays, and discharged Caraballo in a disparate manner inconsistent with the Respondent's treatment of other employees. Accordingly, the Respondent failed to establish that Caraballo would have been discharged regardless of his union activities. Accordingly, I conclude that the Respondent discharged Caraballo because of his union activities in violation of Section 8(a)(3) and (1) of the Act.

Daniel Miranda Discharge

The General Counsel contends that Miranda was discharged for engaging in protected concerted activity, and I agree. Section 7 of the Act grants employees the right to engage in protected concerted activities for the purpose of improving their working conditions, which includes the right to join together in the presentation of a request for wage raises. *Forest City Machine Works, Inc.*, 326 NLRB 1093 (1998). "It is not essential to a finding of concerted activity that employees formally agree to act as a group." *Approved Electric Corp.*, 356 NLRB 238 (2010). "Further, it is immaterial in assessing the concertedness of the two employees' complaints that each may have been motivated by different reasons." *El Gran Combo*, 284 NLRB 1115, 1117, fn.12 (1987) (employees engaged in concerted activity even though a discriminatee testified that a coworker was fighting for his rights and "I was fighting for mine"). See also *Forest City Machine Works, Inc.*, 326 NLRB 1093 (1998) (rejecting employer argument that "each employees was requesting a raise based on their individual merit").

Here, Miranda and Uvaldo were engaged in protected concerted activity when they asked Edelman for pay raises on June 15. As discussed in the credibility section, I credit the testimony of Miranda and Uvaldo that they both asked for a raise. Although Edelman only recalled Miranda addressing the issue of pay, Edelman understood the request to be made on behalf of both the employees. Edelman testified that "the only thing we took out of that meeting was they had come to the meeting expecting that they were getting raises." Accordingly, I find that Miranda and Uvaldo engaged in concerted activity when they asked Edelman for wage increases on June 15. See *Bowling Transp., Inc.*, 336 NLRB 393, 400 (2001); *El Gran Combo*, 284 NLRB 1115, 1117 (1987).

It is telling of Edelman's motive that he was taken aback by the employees' request for a wage raise in the context of what he (Edelman) perceived as a disciplinary meeting. Edelman testified that the purpose of the June 15 meeting was "to have a conversation with [Miranda and Uvaldo] regarding job performance, on time, lateness, their interaction with the girls in that station. And then the only thing we took out of the that meeting was they had come to the meeting expecting that they were getting raises." Edelman was clearly unhappy that the employees asked for a wage increase in that particular meeting and his focus on this aspect of the conversation suggests he acted upon it in discharging Miranda shortly thereafter. I am unaware of any legal authority (and the Respondent has cited none) suggesting that the perceived chutzpah of these employees would be grounds for rendering their protected conduct unprotected.⁵⁸ In fact, the Act tends to protect employees in situations where they would be

⁵⁸ The credible evidence does not actually establish that this was a disciplinary meeting. Edelman was not a credible witness and Asaro did not testify regarding the conversation. Meanwhile, Miranda and Uvaldo testified that the meeting largely occurred because Uvaldo was displeased by Edelman's

“imbued with a feeling of collective security by reason of the presence of fellow employees” and speak their “mind as an equal with [their] employer, without the degree of timidity [they] might normally feel when alone” *Oneita Knitting Mills*, 205 NLRB 500, 506 (1973).

5 The timing of the discharge, close in time to the protected concerted activity, is also strong evidence of a discriminatory intent with regard to Miranda. The timing is particularly suspicious in this case because Edelman called Miranda the day after the June 15 meeting and directed him to come to work on Monday (when Miranda was terminated) instead of Sunday.⁵⁹ This suggests that Edelman considered retaliatory action the day after the meeting even though
10 the adverse employment action was not executed until a couple days later.

 If such evidence were not enough to establish a prima facie case, the shifting and pretextual nature of the Respondent’s explanation for Miranda’s discharge are especially telling. In a position statement, the Respondent asserted the Miranda was discharged for a final act of
15 misconduct in which he was abusive toward Garcia on June 15. However, at trial, Edelman stated that Miranda was merely being counseled (not discharged) for such conduct. Rather, to justify the discharge, Edelman fabricated a story about Miranda being high on marijuana and entirely unresponsive during a disciplinary meeting. In fact, it was not a disciplinary meeting at
20 all and Miranda was both responsive and reasonable in telling Edelman he would like to continue working in whatever job was available if the Respondent eliminated the current department in which he was working. That Edelman so flagrantly falsified the reason for
 Miranda’s discharge tends to enhance my suspicion regarding the dubious authenticity of written warnings which Miranda denied receiving and which are different in format than other
25 JotForms. Under these circumstances, the entirety of the Respondent’s position with regard to its treatment of Miranda is unworthy of belief and warrants a finding that the real reason was
 discriminatory. *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92 (Aug. 26, 2016).

 I do not find it significantly exculpatory that the Respondent discharged Miranda and did not discharge Uvaldo. See *Volair Contractors, Inc.*, 341 NLRB 673, 676, fn.17 (2004); *Master
30 Security Services*, 270 NLRB 543, 552 (1984). It is undisputed that the Respondent has difficulty maintaining personnel and would not necessarily be inclined to deplete its workforce by firing two employees in the shipping department at the same time. Further, since it was
 Edelman’s recollection that Miranda asked for a raise on behalf of both employees, it is not particularly surprising that Edelman targeted Miranda for termination. Meanwhile, as of the
35 week prior to the meeting on June 15, Uvaldo was receiving \$2 per-hour less than the New York state minimum wage, which the Respondent immediately corrected after the meeting. This suggests that the Respondent viewed Uvaldo’s request for a raise as more valid than the

treatment of him (not the other way around). Edelman may have thought the topic was the employees’ misconduct and did not like that the employees took the meeting as an opportunity to ask for wage increases, but the employees addressed Edelman’s conduct and reasonably asked for raises (perhaps, in part, to put up with it). Indeed, Edelman told the employees they would get a wage increase soon and offered to discuss it with them at a subsequent meeting the following Tuesday. Uvaldo did, in fact, receive a wage increase because, until this incident, he was being paid \$2 per-hour less than the New York State minimum wage.

⁵⁹ Edelman generally takes off one day each weekend. Based on the sequence of events, it is reasonable to conclude that Edelman asked Miranda to come in on Monday instead of Sunday so he (Edelman) would be present and could separate Miranda’s employment.

request by Miranda. Further, the discharge of Uvaldo could arguably have exposed the Respondent to a state claim of retaliation.

5 Based upon the foregoing, I find that the General Counsel established a prima facie case that a significant motivating reason for Miranda's discharge was his protected concerted activities.

10 The Respondent did not establish a *Wright Line* defense to the discharge of Miranda. The Respondent admits that Miranda would not have been discharged if he had not shown up to work under the influence of marijuana and was completely unresponsive during a disciplinary meeting. However, there was no disciplinary meeting and the Respondent's stated reason for discharging Miranda is pure pretext. Therefore, like the discharge of Daniels, it is not necessary to conduct a mixed-motive analysis to determine if the Respondent would have discharged Miranda regardless for his protected concerted activities. *Parkview Lounge, LLC*, 366 NLRB No. 71 (Apr. 26, 2018); *K-Air Corp.*, 360 NLRB 143, 144 (2014).

Daniel Uvaldo Discipline

20 The General Counsel contends that the Respondent unlawfully disciplined Uvaldo on July 13, July 20 and August 24. As discussed above, the evidence indicates that Uvaldo and Miranda engaged in protected concerted activity in joining together to request a wage increase which angered Edelman to such an extent that he unlawfully discharged Miranda upon a grossly pretextual reason shortly thereafter. I also credit Uvaldo's testimony that, in about late-June or early-July, Asaro watched Uvaldo (among other employees) talking to Nash and questioned Uvaldo about what the employees discussed with Nash. This occurred in the context of other coercive conduct the Respondent engaged in during the same time period, including a similar interrogation of employees by Antebi and the unlawful discharge of Caraballo. Thus, the evidence indicates that the Respondent was aware of and hostile toward the type of protected activities in which Uvaldo was engaged.

30 Asaro's testimony that he asked Uvaldo to notify him instead of Coello because Coello was not "necessarily" a supervisor is also odd and not effectively explained. Asaro admitted that employees generally notify their direct supervisor if they were going to be late or absent and did not notify him. Thus, even if Coello were merely a team leader (which is at odds with the initial testimony of Edelman and Asaro), it is unclear why Asaro did not ask Uvaldo to notify Guevara or Garcia of attendance issues (instead of Asaro) and took over the counseling of Uvaldo. In this regard, the evidence suggests that Asaro wanted to keep a closer eye on Uvaldo's attendance following his protected activities. That Uvaldo was never actually shown a copy of the warnings also suggests that the Respondent was not using the discipline as a way to correct Uvaldo's conduct, but as a means of retaliating against him and possibly laying the groundwork for a subsequent discharge. Accordingly, I find that the General Counsel has established a prima facie case with regard to the discipline of Uvaldo in July and August.

45 However, the July 13 discipline of Uvaldo was not obviously pretextual and I find that the Respondent established a *Wright Line* defense to that allegation. Uvaldo admittedly woke up at 6:30 a.m. and did not contest Asaro's testimony (as reflected in the discipline) that he (Uvaldo) arrived over an hour late at 7:15 a.m. Other nondiscriminatee employees have been disciplined for arriving that late (or less) and Uvaldo did not notify the Respondent in advance of his start time. It is more troubling that Asaro sent Uvaldo home for the day since Edelman testified that employees are not normally sent home as a punishment unless there is a practical reason for doing so (e.g., to separate employees who had an altercation). However, prior disciplines do

indicate that employees have been sent home for arriving two and four hours late, and Asaro testified that he had already obtained coverage for Uvaldo's shift by the time Uvaldo arrived. Accordingly, I find that the Respondent established that it would have taken the same action against Uvaldo on July 13 regardless of his protected activities.

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I do not find that the Respondent established a *Wright Line* defense with regard to the discipline dated July 20. The discipline states that Uvaldo called out at 7:06 a.m. However, Uvaldo denied he called any later than 6:35 a.m. on the day his wife had emergency surgery and Asaro did not specifically dispute his testimony. Further, given the Respondent's admitted consideration of extenuating circumstances in accommodating employees when they have legitimate problems with attendance, it is surprising that Uvaldo would receive discipline on a day his wife had such a serious health issue. Accordingly, I find that the Respondent did not establish a *Wright Line* defense with regard to its discipline of Uvaldo on July 20.

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The record contains very little evidence regarding Asaro's discipline of Uvaldo on August 24 for calling out from work at 6:18 a.m. However, the Respondent has the burden to establish a *Wright Line* defense and I do not find that it did so. At the time, Asaro was still directly monitoring Uvaldo's attendance in a manner he would usually leave to the employee's direct supervisor. Many employees have been late or absent without being disciplined and Uvaldo was not a no-call/no-show on August 24. Rather, he called 18 minutes after the start of his shift. Although the Respondent's policy directs employees to notify a supervisor of an absence two hours in advance of his her start time, supervisors have significant discretion to abstain from issuing discipline if that policy is violated. Thus, in texts, Peters admonished Caraballo for failing to notify him of absences in enough time to get coverage, but Caraballo issued no formal discipline as a result. Indeed, supervisors largely communicated with employees by text, but the Respondent did not attempt to differentiate between excused and unexcused absences by introducing texts (at least a sample, if not all) to show that employees notified their supervisors in a timely manner on days they were absent but not disciplined. Accordingly, I do not believe the Respondent has satisfied its burden of established it would have disciplined Uvaldo on August 24 regardless of his protected activities.

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Based on the foregoing, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining Uvaldo on July 20 and August 24 because of his union and protected concerted activities.

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Bargaining Order

The Union seeks as a remedy in this case a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). A charging party is not entitled to pursue violations which go beyond those alleged in the complaint, but may pursue remedies that are not sought by the General Counsel. *Kaumagraph Corp.*, 313 NLRB 624, 625 (1993). Thus, the Union is entitled to seek a *Gissel* bargaining order even though the General Counsel does not.

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In *NLRB v. Gissel Packing Co.*, the Supreme Court identified two categories of employer misconduct that warrant imposition of a bargaining order, recently described by the Board in *Bristol Industrial Corp.*, 366 NLRB No. 101 (June 7, 2018) as follows:

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Category I cases are "exceptional" and "marked by "'outrageous' and "pervasive unfair labor practices." *Id.* at 613. Category II cases are "less extraordinary" and "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." *Id.* at 614. In

category II cases, the “possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order[.]” Id. at 614-615.

5 Accord *California Gas Transport, Inc.*, 347 NLRB 1314, 1323 (2006), enfd. 507 F.3d 847 (5th Cir. 2007).

10 The Union seeks a category II bargaining order upon a demonstration of majority support by the authorization cards it collected and the Respondent’s commission of unfair labor practices that, the Union argues, would tend to impede the election process to such an extent that the best remedy would be a bargaining order based on the cards instead of a rerun election.

15 In determining whether to issue a bargaining order, the Board examines “the seriousness of the violations and their pervasiveness, the size of the unit, the number of affected employees, the extent of dissemination, and the position of the persons committing the violations.” *Bristol Industrial Corp.*, 366 NLRB No. 101 (June 7, 2018). Certain “hallmark violations” have been identified as those that more strongly support the issuance of a *Gissel* bargaining order because they are highly coercive of employees’ section 7 rights and can be
20 expected to have a lasting inhibitive effect on a substantial percentage of the workforce. *Milum Textile Services Co.*, 357 NLRB 2047, 2055 (2011). Hallmark violations include the discharge of employees on the basis of union support or activity. See *Milum Textile Services, Co.*, 357 NLRB at 2055 citing *Adam Wholesalers, Inc.*, 322 NLRB 313, 314 (1996) and *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-213 (2d Cir. 1980). The Board has repeatedly held that, even
25 among hallmark violations, the discharge of an employee because of union activity “is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work.” *Dayton Auto Electric, Inc.*, 278 NLRB 551, 558-559 (1986) citing *Apple Tree Chevrolet*, 237 NLRB 867 (1978). It is also relevant to the
30 appropriateness of a bargaining order that an employer continues committing violations after a union loses the initial election as it may “squench any remaining support for the union.” *Aldworth Co., Inc.*, 338 NLRB 137, 150 (2002). The “test for making a determination as to whether a bargaining order is warranted is an objective test.” *Broadmoor Lumber Co.*, 227 NLRB 1123, 1138 (1977).

35 In *Milum Textile Services, Co.*, 357 NLRB 2047, 2055 (2011), the Board found a bargaining order appropriate where an employer discharged two union supporters and suspended a third (with knowledge of the discharges disseminated throughout the workforce),
40 threatened to reduce employee wages if they selected a union, prohibited employees from wearing union buttons while working, created the impression among employees that their union activities were under surveillance, and attempted to obtain a temporary restraining order that would enjoin employees’ Section 7 activity. The employer’s president participated in some of the unfair labor practices, including the adverse employment actions. The bargaining unit consisted of approximately 70 employees.

45 In *Aldworth Co., Inc.*, 338 NLRB 137, 149 (2002), the Board found a bargaining order appropriate where the employer unlawfully discharged two union supporters before the election and suspended/transferred three additional employees after the election, offered to suspend rather than discharge one employee if he curtailed his union activity, solicited grievances and
50 promise to rectify complaints, created a new printed form for employees to use to register such complaints, reassigned a particularly troublesome manager, created a new supervisory position

and encouraged employees to apply for it, encouraged employees to report contacts with union representatives, threatened employees with job loss if they selected the union, threatened to eliminate 401(k) and other benefits if employees selected the union, threatened to impose less favorable working conditions if employees selected the union, forbid employees from wearing union pins or t-shirts, and interrogated employees regarding their union activities. The bargaining unit consisted of approximately 93 employees.

In *Hialeah Hospital*, 343 NLRB 391, 395 (2004), the Board refused to issue a bargaining order where an employer's vice president discharged a leading employee supporter of the Union, told employees she felt "betrayed" and "stabbed in the back" by their unionizing efforts, threatened employees with discharge and other unspecified reprisals for contacting the union, engaged in unlawful surveillance of employees, created the impression among employees that their union activities were under surveillance, implied that supporting the union would be futile, solicited employee withdrawal of union support by promising benefits, more strictly denied employee access to the lounge once the organizing campaign began, and removed a shower head and ping pong table previously used by employees because of employees' union activities. In denying the bargaining order, the Board observed that other cases in which bargaining orders issued involved more discharges and more widespread unlawful conduct by the highest-ranking authority in the facility. The bargaining unit consisted of approximately 11 employees.

Here, the Union introduced into evidence 151 signed and dated authorization cards which were properly authenticated by Nash and certain employees. I have reviewed the cards and compared them to the 192 names on the election voter list. Based upon my review, I have determined that 111 of the cards were signed by individuals on the voter list. Accordingly, the Union established that it enjoyed majority support among eligible voters before the Respondent engaged in unfair labor practices.

Turning to the unfair labor practices, it is most noteworthy that the Respondent committed significant hallmark violations by discharging four employees as a result of their Union support and/or union activities. Two of the discharges occurred shortly before the initial election that the Union lost and two more occurred months after the election (once employees maintained contact with Nash at the Falchi Building). The original discharges were likely to have a long-standing suppressing effect on employees' union activity and the Respondent's subsequent discharges could only serve to confirm and extend the coercive message in such a manner as to undermine the likelihood of a fair rerun election. The Board has recognized that "an employer's continuing hostility toward employee rights in its postelection conduct 'evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort.'" *Parts Depot, Inc.*, 332 NLRB 670, 675 (2006) quoting *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), *enfd.* 47 F.3d 1161 (3d. Cir. 1995).

I also find it significant that Asaro specifically mentioned the discharge of Daniels in the context of an antiunion meeting with receiving employees and said, "we didn't tell him he doesn't work here for no reason" Although Asaro represented to employees that Daniels was discharged for lateness, employees could still have reasonably and correctly believed that Daniels was discharged because of his union activity and support. It would have been clear to employees that Daniels was a Union supporter since he joined the Union's organizing effort after he was discharged and acted as the Union's election observer. Employees would know that Daniels was discharged shortly before the election and would likely know that lateness was not normally a dischargeable offense. Further, although we only have an audio recording of one meeting in which Daniels was discussed, it is reasonable to conclude that managers raised the

5 same topic in other such meetings since they were admittedly working from the same written talking points (including a directive to emphasize that the Union could not guarantee job security) in each session. Under the circumstances, I conclude that the Respondent broadly publicized its unlawful discharge of a known Union supporter in the context of antiunion meetings in such a manner as to be highly suppressive of Union support among the workforce at large.

10 The involvement of high ranking individuals in the unfair labor practices, particularly Antebi, also favors the issuance of a bargaining order. Antebi introduced himself as the founder of the company and talked to employees for the first time during a meeting in which he unlawfully indicated that the Respondent would create a new mechanism for responding to their concerns, including concerns regarding the increase of wage rates, if they rejected the Union. The sudden appearance of the corporate founder to deliver such a message would tend to confirm the seriousness with which the Respondent was taking the organizing drive and the likelihood that the company would follow through on its promises. See *Aldworth Co., Inc.*, 338 NLRB 137, 149 (2002) (that employer had high level executive vice president travel from corporate headquarters to deliver coercive message underscores its significance and impact). Compare *Philips Industries*, 295 NLRB 717, 718-719 (1989) (bargaining order not warranted where unlawful conduct of first-level supervisors was unlikely to be repeated and not necessarily viewed as a reflection of company policy). The meeting was attended by, in Antebi's words, "the vast majority of the staff that were present on that day." Edelman estimated that about 125 employees attended the meeting.

25 Although Antebi attempted to keep his distance from the Falchi building from January 19 to about May, he returned to the facility and, shortly after his reappearance, unlawfully interrogated a group of employees about what they were discussing with Nash and directed Raul to stop talking to Nash. During the same month, June, the Respondent unlawfully discharged Caraballo because of his union activities. Thus, although the Respondent requested during the initial campaign one year to improve its response to employee complaints about issues such as pay, it did not simply rely on improved treatment of employees to ensure that the Union would be unsuccessful in a second organizing attempt. Rather, once it was clear that the Union was maintaining a presence at the Falchi Building, the Respondent, including Antebi, resumed its highly coercive conduct.

35 Other than Antebi, top ranking officials at the Commissary, Edelman and Asaro, engaged in unlawful surveillance of employees' union activity. Likewise, Guevara (responsible for supervising over half the commissary workforce) and Peters committed unfair labor practices. As with Antebi, managers engaged in unlawful conduct shortly before the election and after the election once Nash continued his organizing efforts. That violations of the Act were committed by individuals at the top of the Corporate and Commissary hierarchy on an ongoing basis tends to enhance their coercive effect and undermine the likelihood of a fair rerun election.

45 Ultimately, the Union did, in fact, experience a dramatic loss of support from the time it solicited about 111 authorization cards from employees on the voter list to the time only 38 employees voted in favor of union representation in the election. It is also noteworthy that only about 117 unchallenged votes were cast (with 3 challenges) among 192 eligible voters.

50 The remedy of a bargaining order in this case is a difficult determination, but in my view the totality of the evidence warrants a finding that, despite standard remedies, a fair rerun election is unlikely and the better remedy is a bargaining order on the basis of the authorization cards (which show majority support). In so finding, I recognize that this case involves a large

unit consisting of nearly 200 employees. *Philips Industries*, 295 NLRB 717, 718-719 (1989) (the effects of violations are more easily diluted and dissipated in a larger unit). If the corporate founder did not start speaking to employees for the first time, in a large group, for the purpose of promising those employees improved treatment, including better pay, upon their rejection of the Union, my decision might be different. Likewise, if the Respondent did not specifically talk to employees in antiunion meetings about the discharge of Daniels (a hallmark violation), my decision might be different. If the Respondent allowed the impact of its violations to abate and did not continue to commit unfair labor practices, including additional hallmark violations and the interrogation of a group of employees by the corporate founder, once it became clear that the Union was not going away, my decision might be different. However, given my reading of *Gissel* bargaining order cases too numerous to name here and the totality of the circumstances, the cumulative impact of the Respondent's ongoing conduct appears to fall within the orbit of those cases in which bargaining orders were granted, and I shall do so.⁶⁰

15 Conclusions of Law

1. The Respondent, Juice Press LLC, is an employer within the meaning of Section 2(2), 2(6), and (7) of the Act.
2. The Respondent engaged in the following unfair labor practices within the meaning of Section 8(a)(1) of the Act:
 - a. Discharged Daniel Miranda on June 19 because of his protected concerted activities.
 - 25 b. Disciplined Daniel Uvaldo on July 20 and August 24 because of his protected concerted activities.
 - c. Interrogated its employees regarding their union support and/or activities, including the interrogation of employees regarding whether they would reject union representation in exchange for the promise of a wage increase for doing so.
 - 30 d. Engaged in surveillance of its employees' union activities.
 - e. Solicited employee grievances, including concerns regarding improvements in pay, and promised to remedy those grievances in order to discourage employees from supporting the Union.
 - 35 f. Directed employees not to speak to union representatives and impliedly threatened employees with unspecified reprisals if they continued to do so.
3. The Respondent engaged in the following unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act:
 - a. Discharged Tequaan Daniels on January 11, Jaby Sadio on January 15, Thierno Diallo on April 7, and Christopher Caraballo on June 11 because of their union support and/or activities.
 - 45

⁶⁰ See CiteNet heading 625-6612-0100-000 with search term "Gissel."

b. Disciplined and sent Daniels home on January 6 and 8 because of his union activities.

5 c. Reassigned Daniels to a different job on January 7 because of his union activities.

d. Disciplined Uvaldo on July 20 and August 24 because of his union activities.

4. The unfair labor practices committed by the Respondent affect Commerce within the meaning of Section 2(6) and (7) of the Act.

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Remedy

15 Having found that the Respondents has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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20 For the reasons described above, I will include in my order a directive that, upon request, the Respondent bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

20

25 Since I have found that a bargaining order is appropriate and will order the same, I will not order a rerun election. However, if successful exceptions are taken to my issuance of a bargaining order, I would certainly recommend a rerun election in its place on the basis of unfair labor practices which were committed by the Respondent during the critical period between the filing of the petition and the election. See *Columbus Mills*, 303 NLRB 223, 236 (1991); *Standard Products Co.*, 281 NLRB 141, 143, fn.4 (1986).

25

30 The Respondent, having unlawfully discharged Tequaan Daniels, Jaby Sadio, Thierno Diallo, Christopher Caraballo, and Daniel Miranda, must offer them reinstatement to their former jobs or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges enjoyed.

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35 The Respondent shall make Daniels, Sadio, Diallo, Caraballo, and Miranda whole for any loss of earnings and other benefits suffered as a result of their discriminatory discharges. The make whole remedies 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). In accordance with *King Scoopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Daniels, Sadio, Diallo, Caraballo and Miranda for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, and compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Daniels, Sadio, Diallo, Caraballo and Miranda for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of

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backpay is fixed either by agreement or Board order, file with the Regional Director for Region 29 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

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The Respondent will also make Daniels whole to the extent he was sent home without pay on January 6 and 8. This make-whole remedy shall be computed in accordance with *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with the same compounded daily interest, adjustment for adverse tax consequences and reporting requirements as those discussed above with regard to the discriminatory discharges.

10

In addition, the Respondent will be required to remove from its files any reference to the unlawful discharges of Daniels, Sadio, Diallo, Caraballo, and Miranda. The Respondent will also be required to remove from its files any reference to the discipline of Daniels on January 6 and January 8 and Daniel Uvaldo on July 20 and August 24. The Respondent shall notify these employees in writing that their respective unlawful discharges and/or discipline will not be used against them in any way.

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The Respondent shall be ordered to post the notice attached hereto as "Appendix."

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶¹

Order

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The Respondent, Juice Press, LLC, Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

30

(a) Discharging, disciplining, sending home, reassigning or otherwise discriminating against employees for engaging in union activities, engaging in protected concerted activities, and/or supporting Local 1181-1061, Amalgamated Transit Union, AFL-CIO (Union) or any other union.

35

(b) Engaging in surveillance of its employees' union activities.

(c) Interrogating employees about their Union support and/or union activities.

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(d) Interrogating employees regarding whether they are willing to reject the Union in exchange for the promise of wage increases for doing so.

⁶¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Soliciting employee grievances, including employee complaints regarding wages, and promising to remedy them in order to discourage employees from supporting the Union or selecting union representation.

5 (f) Directing employees not to speak with union representatives and impliedly threatening employees with unspecified reprisals if they continue to do so.

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

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

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

20 All full-time and regular part-time employees working in the back of the house, commissary kitchen, packers, transportation and maintenance departments, employed by the Employer at its Long Island facility, but excluding managers, clerical employees, professional employees, guards and supervisors as defined by the Act.

25 (b) Within 14 days from the date of this Order, offer Tequaan Daniels, Jaby Sadio, Thierno Diallo, Christopher Caraballo, and Daniel Miranda reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

30 (c) Make Daniels, Sadio, Diallo, Caraballo, and Miranda whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(d) Compensate Daniels, Sadio, Diallo, Caraballo, and Miranda for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

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40 (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 amount of backpay due under the terms of this Order.

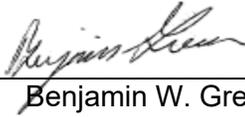
(f) Within 14 days after service by the Region, post at its Long Island City, New York facility copies of the attached notice marked "Appendix."⁶² Copies of the notice, on forms

⁶² 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."

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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed, or are otherwise prevented from posting the notice at the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2016.

(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 the Respondent has taken to comply.

Dated, Washington, D.C. August 22, 2018



Benjamin W. Green
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES

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

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

FEDERAL LAW UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, discipline, reassign or otherwise discriminate against you for engaging in union activities, protected concerted activities, and/or supporting Local 1181-1061, Amalgamated Transit Union AFL-CIO (Union) or any other union.

WE WILL NOT engage in surveillance of your union activities.

WE WILL NOT coercively question you about your Union support or union activities.

WE WILL NOT ask you to reject the Union or other union representation in exchange for a promise to increase your wages.

WE WILL NOT solicit grievances from you, including concerns regarding wage increases, and promise to remedy them in order to discourage you from supporting the Union or selecting union representation.

WE WILL NOT direct you not to speak with union representatives and impliedly threaten you with reprisals if you continue to do so.

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

WE WILL, within 14 days from the date of this Order, offer Tequaan Daniels, Jaby Sadio, Thierno Diallo, Christopher Caraballo and Daniel Miranda full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tequaan Daniels, Jaby Sadio, Thierno Diallo, Christopher Caraballo and Daniel Miranda whole for any loss of earnings and other benefits suffered resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Tequaan Daniels, Jaby Sadio, Thierno Diallo, Christopher Caraballo, and Daniel Miranda for the adverse tax consequences, if any, of receiving lump-sum backpay awards 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 awards to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges and discipline of Tequaan Daniels, Jaby Sadio, Thierno Diallo, Christopher Caraballo, Daniel Miranda, and Daniel Uvaldo, and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and discipline will not be used against them in any way.

Juice Press, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2 Metro Tech Center
100 Myrtle Avenue
5th Floor
Brooklyn, NY 11201-4201
Phone: 718-330-7713

The Administrative Law Judge's decision can be found at www.nlr.gov/case/29-CA-191213 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (718) 765-6190.