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

AMNESTY INTERNATIONAL OF THE USA, INC.

and Case 5-CA-221952

RAED JARRAR. AN INDIVIDUAL

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for the General Counsel.
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DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, D.C. on January 16, 2019. The amended complaint alleges that Amnesty International of the USA, Inc. (Respondent or AIUSA) violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act on or about April 6, 2018[2] by (1) advising that they should have requested a meeting with the Respondent instead of circulating and submitting a petition that related to their terms and conditions of employment, and (2) telling employees that their participation in supporting the petition could lead to an increased workload. Additionally, on May 9, the Respondent allegedly (a) criticized its employees' decision to circulate and/or support the petition, (b) asked employees why it was not provided with advanced notice of the petition, and (c) advised employees that they should have requested a meeting with Respondent rather than circulating and submitting the petition. The Respondent concedes that its executive director expressed disappointment on both occasions with the employees' decision to submit a petition rather than speak with her beforehand about their concerns. It contends, however, that the statements at issue were not coercive in nature, but rather, the executive director's reinforcement of the organization's open-door policy.

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

[1] 29 U.S.C. § 151–169.
[2] Unless otherwise indicated, all dates hereafter refer to the 2018 calendar year.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a non-profit organization with an office and place of business in Washington, D.C., where it engages in the business of lobbying for and advocating for human rights causes. During the 12-month period ending August 31, the Respondent derived gross revenues more than $250,000, and purchased and received goods at its Washington, D.C. location valued in excess of $5,000 from points outside of the District of Columbia. Accordingly, the Respondent admits, and I find, I that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

Respondent is a non-profit grassroots organization with six offices throughout the United States, including Washington, D.C. (the DC office) and 210,000 members/volunteers. The mission of the organization is to protect human rights, as broadly defined under the Universal Declaration of Human Rights. The Respondent's work, within that broad mandate, includes direct advocacy with federal officials, petitions, and other forms of activism, and staff members are assigned to work on specific campaigns and programs.

The Respondent employs approximately 100 individuals, including 25 employees in the DC office. Margaret Huang, the Respondent's executive director since January 2014, is the highest-ranking employee within the organization. She is overseen by the Respondent's Board of Directors and manages the organization along with an executive team comprised of unit and group managers. Joanne Lin, as national advocacy director, supervises the government relations unit. At the relevant times in 2018, Bart Ianantuoni was the Respondent's interim head of human resources.

The Charging Party, Raed Jarrar, was employed as advocacy director for the Middle East and North Africa from September 11, 2017 until July 28. In this role, he was responsible for the organization's lobbying efforts on issues pertaining to these regions, as well as other in-house tasks. Jarrar and Ryan Mace, a grassroots advocacy refugee specialist, were assigned to the government relations unit supervised by Lin.

During his relatively short tenure with the Respondent, Jarrar was an active member of the Communication Workers of America, Local 1189 (the Union). He served on the Union's six-member team that negotiated with the Respondent over a new collective bargaining agreement. Jarrar attended several meetings before he was suspended on or about June 5. Forty-five days later, on July 20, Jarrar was terminated.[3]

[3] Jarrar testified that he was unlawfully suspended and subsequently terminated on July 28 in retaliation for an unspecified reason. Although the circumstances of his suspension and termination were not an issue in the case, the Respondent sought to impeach him by introducing his termination letter, which alleged specific misconduct as the basis for the adverse action. Jarrar was afforded limited leeway

The Respondent's Employee Handbook, effective April 2018, lists classifications for full and part-time employees; temporary employees, interns/fellows, consultants and member volunteers. Interns/Fellows, the classification at issue, are defined as follows:

> An intern is an individual who performs work on an unpaid or stipend basis for the individual's own purposes, which includes but is not limited to meeting educational requirements or expectations for a degree being pursued by the individual, and/or providing support for human rights initiatives/causes.[4]
>
> AIUSA currently offers a number of fellowships typically to recent graduates or activists relatively new to the human rights field. These include the Ladis Kristoff Fellow, the Youth Leadership Fellow, and the Styron Fellow. Individuals awarded a fellowship often work on special projects that are designed to align with the organization's priorities. A fellow may be considered a full-time, exempt employee.
>
> Interns/Fellows are subject to all AIUSA policies that apply to employees during the period of their internship/fellowship, as appropriate for the duties they are assigned.

The handbook also states the Respondent's requirement to designate employees as either non-exempt or exempt under the Fair Labor Standards Act (FLSA) wage and hour laws:[5]

> Non-exempt employees are paid on an hourly basis and are eligible to receive overtime. Non-exempt employees do not meet the qualifications for exemptions from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA).
>
> Exempt employees are paid on a salaried basis and meet the qualifications for exemption from the minimum wage and overtime requirements of the FLSA.

Since 2009, the Respondent has voluntarily recognized the Union as the exclusive collective-bargaining representative of all non-supervisory regular full-time and regular part-time clerical and professional employees. Pursuant to the 2015 collective-bargaining agreement (CBA), which expired on June 30, the following classifications were excluded: "consultants, casual employees, canvassers, seasonal employees, interns, volunteers, work-study students, temporary employees, managerial employees, confidential employees, and guards and supervisors as defined in the National Labor Relations Act."[6] On October 10, the Respondent

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to introduce documentary evidence confirming that he previously claimed retaliation as the basis for his removal. As such, and although he incorrectly referred to the date as July 28, the termination letter did not diminish Jarrar's credibility as to his assertion that he was retaliated against. (Tr. 13-14, 47-48; A:LJ Exh. 1-2; R. Exh. 1; CP Exh. 1-2.)

[4] In contrast to interns and fellows, members and volunteers are individuals who have supported the organization over long or indefinite periods of time. Some interns subsequently become members or volunteers, and vice versa (Tr. 88-89, 92-94.)

[5] 29 U.S.C. § 201-219.

[6] The grievance procedure, described in Article 10, permits but does not require informal resolution before a grievance is filed. The first step of the procedure requires a written grievance. (Jt. Exh. 5.)

and the Union agreed to a successor CBA for the period of July 1, 2018 through June 30, 2021. The recognition provision of covered and excluded classifications remained the same.

B. The Intern Program

The Respondent regularly employs interns and fellows that perform work for the organization on an unpaid basis or stipends from outside sources. As of April, there were about 30 to 40 interns each academic term (fall, spring, or summer) nationwide, including approximately 15 interns in the Washington, D.C. office.

The intern recruitment process is initiated by employees with the assistance of the human resources department. Once selected, interns/fellows usually serve for an academic semester and are assigned to staff members or teams to work on specific projects. Depending on their academic requirements, weekly schedules range from one day per week to every day.

The U.S. Department of Labor's "Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act (FLSA)" provides guidance regarding the utilization of volunteers:

> The FLSA recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer in many circumstances for charitable and public purposes. Individuals may volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service and not be covered by the FLSA. Individuals generally may not, however, volunteer in commercial activities run by a non-profit organization such as a gift shop. A volunteer generally will not be considered an employee for FLSA purposes if the individual volunteers freely for public service, religious or humanitarian objectives, and without contemplation or receipt of compensation. Typically, such volunteers serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees. In addition, paid employees of a non-profit organization cannot volunteer to provide the same type of services to their non-profit organization that they are employed to provide.[7]

Since the Respondent does not employ paid administrative assistants, staff members also rely on interns/fellows to perform various administrative tasks, note-taking and other functions; some staff members, including Jarrar, relied heavily on interns to accomplish their work goals. In the government relations unit, interns were assigned to attend Congressional hearings or meetings with coalition partners, report back on those events and participate in devising responsive strategies, including drafting articles for publication in print and electronic media.

After discussing the issue for over a year, the executive team decided to change its intern policy and compensate them for their work. The timing of the change was on the executive team's agenda for discussion at its meeting on April 4. A major item consideration was the likely reduction in interns from a virtually unlimited supply of unpaid interns to one based on

[7] https://www.dol.gov/whd/regs/compliance/whdfs14a.htm.

available funding for a limited number of interns. The expectation, based on prior discussions, was that the change would roll out in 2019 to facilitate an orderly transition with staff.[8]

C. The Petition

In February, Jarrar was approached by a group of interns working in the DC office who complained that they were not being compensated for their work. Jarrar had several conversations with these interns and they decided to submit a petition requesting compensation for interns. Jarrar assisted the interns after they drafted a petition by providing feedback and editing. Along with Emily Walsh, another unit employee and a shop steward for the Union, Jarrar helped to collect signatures by walking around the DC office with Walsh and/or an intern and encouraging other employees to sign the petition.[9]

On April 2, the government relations unit held its weekly meeting. Approximately ten advocacy directors, including Jarrar, participated in the meeting; about five or six were physically present, while the rest participated by conference call. During this meeting, Huang shared the results of an annual employee satisfaction survey. After the presentation, she invited questions and Jarrar raised one regarding the interns. He proposed that the Respondent consider paying its interns and articulated the principles and moral grounds justifying a change in policy. Huang responded positively, explaining that the issue was an important one that the Respondent's executive team had been reviewing during the past year and was scheduled to discuss its implementation later that week. Lin, Jarrar's supervisor and a former attorney with the American Civil Liberties Union (ACLU), was familiar with the subject and discussed the legal risks in not compensating interns because they were actually being engaged as team members, were delivering services and the organization relied on them. During the ensuing discussion with staff members about the transition to a paid intern system, Huang explained that the change would reduce the number of interns from dozens to three for the entire organization.[10]

Notwithstanding Huang's statements about a looming paid intern system, the interns pressed forward with a petition in support of such a change. On April 3, Huang received an email from an intern on behalf of the DC office interns:

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[8] Huang's credible testimony regarding the executive team's previous decision to compensate interns, while vague as to the details, was not disputed. (Tr. 53, 94-99, 117.)

[9] Jarrar credibly testified that employees supported the petition, and none expressed any reluctance in signing (Tr. 19-20.) His testimony was corroborated by Mace, an employee called by the Respondent, who testified that he signed because he "supported the spirit" of the petition. (Tr. 53.) When confronted by Huang at the April 9 meeting, however, Mace and Amanda Armstrong apologized for signing the petition. In Armstrong's case, she attributed her sudden regret to the fact that Jarrar presented her with the petition accompanied by Walsh, the shop steward. (Tr. 125-27; ALJ Exh. 3.)

[10] I credited Huang's testimony that she responded positively over Jarrar's vague assertion that she "pushed back" against the idea of paying interns. It is undisputed that Huang explained during that discussion that the change meant that the Respondent would only be able to afford three paid interns for the entire organization – a specific calculation clearly resulting from prior discussions. It is also undisputed that Lin, Jarrar's supervisor, endorsed his proposal, citing the legal exposure presented by an unpaid intern system and their vital roles as team members. Moreover, Mace credibly corroborated Huang's testimony that she explained that the executive team was already in the process of planning such a change. (Tr. 20-23, 44-46, 52-53, 94-95.)

> We hope this email finds you well. As a group of Amnesty International USA interns united for the aim of achieving remunerated quality internships within the organization, we are submitting this letter to you with the intention of highlighting our concerns about management's policy of not offering financial compensation for our labor. As the youngest contributors to Amnesty International, we strongly believe in and are committed to the values of our organization. We therefore wish to align the working conditions of interns with the values Amnesty International stands for. which in our view are undermined by the status quo. Inspired by your commitment to youth empowerment, we would like to engage in a constructive dialogue with you and your team at your earliest convenience to discuss concrete proposals to improve the quality of internships at Amnesty International.
>
> Attached in this letter, you will find the scanned copy of our petition along with the signatures of both interns and staff members. Please kindly acknowledge receipt or the email message.

The petition was signed by fourteen "DC interns" and "[s]upported by" the additional signatures of twenty-one staff members in the Respondent's DC office, including Jarrar:

> We, the interns in the DC office of Amnesty International USA, are writing to express our concerns about management's policy of not offering financial compensation for our work. With 12 interns currently in the office contributing hundreds of hours a week, we are an essential aspect to the work and performance of our organization, but unlike other peers in similar organizations we do not get paid.
>
> While we have elected to intern for Amnesty despite the lack of compensation, because we believe in the work and mission of Amnesty International, it still does not seem fair and just that we would not be compensated for our contributions. Amnesty criticizes exploitative labor practices around the world and we believe it should be held to the same standard within the organization. We. believe that labor is valuable, and people should be compensated fairly for their work. It seems incongruent that Amnesty should uphold these values and fail to apply them to members of their own community and workplace.
>
> Furthermore, compensation for our labor would allow us to commit more time and energy to our work here. As many of us are currently or recently students, we have many costs we need to cover, including tuition, housing, and other costs of living. As a result, we must find other methods to sustain ourselves financially, taking away from hours that we could be contributing the great work of this organization.
>
> Providing compensation for internships would demonstrate true commitment to making Amnesty an equal opportunity employer and creating a diverse workplace. Amnesty International's commitment to human rights should be proven from within first. It is a basic human right to be able to seek employment and the lack of monetary compensation in this position restricts the ability to carry out that right.

> Without pay, AIUSA's internships are more available to students of higher socioeconomic status, which serves to limit racial and socioeconomic diversity. In order to create a more diverse and varied work environment it is imperative that Amnesty help include those people who cannot afford to live without a fair and standardized pay.
>
> As demonstrated by Board Member Janet Lord's statements in December, improving the diversity, equity, and inclusion standards from within an organization is about committing to each of these qualities. "A commitment to equity, especially, within a human rights framework entails working actively to challenge and respond to bias . . . it also entails proactively advancing, from an institutional perspective, policies and practices of equal opportunity for all persons." This means not only making statements in support of DEI, but also committing to taking action to remedy any shortcomings with each factor.
>
> We would be happy to comply with a contract outlining minimum hours so that we ensure that we are justly compensated for our labor, or even to have this agreement included in the union contract that is currently being negotiated with management. We are also willing to accommodate an agreement that would provide even a partial monetary compensation to start. For example, a system where we are encouraged to volunteer a set number of hours but are getting paid for the remainder.
>
> We write you this letter and deliver this petition with a passion for the work that Amnesty does and gratitude for the opportunity to take part in this organization. We also write with the belief that Amnesty should seek to actualize its values throughout the world and at home–even, and perhaps especially–within the organization itself.

Upon reading the petition, Huang was disappointed that it had been signed by many of the employees who met with her the previous day. She was clearly dismayed by the suggestion of hypocrisy on the part of the Respondent, a human rights organization, with respect to its use of unpaid interns and concerned that it was "not something that [she] want[ed] people outside of the organization to believe about the [Respondent]." Huang immediately forwarded the email to the executive team for consideration at its meeting the next day.

The executive team's previous discussions anticipated a rollout of a paid intern program in 2019 for several reasons. Based on available funding, the number of interns available to support employees throughout the organization would be reduced from dozens to three. The reduced intern support would require many employees to adjust their goals and program objectives. The government relations unit, for example, heavily relied on interns to cover Congressional hearings and attend meetings with coalition partners. A final determination in that regard, however, depended on the availability of members/volunteers to alleviate the shortfall.

After Huang shared the interns' petition with the executive team, the organization decided to accelerate the transition to paid interns. Having already hired its complement of interns for the summer, however, the executive team decided to begin hiring paid interns in the

fall of 2018. The decision to pay three interns was based on available funding and the belief that hiring any more would force the organization to reduce its number of paid staff positions.[11]

D. The April 9 Meeting

Sometime later that week, Huang sent an Outlook calendar invite to an April 9 meeting to all of the paid employees who signed the interns' petition. This invite was atypical because it did not specify the purpose of the meeting and because of its formality; the Respondent's customary practice had been to send an informal email asking to meet and discuss an issue, rather than the more formal approach in an Outlook calendar invitation.[12]

On April 9, Huang initially met with the DC office interns. She informed them of the Respondent's previous plans to pay its interns and, due to their petition, to implement that change for the fall 2018 term. That change, however, had no bearing on the interns in attendance, since their internships were ending in the next several months.

Huang and Ianantuoni then met with the employees who signed the petition. Huang informed the employees that the Respondent would be implementing a paid internship program. However, based on available funding, the Respondent would only be able to hire three interns for the entire organization. Huang also explained that the deployment of the three interns would be determined based on employee applications for their services. Her announcement evoked complaints from employees who relied on interns for their programs. Clearly frustrated, Huang said she was disappointed because she had an open-door policy and would have expected employees to discuss their concerns with her or request a meeting with the executive team before resorting to a petition. She characterized the action as aggressive and litigious. Regarding the impact that the loss of intern support would have, employees would have to reset their program goals with the likely reduction in the number of projects that could be satisfactorily carried.

Notwithstanding their unequivocal support for the petition when presented with it, several employees responded to Huang's comments by apologizing or expressing regret for signing it. One employee, Amanda Armstrong, insisted that the only reason she signed the petition was because Jarrar was accompanied by Walsh when he presented it to her.[13]

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[11] Huang's assertion that she, Lin and the Board of Directors perceived the petition as threatening legal action, is not supported by its language. The petition did not reference the FLSA or any other statute or regulation, but rather, alluded to principles of fairness, morality, equity, diversity, inclusion and an interest in collective bargaining. (Tr. 99, 104-05, 109, 114-16.)

[12] This finding is based on Jarrar's credible and undisputed testimony regarding the Respondent's meeting practices, and corroborated by Mace's credible testimony that, upon receipt of the invitation, he felt "[c]urious, if anything, about what the conversation would be." (Tr. 22-23, 54-56.)

[13] Aside from confirming Huang's disappointment with the petition, I did not credit Ianantuoni's conclusory denial and vague recollection of the meeting. (Tr. 78-80.) Nevertheless, I credit Huang's denial over Jarrar's assertion that she told employees that the DC office would be assigned only one paid intern. Mace credibly corroborated her version by recalling that she discussed the staff's need to reset goals during the transition. Second, Jarrar's testimony on this point is inconsistent with his subsequent statements to Huang on May 9 about the April 9 meeting when he expressed concerns that her remarks were perceived as a threat to employees' job security and made no mention about the distribution of interns. Lastly, whether the DC office would be assigned one or more interns was not the problem; those

On April 12, Huang sent out an email to the whole organization, outlining a new policy regarding interns:

> As many of you will recall, we have been discussing the option of moving forward to paid internships for some time, particularly within the context of our DEI commitment. We want to ensure that individuals from underrepresented communities have the opportunity to work with Amnesty International and learn more about our mission – something that can be too difficult if the work is unpaid.
>
> Recently, the issue was raised again by interns in the DC office, who made a strong case for the organization moving to paid internships. Last week, the Eteam made the decision to do this starting in the fall of this year.

The email then outlined the new policy, which would have three paid internships across the organization for each term (spring, summer, and fall). She also stated that she wanted the program to be "a thoughtful pipeline into our organization where we proactively recruit for these positions from communities of color and folks from other marginalized backgrounds."[14]

E. The May 9 Meeting

Concerned about retaliation for his role with the petition because the Respondent was investigating him for other matters, Jarrar arranged to meet with Huang in her office on May 9.[15] Jarrar recorded most of the conversation on his telephone.[16]

During this conversation, Jarrar expressed concerns that, because of the tension during the April 9 meeting, some employees feared retaliation for supporting the petition. Although he did not fear for his job at the meeting, he became concerned after Huang informed Lin about his role in collecting the signatures. Lin then asked Jarrar what was going on and asked staff for their notes about meeting with Jarrar. Jarrar also explained that Huang and Lin mischaracterized the petition as litigious or threatening legal action. Huang replied that she, Lin and the Board of Directors considered the petition adversarial, adding that some staff told her at that meeting that they felt pressured to sign the petition. She also clarified that no one would be fired or otherwise retaliated against for supporting the petition. Huang, noted, however, that she was disappointed and "very embarrassed" that no one spoke to her about their desire to change organizational policy beforehand.[17] She also considered it "strange" that no one told her about the interns'

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in attendance were dismayed by the drastic reduction of approximately fifteen interns at the DC office and the competitive process for their services that would result. (Tr. 23-25, 54-60, 99-105, 118-121.)

[14] Jt. Exh. 3.

[15] Allegations of retaliation are not an issue in this case. (Jt. Exh. 7; Tr. 26.)

[16] The flash drive containing an audio recording of this meeting was received as GC Exh. 2. With the agreement of all parties, a transcript of that recording was received in evidence as ALJ Exh. 3.

[17] While expressing support for the petition's goal, Huang was disappointed that no one had come to talk with her prior to delivering the petition. She also testified that the petition was "unnecessarily demanding" and "a tactic that create[d] a sense of both urgency and anxiety on the part of management." (Tr. 108-09; ALJ Exh. 3 at 5-14, 17-22, 34, 37, 40, 43.)

interests and said it "would have been really helpful. . . to tell the interns to give me the heads-up to let me know it's coming."[18]

At one point during the conversation, Jarrar acquiesced to Huang's insistence that he "try talking to us before you do another petition."[19] Huang conceded that petitions could be an effective tactic, but asserted that it would be inappropriate where there is no goal to be attained by the action:

> If the demand can be met without applying that pressure, there's no reason to do the petition. So if somebody came to you and said we should do a petition because we should have, I don't know, something that, you know, that the organization would be willing to consider, it doesn't make sense to do the petition, strategically. It actually sets off a more adversarial relationship. Look, so I'm not telling you, you should never tell somebody you shouldn't do the petition . . . But I would advise especially interns who don't know that strategically you might get further if you request a meeting with management. That's appropriate. . . But what I'm trying to say is tactically it doesn't make sense to spring it on me the next day. So part of the advice to the interns could have been, you know, we just heard from Margaret yesterday, or whenever it was, that they're considering this, so maybe the first step is to share this but to say we -- and ask for a meeting rather than present this . . . And I know you don't perceive it as adversarial, but it was really clearly not asking for a meeting or not asking for an initial conversation . . . So tactically it felt very strange to me . . . This is not something I oppose clearly because we actually did exactly what they wanted us to do . . . which was to move to paid internships. But it felt coerced. It didn't feel like a positive experience for me, either. I came out of this feeling like, wow, I don't have the kind of relationship with staff . . .[20]

After Jarrar acknowledged that some staffers now regretted the petition, Huang continued with her mixed message of assurance and depiction of the petition as a negative tactic:

> I would like to discuss moving forward in a way that like gives all staff the assurances that, you know, we're whole on what happened and like there was some – it was a negative experience but no one is going to pay a price. No one is going to be like punished because of it, and these are the steps that we're going to take moving forward. Like this conversation that I have with you now made me feel very good about the situation.[21] . . . I just wanted to be clear I don't want to – I don't know that we'll agree, ultimately, that some people are going to say I'm glad I signed the petition, I'd do it again. And other people are going to say I wish we hadn't done it. Ultimately, that's really not the point . . . What I really want is a context in which people feel comfortable when they do see problems . . . That they come forward . . . and they do it constructively . . . So I could see that wasn't their intention . . . to sort of levy a threat, the way it felt.[22] . . . You reach out first. I know . . . But we didn't get that this time . . . it wasn't just theirs. I mean

[18] ALJ Exh. 3 at 22.
[19] Id. at 33.
[20] Id. at 33-38.
[21] Id. at 40-42.
[22] Id. at 43-45.

once you and Emily started collecting signatures, it became yours collectively.[23]

Jarrar acknowledged that, from Huang's perspective that she was "blindsided" by the petition but noted that a petition is a frequently used by the organization as a campaign tool. Huang replied that a petition, however, "isn't usually happening against your employer though . . . For all the reasons that it's caused all this anxiety, it's significant." Jarrar concurred:

> I hear what you are saying. I'm just saying about how people felt about it. People felt like it's a low threshold to ask, and then they felt that there was an overreaction. . . And I think some people were like intimidated. There was like a chilling effect. They're like, oh my God, I'm going to lose my job, like why did I join, I want to take my name out, you know, like three interns now, we're getting punished. So it's like, so there was like anxiety on like our side as well.

Huang and Jarrar concluded by agreeing to set up a follow-up meeting with staff to address the anxiety persisting from Huang's comments at the April 9 meeting.[24]

LEGAL ANALYSIS

I. THE NATURE OF THE CONCERTED ACTIVITIES AT ISSUE

To be protected under Section 7 of the Act, employee conduct must be both concerted and engaged in for mutual aid and protection. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Petitions that relate to terms and conditions of employment—such as a petition for better wages—are a form of protected concerted activity. E.g., *Sam's Club*, 322 NLRB 8, 14 (1996) (holding that circulating a petition protesting labor conditions and soliciting signatures to the petition is concerted activity). Concerted activity undertaken solely for the benefit of or in solidarity with other employees is also protected. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 155 (2114) ("Congress created a framework for employees to band together in solidarity to address their terms and conditions of employment…even if only one of them has any immediate stake in the outcome.") (internal quotation omitted). However, concerted activity is not for mutual aid or protection when it solely communicates concerns "on behalf of nonemployee third parties." See *Five Star Transportation, Inc*., 349 NLRB 42, 44 (2007) ("merely raising safety or quality of care concerns on behalf of nonemployee third parties is not protected under the Act."); See also *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 n. 3 (1999) (an individual who is not paid and has no legal expectation of being paid deemed a nonemployee third party).

A. *The Interns' Employment Status*

The FLSA uses a "primary beneficiary test" in determining whether unpaid interns should be classified as employees. The analysis considers whether the intern or the employer is the primary beneficiary of the relationship. *Glatt v. Fox Searchlight Pictures*, 811 F.3d 528, 538 (2d Cir. 2015) ("the proper question is whether the intern or the employer is the primary

[23] Id. at 46-47.
[24] Id. at 48-49.

beneficiary…"); accord *Benjamin v. B&H Education, Inc*., 877 F.3d 1139 (9th Cir. 2017); *Schumann v. Collier Anesthesia*, 803 F.3d 1199, 1211-12 (11th Cir. 2015), *Solis v. Laurelbrook Sanitarium & Sch., Inc*., 642 F.3d 518, 529 (6th Cir. 2011).

Glatt identifies a number of factors that may be useful to such a consideration: whether there is an expectation of compensation; whether the internship provides training; whether the internship is tied to a formal education program and accommodates the intern's academic calendar; and whether the intern displaces work done by paid staff or merely complements it; and whether there is the likelihood of a post-internship hire or whether the internship's duration is limited to a period providing the intern with beneficial learning. See id. However, this list is not exhaustive, and each factor should only be given weight to the extent it sheds light on the underlying question of who the primary beneficiary in an employer-intern relationship is. Id. at 536-37 ("we propose the above list of non-exhaustive factors to *aid courts* in answering [the] question [of whether the intern of employer is the primary beneficiary].") (emphasis added); see also United States Department of Labor, *News Release: U.S. Department of Labor Clarifies When Interns Working at For-Profit Employers are Subject to the Fair Labor Standards Act,* 18-0043-NAT ("The Wage and Hour Division will update its enforcement policies to align with [appellate court rulings]…and provide the Division's investigators with increased flexibility to holistically analyze internships on a case-by-case basis.").

Several factors identified in *Glatt* weigh against finding the interns employees, and others weigh in favor. On the one hand, the evidence established that the internships are filled by students for academic terms, are not compensated and, although some continue as volunteers, interns are not typically hired as employees upon completion of the internship.[25] In addition, although interns perform some functions that would be performed by administrative assistants, they do not displace such employees because the Respondent does not employ any.

On the other hand, there is no evidence that the Respondent provides interns with training, but its employees rely heavily on them to accomplish their program objectives and work goals; interns engage in integral tasks such as attending and taking notes at Congressional hearings, and publishing blog posts and articles relating to human rights campaigns. Some of these tasks—such as writing and publishing blog posts—are the same as those engaged in by the Respondent's paid employees, indicating that interns have been partially displacing the advocacy work of employees. *Mark v. Gawker Media, LLC*, 2016 WL 1271064 (S.D.N.Y. 2016) at 11 (holding that a jury could find interns' work, in writing blog posts, displaced the work of paid employees where interns did pay writers' work "at least part of the time.").

Looking at the relationship holistically, it is evident that the Respondent has benefited the most from its relationship with interns. The drastic reduction of available interns would require employees to reduce the number of projects or campaigns that they work on. In addition, the transition to paid interns will force Respondent to hire administrative assistants for the first time.

[25] The record evidence suggests that internships are typically served during academic terms but does not indicate whether they are used as a vehicle for paying jobs elsewhere as was the case in *WBAI Pacifica*, 328 NLRB at 1274 (concerted activities by applicants not currently receiving any form of compensation from the employer, but "seeking entry to wage-paying jobs," could be covered by the Act).

These factors clearly shed the greatest amount of light as to the severe impact that the reduction of available interns will have on the Respondent's operations. Based on those consequences, it is evident that the Respondent has benefitted from its interns to such an extent that it is the primary beneficiary in that relationship. See *Glatt v. Fox Searchlight Pictures*, 811 F.3d at 536-37.

B. The Relationship of Interns to Employees' Terms and Conditions of Employment

Aside from the employee status of interns, the process by which the Respondent's employees selected and utilized them is in and of itself a condition of their employment. See *NLRB v. Wooster Division or Borg Warner Corp*., 356 U.S. 342 (1958) (subjects that directly concern or settle an aspect of the relationship between the employer and employees are conditions of employment). An appropriate analogy is that relating to concerted activity over hiring practices, which the Board has held to be protected. See *Houston Chapter, Associated General Contractors of America, Inc*., *(Local 18, Hod Carriers),*143 NLRB No. 43, slip op. at 3 (1963) (the word "employment" in the phrase "terms and conditions of employment" connotes the initial act of employing, in determining that a hiring hall relates to the conditions of employment); *Dave Castellino & Sons*, 277 NLRB 453 (1985) (employee engaged in protected concerted activity by refusing to cross picket line protesting failure to hire local residents).

Prior to the petition, the intern selection process was initiated by employees desiring help on projects. With the assistance of the human resources department, the employee would post a solicitation for interns and make the selection. With the shift to a process involving only three paid interns for the entire organization, the employee's control over the intern selection process ceased. The transfer of duties previously done by employees constitutes a change in a condition of employment. See *St. John's Hosp*., 281 NLRB 1163, 1166 (1986) (a change in employee's duties is a mandatory subject of bargaining and employer was obligated to bargain over a transfer of certain work duties from secretaries to nurses' assistants). As previously discussed, an intern's role also directly correlated to employee performance since it dictated how many projects or campaigns the employee could handle. Thus, for better or worse, the petition seeking to compensate interns necessarily and directly affected the terms and condition of employment of Respondent's employees.

C. Whether Respondent's Speech had the Potential to Coerce Future Concerted Activity

Lastly, employer conduct in response to employee activity that is unprotected—or arguably unprotected—may still violate Section 8(a)(1) if the conduct would tend to restrain future protected concerted activity. See *Keller Ford*, 336 NLRB 722, 722 (2001) (employer's threat against employee for speaking about insurance copayment with coworkers was unlawful whether or not the employee had stated his intent to engage in bona fide concerted action) (citing *K Mart Corp*., 297 NLRB 80, 80 n. 2 (1989)). This can be true even when the employer's actions are directly related to activity that is only questionably protected. See *Ellison Media Co*., 344 NLRB 1112, 1113-14 (2005). In *Ellison Media Co*., the Board found that even where an employer had forbidden employees from engaging in unprotected gossip, the employer violated the Act because the employer's speech had the potential to be interpreted by employees as applying more broadly to encompass concerted activity.

Here, although Huang's speech was made in response to the petition relating to unpaid interns, it referred to petitions generally. During the April 9 meeting, she expressed a desire that employees make use of an open-door policy not merely with regards to the present petitions, but all similar future actions. The disappointment she expressed was not with the particular request made, but with the form in which it was made—by formal petition, rather than an informal meeting or conversation. Likewise, during the May 9 meeting, Huang made references to petitions generally, making forward-looking statements to Jarrar that he should "try talking" to her before "doing another petition." Thus, even if the interns were nonemployee third parties, the statements made by Huang, which encompassed future, protected activity, would still be unlawful if they were coercive. For the reasons discussed below, they were.

II. HUANG'S STATEMENTS TO STAFF

A. The Legal Standard

Section 8(a)(1) of the Act makes it an unfair labor practice to interfere with, restrain, or coerce employees in their exercise of their protected right to concerted activity. In determining whether an employer's actions violate Section 8(a)(1) the employer's motivation is immaterial; what matters is whether the employer's conduct, viewed from the perspective of a reasonable person, tends to interfere with the free exercise of employee rights. E.g., *Crown Stationers*, 272 NLRB 164, 164 (1984) (the test for interference or coercion is whether the conduct may reasonably be said to tend to interfere with the free exercise of employee rights); *Hanes Hosiery, Inc.*, 219 NLRB 338, 338(1975) ("we have long recognized that the test of interference, restraint and coercion…does not turn on Respondent's motive, courtesy, or gentleness…the test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act.").

Section 8(c) of the Act affords an employer the right to express its personal negative views concerted activity to its employees, but only so long as such expression does not contain an express or implied threat of reprisal or force or promise of benefit. *Wal Mart Stores, Inc.*, 352 NLRB No. 103 at 8 (2008) (employer had the right to encourage use of its open-door policy as a superior alternative to representation). A threat need not be explicit; it may be implied. *Pomona Valley Hospital Medical Center*, 355 NLRB 234, 235 (2010) (holding that where words could reasonably be construed as coercive, they may violate the Act).

B. *The April 9 Meeting*

When a supervisor expresses personal disappointment about an employee's concerted activities, it is reasonable for an employee to read an implied threat of future reprisal into the employer's statements, making such statements coercive. *Print Fulfillment Services*, LLC, 361 NLRB 1243, 1243-44 (2014) (finding a violation where employer informed employee that the employer felt "disappointed" in the employee's pro-union activity). Suggesting that an employee's protected concerted activity is an act of disloyalty to the employer is also coercive. *Sogard Tool Co*., 285 NLRB 1044, 1047-48 (1987) (employer who conveyed belief that union activity was inimical to the employer's interests by comparing it to cancer acted unlawfully).

Huang's April 9 statements were precisely the kind that the Board has found unlawful. They were made during an unusually-scheduled meeting where to which only those employees who signed the interns' petition were invited, even though Huang's announcement—that the Respondent would be moving to a paid internship program—would be of import to all employees, not just the petition's signatories. The fact that only a specific group of employees was singled out for her announcement reasonably suggested to those present that they had been branded as disloyal. See *Westwood Health Center*, 330 NLRB 935, 941-42 (2000) (employer unlawfully implied during a private conversation with employee that she would consider her disloyal if she supported a union); *Tito Contractors, Inc*., 366 NLRB No. 47, slip op. at 1 (2018) (supervisor violated Section 8(a)(1) by depicting concerted activity as a personal betrayal and considered employees who engaged in a protected lawsuit to be "stabbing [him] in [the] back.")

During this meeting, Huang indicated that she believed the petition was adversarial, aggressive, and litigious—even though the petition was expressed in moral terms and neither referred to litigation nor regulations. These expressions are like those made in *Sogard Tool Co*., in that they indicate that concerted activity—here, a petition—is hostile to the employer's interests. 285 NLRB at 1047. Huang also expressed her own disappointment that the assembled employees had not made use of her open-door policy, a coercive statement of personal affront like that found unlawful in *Tito Contractors, Inc*. 366 NLRB No. 47, slip op. at 1.

The remaining allegation, however—that Huang's statements were coercive because they impliedly threatened to increase employees' workload as a result of the petition—is not supported by the record. Huang did not say that there would be an increased workload, only that employees would need to adjust their goals to account for the reduced number of interns available to work on projects. In essence, employees' workloads were to be reduced as a result of their concerted action – a development neither alleged nor shown to be averse to their terms and conditions of employment. See, e.g., *Forkkio v. Powell*, 306 F.3d 1127, 1131 (2002) (adverse employment actions are those where a reasonable trier of fact could find objectively tangible—as opposed to purely subjective—harm) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). Accordingly, that allegation is dismissed.

Under the circumstances, with the exception of the alleged statements that workloads would increase, Huang's statements to staff at the April 9 meeting were coercive in violation of Section 8(a)(1) of the Act.

C. The May 9 Meeting

"[A]n employer may not interfere with an employee's right to engage in Section 7 activity by requiring that the employee take all work-related concerns through a specific internal process." *Valley Hospital Medical Center*, 351 NLRB 1250, 1254 (2007); *Kinder-Care Learning Centers, Inc.*, 299 NLRB 1171, 1171-72 (1990) ("an employer may not impose procedural prerequisites to the exercise of Section 7 rights."); compare *Wal Mart Stores, Inc*., 352 NLRB No. 103 at 8 (2008) (employer was found not to be acting unlawfully by encouraging use of an open door policy as an alternative to union representation).

Here, Huang coerced Jarrar by attempting to dictate her own procedural process for collective action, in violation of his Section 7 rights. Although Huang stopped short of outright commanding Jarrar to cease using petitions and only use the Respondent's open-door policy, her statements cannot be taken as the mere expression of an opinion as to the benefits of an open-door policy, as in *Wal-Mart Stores*. Huang told Jarrar that he should "try talking" to her before "doing another petition," that "the first step" should be to ask for a meeting rather than present a petition, and that "strategically you might get further if you request a meeting with management." Simply wording such instructions in a slightly less compulsory manner than they might otherwise be phrased does not serve to change their compulsory effect; statements need not be phrased as a direct command to constitute a directive. *Boeing Co*., 362 NLRB 1789, 1791-92 (2015) (previously mandatory policy that was altered to use word "recommend" was still considered a directive); *Heck's, Inc.*, 293 NLRB 1111, 1114, 1119 (1989) (statement that the "company requests you regard your wage as confidential" was still restrictive of employees' Section 7 activity). In *Boeing Co.,* the employer was unable to make otherwise unlawful directives lawful simply by couching them as being recommendations; neither does Huang's use of ambiguous phrases like "you might get further" conceal the fact that these words conveyed the message that employees are expected to make use of an open-door policy before submitting a petition. 362 NLRB at 1791-92.

Furthermore, just as she did during the April 9 meeting, Huang characterized the petition in hostile terms, telling Jarrar "I know you don't perceive it as adversarial…tactically, it felt very strange to me" and stating that "it felt coerced;" she described the petition as "a negative experience" and even "a threat." As discussed at length above, an employer's speech tends to coerce employees when it suggests that concerted activity is hostile to the employer's interests, or a personal attack. Such speech tends to suggest to an employee the threat of future reprisal. E.g., *Westwood Health Center*, 330 NLRB at 941-42 (implications of disloyalty suggest threats of future reprisal). While it is true that Huang assured Jarrar that no one would be punished because of the petition that was already circulated, her strongly-worded disapproval, coupled with her repeated calls to use the Respondent's open-door policy, suggested that some sort of unknown reprisal might occur in the future.

Finally, Huang told Jarrar that it was "strange" to her that no one had thought to share with her that the interns were interested in compensation and that it "would have been helpful" if the interns had been told to give her advance notice of the petition. As previously discussed, Huang considered Jarrar and other employees to have acted collectively with the interns in actions relating to their conditions of employment. As such, Huang's statement encouraged Jarrar to inform on the protected concerted activity of others in violation of Section 8(a)(1). See, e.g., *Ryder Transportation Services*, 341 NLRB 761, 761-62 (2004) (unlawful for employer to instruct that employees report in writing if they subjectively felt harassed by coworkers soliciting for the union because such an instruction effectively encouraged employees to report the identity of union card solicitors); *Arcata Graphics/Fairfield, Inc*., 304 NLRB 541, 542 (1991) (same).

For the foregoing reasons, Huang's statements tended coerce Jarrar in the exercise of his Section 7 rights in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in interstate commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act on April 9 and May 9, 2018 by: (a) instructing employees to communicate complaints to management orally before submitting complaints in writing; (b) threatening employees with unspecified reprisal because they engaged in protected concerted activity; (c) equating protected concerted activity with disloyalty; and (d) requesting employees to report to management employees who are engaging in protected concerted activity.

3. All other complaint allegations not specifically described above are dismissed.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Amnesty International of the USA, Inc, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees to communicate complaints to management orally before submitting complaints in writing.

(b) Threatening employees with unspecified reprisal because they engaged in protected concerted activity.

(c) Equating protected concerted activity with disloyalty.

(d) Requesting employees to report to management employees who are engaging in protected concerted activity.

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

[26] 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.

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

(a) Within 14 days after service by the Region, post at its facility in Washington, D.C. copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 9, 2018.

(b) Within 21 days after service by the Region, file with the Regional Director 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. March 18, 2019

Michael A. Rosas
Administrative Law Judge

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

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT instruct you to make complaints orally to us before you make complaints in writing.

WE WILL NOT threaten you with unspecified reprisal because of your protected concerted activity, including participating in group petitions about your terms and conditions of employment.

WE WILL NOT equate your protected concerted activity, including participating in group petitions about your terms and conditions of employment, with disloyalty.

WE WILL NOT request you to report to us employees who engage in protected concerted activity, including participating in group petitions about your terms and conditions of employment.

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.

AMNESTY INTERNATIONAL OF THE USA, INC
(Employer)

Dated _____ By _____
(Representative) (Title)

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

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-2700
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-221952 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, (410) 962-2880.