

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

**GOWANUS STAFFING, INC.**

and

**Case 29-CA-208094**

**JAMAL WATTS-TARVER, an Individual**

*Noor I. Alam, Esq.*,  
for the General Counsel.  
*Jeffery A. Meyer, Esq.* (Nixon Peabody LLP),  
for the Respondent.

**DECISION**

**Statement of the Case**

BENJAMIN W. GREEN, Administrative Law Judge. This case was tried before me in Brooklyn, New York on January 22, 2019. The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Charging Party Jamal Watts-Tarver<sup>1</sup> because of his position as union shop steward and his union activities. For the reasons discussed below, I find that the Respondent violated the Act as alleged.

The complaint issued in this case on October 25, 2018 and the Respondent filed an answer on November 7, 2018. In its answer, the Respondent denied knowledge and information to form a belief as to the truth of the allegations that the underlying charges were filed and served. The charges and affidavits of service were entered into evidence. Accordingly, I find that the original charge was filed with the Board and served on the Respondent on October 17, 2017.<sup>2</sup> I further find that a first amended charge was filed with the Board on November 7 and served on the Respondent on November 8.

At trial, the Respondent stipulated to complaint allegations regarding jurisdiction, the status of Local 713, International Brotherhood of Trade Unions (Union or Local 713) as a labor organization, the status of Manager Cruz Olmo as a supervisor, the suspension of Tarver on September 13, and the discharge of Tarver on September 23. The Respondent denies the suspension and discharge of Tarver were unlawful.

Prior to the hearing, the General Counsel served on the Respondent a subpoena duces tecum. The Respondent filed a petition to revoke this subpoena, which I denied. Subpoena paragraphs 13 and 14 requested the following documents:

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<sup>1</sup> Jamal Watts-Tarver is referred to herein as "Tarver" to avoid confusion with Union Representative Kevin Watts.

<sup>2</sup> All dates refer to 2017, unless stated otherwise.

13. For the period [from March 15, 2016 through December 15], all documents that show:
- (a) the identity of individuals employed by Respondent at its Maspeth facility;
  - (b) the dates of hire;
  - (c) the job classifications or positions occupied by such individuals;
  - (d) all changes to the job positions of such individuals;
  - (e) the rates of pay of such individuals;
  - (f) any benefits provided to such individuals;
  - (g) the nature and effective dates of all changes to the pay of such individuals;
  - (h) all changes to the employment status of such individuals; and
  - (i) the dates of any such changes.
14. The complete personnel and employment files (excluding medical records but including documents showing dates of employment, job titles, job duties, dates of job titles, rates of pay, wage raises, bonuses, appraisals or performance evaluations, commendations, corrective action or discipline, and all documents showing the reasons for corrective action or discipline) of all Unit employees at the Maspeth facility during the period covered by this subpoena.

At trial, the General Counsel represented that, in response to subpoena paragraph 13, it sought Respondent's payroll records. Respondent's counsel refused to provide payroll records upon the grounds that he would "stand by our petition . . ." (Tr. 14) I advised Respondent's counsel that the failure to produce subpoenaed documents could subject the Respondent to *Bannon Mills* remedies.

On the entire record, including my observation of the demeanor of the witnesses, and after considering a posthearing brief filed by the General Counsel,<sup>3</sup> I make these

### Findings of Fact<sup>4</sup>

#### I. Jurisdiction

At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

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<sup>3</sup> The Respondent did not file a posthearing brief and the Union did not participate in the hearing.

<sup>4</sup> 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, including the demeanor of the two witnesses who testified in this case. However, credibility determinations may rely on a variety of factors, including the context of the testimony, 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 NLRB 586, 589 (1996), enf'd. 56 Fed.Appx. 516 (D.C. Cir. 2003).

## II. Alleged Unfair Labor Practices

5 The Respondent is in the business of providing staffing services to various clients, including J&J Farms Creamery Inc. (J&J) at 57-48 49th Place, Maspeth, New York. The Maspeth facility is about 60,000 square feet. Gowanus provides personnel to J&J for the receiving and storage of products, picking warehoused product orders and assembling them for shipment to customers, warehouse cleaning and maintenance, and warehouse administration.

10 Cruz Olmo is the Respondent's night manager. Olmo works throughout the facility, but is primarily stationed in the warehouse office. Olmo testified that the Respondent employs 50 pickers at the facility and they all report to him. The facility has a system of video surveillance which can be monitored on a screen in the office. The video feed is recorded. The recording has been used by Olmo to determine that at least one employee was stealing merchandise. Olmo claims he is the only manager responsible for hiring, firing, and disciplining employees. 15 Regarding discipline, Olmo testified that he faxes all written warnings and related materials to the Union, and, thereafter, retains the information in a single file in the office. However, Olmo testified that he was unable to find this file in searching for records responsive to the General Counsel's subpoena. Olmo offered no explanation as to what might have happened to the file.

20 The Respondent and the Union are parties to a collective-bargaining agreement covering a unit of all full-time employees employed by the Respondent at J&J's Maspeth facility.<sup>5</sup> The term of the agreement is 3 years ending June 30, 2019. The contract includes a provision, Article 15 – Shop Steward, which states as follows (Jt. Exh. 1):

25 The Union shall have the right to establish a Shop Steward in the facility covered by this Agreement. Such Steward shall have the right to take up with a representative of the Employer all grievances arising out of this Agreement. The Shop Steward shall have super seniority.

30 In Article 13 – Discharge/suspension, the contract states that employees may not be suspended without just cause, but lists theft of merchandise, use of narcotics, and insubordination among misconduct that is grounds for immediate discharge. In Article 14 – Arbitration, the contract directs the parties to attempt to adjust disputes and, if no adjustment can be reached within 48 hours, submit the matter to arbitration.

35 Kevin Watts is the Union representative responsible for administering the Gowanus contract at the Maspeth facility.

40 Tarver was hired by the Respondent as an order picker in April 2016. He responded to an advertisement for the position on Craigslist and had similar prior experience with previous employers. Accordingly, he called and spoke to Izzy Pollack. Pollack told Tarver to come for an interview. Tarver came to the facility and presented Pollack with a job application and his resume. Pollack tested Tarver on the operation of a pallet jack. Pollack then told Tarver to come back next week and start work. Tarver credibly testified that he did not speak to Cruz 45 when he came to apply for the position.

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<sup>5</sup> Tarver testified that another union, Local 2013, represented certain employees employed at the facility, including other order pickers. According to Tarver, of about 35 to 40 employees who worked as pickers at the facility, 13 to 15 were represented by Local 713. Olmo initially testified that most of the Respondent's employees were represented by Local 713, but subsequently testified that he was unaware of any employees who are represented by a different local.

Olmo testified that he is responsible for all Gowanus hiring at the Maspeth facility and claimed to recall hiring Tarver. Olmo testified that Pollack is not authorized to hire unit employees and has no other authority over such employees. When asked where he hired Tarver, Olmo testified that Tarver was hired at the Maspeth facility (without identifying the location within the facility). When asked how he obtained Tarver's application, Olmo testified that he did not recall. I credit Tarver's account of his hiring over the testimony of Olmo.<sup>6</sup>

As an order picker, Tarver received product orders from Olmo or Pollack at the office window and drove a pallet jack throughout the warehouse to retrieve those products. He stacked cases of product (e.g., juice, eggs, milk, cream cheese) on a pallet, weighed it, and bought it to a staging area where Pollack and Olmo could see it from the office window and quality control could inspect it. He would then give the completed order to Olmo or Pollack and receive another order (until all the product was picked for the night). The orders vary in size, weight, number, and location of cases to be pulled. Tarver testified that he generally completed about 13-14 orders per evening. Tarver also trained a number of pickers hired after him.

Olmo testified that orders are largely kept in one pile and given to "the regular guys" consecutively off the top of that stack. However, a separate stack of more difficult orders that require a "little better handling" for particularly demanding customers are given to more experienced employees. (Tr. 144) Fresh Direct orders are an example of those kept in the second stack. Tarver and an employee named Ramell Haynes<sup>7</sup> were among the pickers who received orders from the second stack.

According to Tarver, he and Haynes were the two top pickers. Tarver testified that Olmo complemented the neat way in which he (Tarver) stacked cases on his pallet. According to Tarver, the Respondent also liked the efficient way in which he moved around the facility and the accuracy of his picking.

The Respondent took the positions at hearing that it does not employ Pollack and that Pollack is not a supervisor within the meaning of Section 2(11) of the Act. Olmo testified that he did not know the identity of Pollack's employer. Olmo works with Pollack in the Maspeth facility office every day and, according to Olmo, Pollack is responsible for maintaining paperwork for outbound freight. Olmo subsequently admitted that, when he is not in the office, Pollack is responsible for distributing orders to the pickers. Tarver understood Pollack to be the Respondent's night manager and both Pollack and Olmo to be his immediate supervisors. When Tarver took sick leave, he called the office and notified either Olmo or Pollack (whomever answered the phone).

In addition to their hourly wage, pickers are eligible to obtain an incentive bonus of \$75 or \$100 depending upon the number of cases they complete per hour over the course of the week. Tarver received the \$75 bonus (for pulling about 145 cases per hour) almost every week and the \$100 bonus (for pulling about 175 cases per hour) occasionally. According to Tarver,

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<sup>6</sup> I generally credit Tarver over Olmo throughout this decision, including Tarver's testimony regarding his hiring. Tarver provided detailed and consistent testimony, and responded to all questions, regardless of the source, in a manner that appeared measured and honest. Olmo provided more general testimony and often failed to specifically address the details provided by Tarver. Olmo was far more guarded and uncertain in his demeanor and seemed far more reluctant to provide testimony that might be harmful to the Respondent's defense.

<sup>7</sup> Ramell Haynes is spelled herein as his signature appears in GC Exhibit 2. In the transcript, Ramell Haynes is spelled "Ramel Hinz."

he was one of a few “top guys” who received a bonus every week. He knew this because the employees discussed their pay with each other.<sup>8</sup> Tarver testified that certain orders were easier and took less time to pick than others. For example, some orders required the picker to go to multiple locations throughout the warehouse for various products while other “bulk orders” could be filled by just a couple of products at a couple locations. Therefore, the number of cases an employee pulled per hour did not always accurately reflect his/her productivity.

Tarver testified that Olmo and Pollack distributed, out of order, some “bulk orders” to employees they favored and thereby made it easier for those employees to obtain the weekly incentive bonus. As noted above, Olmo and Pollack generally give pickers who approach the window for a new order the next order on top of the stack. However, in certain instances, Tarver saw Olmo and Pollack reach into the middle of the stack to pull specific bulk orders for people or take an order from a separate stack. According to Tarver, “A lot of the guys felt the bonus initiative was rigged; they felt that [Pollack] and Olmo would fish for certain orders and hand favorable orders to guys that they liked over other guys.” (Tr. 59) Tarver raised these complaints to Pollack on occasion, but Pollack denied it. In addition to their concern that the bonus system was “rigged,” some employees (including Tarver) thought the Respondent failed to pay them for certain bonuses they were entitled to receive.

Tarver and Olmo testified that they had a good working relationship with each other prior to Tarver’s suspension on September 13. (Tr. 55, 146)

When Tarver was hired, the Union did not have a shop steward. Tarver and other employees discussed the appointment of a steward for in-house representation because Watts rarely came to the facility and was often difficult to reach. In about May, at the request of employees, the Union designated picker Jason Quijano as shop steward.

In about June, Tarver was effectively suspended by Pollack. On a Sunday, Tarver notified Pollack he would be out sick with a migraine headache. Pollack said, “no problem.” Tarver’s condition did not improve and, the next day, he notified Pollack he would be out sick again. This time, Pollack told Tarver to take the rest of the week off. Tarver objected and said he did not need the remainder of the week off, but Pollack insisted. Tarver notified Watts and a grievance meeting was held the following week. At this meeting, the Respondent agreed to pay Tarver backpay for the 3 days he was told not to come to work. However, Tarver was only compensated for 2 of those days. Tarver did not contest the discrepancy because he did not want to create “an uproar” with management.<sup>9</sup> (Tr. 55)

Quijano served as steward until early-July, when he was terminated. The Union apparently grieved the termination, but Quijano did not return to work during the remainder of Tarver’s employment with the Respondent.

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<sup>8</sup> Though hearsay, I accept Tarver’s testimony as valid secondary evidence because the Respondent refused, without any valid excuse or explanation, to produce its payroll records. *Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124, \*10 (July 11, 2018) (accepting secondary evidence, including hearsay testimony, in lieu of subpoenaed payroll records) citing *Bannon Mills*, 146 NLRB 611 (1964) and *McAllister Towing & Transportation, Inc.*, 341 NLRB 394 (2004).

<sup>9</sup> Although Olmo testified that Pollack had no authority over Union represented employees, he (Olmo) did not address or attempt to rebut testimony that Pollack effectively suspended Tarver for 3 days. Notably, the Respondent did not immediately reinstate Tarver upon learning that Tarver was suspended by Pollack (who, Olmo claims, did not have authority to do so). Rather, the Respondent attended a grievance meeting and only agreed to a remedy of backpay at that time.

On July 12, after Quinjano was terminated, Tarver and other employees met to discuss the appointment of a replacement steward. The employees agreed that Tarver should replace Quijano (at least until Quijano was reinstated). Tarver drafted a letter reflecting his nomination to the position of steward and several employees signed it the next day.

On July 13, after employees signed the letter regarding his nomination, Tarver delivered it to Olmo. Olmo told Tarver to be careful because the steward job could be hard and the previous steward was terminated for insubordination. Olmo said Quinjano would not be reinstated.

A few days later, Tarver notified Watts of his nomination to the steward position and Watts confirmed that Tarver would replace Quijano. As steward, Tarver talked to Watts about once a week and attended certain meetings Watts held with management.<sup>10</sup> (Tr. 111)

Shortly after Tarver became shop steward, in about mid-July, he spoke on behalf of a new employee who was suspended. Tarver was responsible for training the employee and did so for four days. On the fourth day, Tarver was relieved as trainer and the employee began working on his own. About midway through the employee's shift, he spilled some cases of product off his pallet and Olmo told him to go home. Tarver was present and objected. Tarver told Olmo he did not have good cause to send the employee home and that he (Olmo) was violating the employee's rights. As the conversation progressed and Tarver persisted in his objections, Olmo accused Tarver of being insubordinate. Accordingly, Tarver stopped discussing the matter with Olmo and told the employee to file a grievance with Watts.

In about the same time period, Tarver confronted Olmo about doing unit work. Tarver saw Olmo picking orders and asked if he was allowed to do such work since he was a salaried employee. Olmo said Watts told him it was alright for him to pick orders.<sup>11</sup> (Tr. 76)

Tarver regularly talked to other pickers about replacing the bonus system with a merit pay increase and they ultimately decided that the latter would be preferable. Accordingly, in about the first week of August, Tarver drafted a document to be signed by Union members "[i]n favor of merit raise based off performance criteria VS bonus initiative." (GC Exh. 3) Eleven unit employees signed the document in favor of merit raises. Tarver showed this document to Pollack and told him that many employees preferred to replace the bonus system with a system of merit pay increases for the top pickers. Pollack said it "wasn't a bad idea" and agreed to the proposal. (Tr. 63) Pollack said he would give the pickers a 30-day trial period to increase their numbers and, thereafter, select about eight pickers to receive merit pay increase of \$2 to \$2.50 per hour. Tarver relayed Pollack's comments to other unit employees who, collectively, decided the agreement should be in writing. The next day, Tarver asked Pollack to have the agreement

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<sup>10</sup> Olmo admits Tarver and Watts told him the Union designated Tarver as the new steward. Olmo claims he congratulated Tarver on the appointment "and that was pretty much it." (Tr. 146) I credit Tarver's testimony regarding this conversation, including Tarver's testimony that Olmo said he should be careful because the previous shop steward was terminated for insubordination. Olmo was not asked to specifically deny the comment. Further, Tarver was far more credible in his demeanor and detailed description of the conversation than Olmo.

<sup>11</sup> Olmo testified that he had, previously, talked to Watts about performing unit work. He told Watts that he had a huge responsibility and, occasionally, about once a month, needed to pick orders to finish the workload.

on merit pay increases reduced to writing “for the CBA.” (Tr. 69) Pollack told Tarver he would let “the guys in the back” (i.e., upper management) know and get back to him. (Tr. 69)

5 A few days after he spoke to Pollack, Tarver called Watts and told him of the proposal he made regarding merit pay increases in lieu of the bonus. Watts said he would look into it.

10 About a week later, Tarver asked Pollack whether he received the written agreement regarding merit pay increases. Pollack said, “not just yet, they’re still reviewing a few details, working out the kinks of it, just want to make sure everything is detailed properly, and he’ll have it to me as soon as possible.” (Tr. 69)

15 At some point after Tarver became steward, an employee complained to him about work and suggested the employees walk off the job. Tarver spoke to some of the employees and later organized a meeting during a lunch break. Tarver and other employees agreed it would not be wise to engage in a work stoppage and, rather, it would be better to commit to the work and being good employees.

20 Tarver testified that the Respondent hired its first security guard in about early-August and a second security guard, who replaced the first, in early-September.<sup>12</sup>

25 In about the third week of August, Tarver met with Watts outside the facility regarding various matters, including the proposal for merit pay increases and Olmo’s performance of unit work. Watts said he spoke to somebody at J&J and they were unaware of any proposal regarding merit pay increases. Watts also told Tarver that Olmo was not allowed to perform unit work.

Throughout August and early-September, the Respondent continued to pay employees the incentive bonus based on cases pulled per hour.

30 Sometime between mid-August and mid-September, Watts called Olmo regarding the proposal for merit pay increases. Olmo testified that this was the first time he heard about it. Olmo adamantly rejected any such proposal during the term of the current collective-bargaining agreement, but told Watts the Union could address it during negotiations for the next contract. Olmo admittedly understood the proposal on merit pay increases to have come from Tarver.

35 On about September 10, after the 30-day trial period (which Pollack mentioned), Tarver again asked Pollack for the written agreement on merit pay increases. Pollack said, “they’re still working out due diligence.” Tarver told Pollack that Watts said the higher-ups of the company had no idea about a merit increase and had not heard anything about it. Tarver said, since this was the case, he doubted the merit pay increases were coming, and asked Pollack whether they were coming or not. Tarver explained to Pollack that he already told the employees about

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<sup>12</sup> As discussed below, Olmo claims he suspended and subsequently discharged Tarver for an incident that occurred on September 12 between Tarver and the second security guard. Although unsure, Olmo testified that the second guard was hired in about mid-August and worked until he quit on September 12 (after the incident with Tarver). I credit Tarver’s testimony that the second guard was hired in early-September. First, an adverse inference against the Respondent is warranted since it refused without excuse or legitimate explanation to produce payroll records which would have been best evidence to resolve the factual issue. *Bannon Mills, Inc.*, 146 NLRB 611 (1964). Further, Tarver specifically recalled two employees complaining about the second guard shortly before Tarver approached the guard on September 12. This suggests that the guard was hired in early-September, when Tarver received the complaints about him.

the agreement and they were expecting to be paid after the trial period. Pollack told Tarver the only picker deserving of a merit pay increase was Haynes. Tarver described the remainder of this conversation with Pollack as follows (Tr. 72):

5 He told me even if Ramel misses one day, he'd come in, and he'd still put up  
good numbers. I began to say, even if I miss a day, I come in and I feel I produce  
good numbers as well. I also said, I'm aware that if Ramel misses a day, you  
10 guys still give him the bonus, even though he should be excluded from it,  
because you exclude everyone else if they miss a day. And he said, well,  
Ramel's a beast, and if anyone is deserving of it, it's only him. I said, okay, if  
that's how you feel, then I won't shoot for the bonus initiative. Instead of me doing  
200 percent a day, I'll just give you 100 percent. And he said, okay fine. I took my  
order and continued to do work.

15 On September 11, an employee complained to Tarver that a new security guard was  
following him around the warehouse, looking at him suspiciously, and looking into the basket  
where he kept his personal items. Tarver told the employee the security guard was just doing  
his job. However, later that day, a second employee came to Tarver with similar complaints  
20 about the guard. Tarver said he would introduce himself to the guard and "see where he's at."  
(Tr. 81)

On September 12, after a lunch break which ended about 10:30 p.m., Tarver saw Olmo  
getting onto a pallet jack. Tarver asked Olmo whether work was looking light or heavy that  
evening. Olmo said it was a light night. Tarver then asked, "are you supposed to be picking  
25 orders with us? I was informed you're not supposed to." Olmo replied, "I'm bored, I can do  
whatever I want." (Tr. 87) Later that evening, Tarver drove by Olmo as he was staging his  
finished product. Tarver pulled out his cell phone and took pictures of Olmo staging the product.  
Olmo said, "come on J." Tarver responded, "I'm just taking photo documentation just to cover  
myself as well as the Union employees." (Tr. 88) Olmo asked Tarver to come speak with him in  
30 the back. Tarver asked if this was a disciplinary meeting and said he would rather speak to  
Olmo later in the week when Watts was present.<sup>13</sup> Tarver said, "so I'll turn down the offer to  
speak to you right now," and proceeded with his work. (Tr. 88)

35 Olmo denied he said he could do whatever he wanted because he was bored. Olmo  
testified, "I told him clearly when he questioned what I was doing, if he had any questions or  
concerns regarding what I'm doing, he's to call the Union and speak to me, not question what I  
was doing at the present time." (Tr. 148)

40 At some point during the same evening, September 12, Tarver saw the security guard  
and introduced himself as the Union shop steward. Tarver told the guard he could come to him,  
in addition to Olmo and Pollack, if he needed anything or if any of the employees were doing  
anything wrong. Tarver said he used to work in security and asked where the guard went to  
school. Ultimately, Tarver asked the guard if he was certified in New York State. Tarver  
45 thought the guard's mood darkened after he asked the question. The guard frowned, did not  
answer, and changed the subject, asking Tarver, "are you aware that the company is hiring  
illegal people?" (Tr. 82) Tarver said he was not sure what the guard was talking about and left.  
Tarver testified that he was calm and friendly in dealing with the guard throughout this initial  
conversation.

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<sup>13</sup> Tarver did not recall whether Olmo said it would or would not be a disciplinary meeting.

Tarver continued to drive in a lane that wrapped around and headed back from where he had come. On his way back, Tarver saw the security guard waiting for him. Tarver described his subsequent conversation with the guard as follows (Tr. 83):

5 [S]o once I got there, he says to me, I'm just security. He ripped off his hat. He unzipped his coat, flagged it open. He says, I'm just security. I'm 24 years old. I'm just trying to do my job. I stated to him, I understand. I used to do security. I'm 32 years old. There's no beef here. And as I began to ride off, a few guys were around that scene as well, because it's like, the way he did created a scene. So  
10 it's like a crash. Everybody want to stop and see -- hey, what's going on? So a few guys were looking. Some guys actually stopped their work and was looking. As I rolled off, I jokingly said to those guys -- like, guys he's not security. You don't got to listen to him. But at the same time, no, I'm just joking. Whatever this guy tell you, you got to do it. If he want to check your bag, you got to let him  
15 check your bag, guys. Let's all be good together. He's security, and let's all have a good day. And I continued my work.

Tarver was riding by the guard, a couple feet away, when the guard threw off his hat. Tarver testified he was prompted to make the joke about employees not needing to listen to the  
20 guard "because of the way [the guard] was acting, so childish." (Tr. 127)

At about 1 a.m., shortly before a coffee break, Tarver noticed the guard staring at him when he dismounted the pallet jack at the weigh station. Tarver jokingly pointed at himself as if to say, "looking at me?" The guard nodded in agreement. After Tarver finished weighing his  
25 order, as he drove by, he asked the guard, "Are you okay? Is everything okay?" The guard asked, "you think you're real funny?" Tarver said, "no, I'm just the shop steward. It's my job to . . . do certain things, and make myself familiar with people. I make them aware of who I am and how I can assist them in any manner." (Tr. 86) Tarver testified that he was calm and as professional as possible during his interaction with the guard that evening.  
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Neither Olmo nor Pollack were present during any of the exchanges Tarver had with the guard on September 12.

Olmo testified that, sometime after midnight, the guard approached him in the back of the facility and resigned because of the incident with Tarver. Olmo described his conversation with the guard as follows (Tr. 154):  
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He claimed [Tarver] approached him in the back of the facility . . . and started questioning his qualification. First, . . . they introduced each other . . . They  
40 exchanged words. He -- [Tarver] had returned. Requested a . . . credential from the security guard, which then the security guard became a little uneasy about it and said, I don't have to provide you any credentials proving anything. You're no one in here. [Tarver] then return -- reply, yeah, I'm the shop steward and if I'm going to have you checking any of my belongings or my bags or any of my  
45 members' bag, we need to know -- . . .

[Tarver] then proceeded to tell him that he doesn't have to have his belongings, or any of the members' bags being checked by -- randomly by no one. After that matter, he stated to me that he was doing his rounds, which meant the security  
50 guard was back and forth throughout the facility, and that towards the latter part of the evening, at the weigh scale station, which is approximately 20 to 50 foot from my office space, the security guard was stationed, walking towards the whole entire floor. And he replied to Mr. Watts that, you're funny. Okay. He also

5 mentioned he removed his hat. He must have been hot, or whatever the case was. And Mr. Watts, in return, became verbally aggressive and said, if I may, to the security, this is my house, nigga. Security then felt threatened by it. It was alongside of other employees that were around the vicinity. And he came and brought it to my attention. He said he felt threatened by Mr. Watts and every other member that was within the vicinity who were claiming they were being singled out by the security, when he was just merely just doing his job and just observing the grounds.

10 Olmo then took a signed written statement from the guard and faxed it to the Union. However, Olmo was not able to find the statement for production in response to the General Counsel's subpoena.

15 Tarver specifically denied he used the N-word in speaking with the guard, used any other vulgar language, or otherwise became aggressive. Tarver testified that Olmo did not ask him, during their discussion regarding the matter on September 12, whether he engaged in any such conduct. Tarver also testified that foul language and horse play were common among employees who joked around with each other in the warehouse. In particular, Tarver noted that one Spanish speaking employee routinely referred to him as "my nigga." While Tarver testified that the N-word is "slang black people use every day," he further testified that he would not use that language with anyone who "wasn't my buddy" (such as the security guard). (Tr. 135)

25 At about 2 p.m., after Tarver scanned his final order of the evening, Olmo asked him to come into the office to speak. Olmo said it would be "just two guys talking off the books." (Tr. 89) Tarver agreed and went to sit with Olmo in the back. Olmo took out a pad and pen to take notes. Olmo told Tarver the security guard resigned. Tarver asked, "why?" Olmo did not respond. Rather, Olmo asked Tarver what took place with the guard that evening. Tarver described the remainder of the conversation as follows (Tr. 89-90):

30 I just told him I introduced myself -- I told him first that a couple of the guys came up to me saying the security was rubbing them the wrong way. He was going out of his way to look into their personal belongings when he didn't have to. Then I explained how I got off my machine and introduced myself to the security officer, told him my name. He told me his name. I told him I'm the shop steward, if you need anything you can come speak to me as well as management. Then he began . . . to ask me if I was aware that the company was hiring illegal people. Then Olmo asked me, are you aware of that J? I said, I have no idea about any of that, that's none of my business. He was taking notes, and then he asked me if I was intentionally slowing down my pace on my numbers? I explained that I'm not intentionally doing anything. I'm just moving at a normal pace that I was being paid to perform at . . . He said he noticed my numbers are low. I said, that may be because I'm not moving as quick as I normally would when I was trying to obtain a certain number for the bonus initiative. And I asked him if there was a quota I had to abide by. He said no. And that was it. That was the end of the meeting. I went upstairs, changed my clothes, exited the building, went home.

45 Olmo did not describe this conversation with Tarver in detail. According to Olmo, he asked Tarver into the office for a brief conversation. Tarver accepted and told Olmo what transpired that evening with the security guard.

50 During this meeting, Olmo also asked Tarver about employees walking off the job. Tarver explained that it was something the employees considered but decided against. Olmo did not discipline or discharge Tarver during this meeting. Olmo's recollection of the respective

descriptions of the incident by Tarver and the guard was that their stories were “somewhat similar, with the exception of the verbal aggressiveness, in [Tarver’s] part, toward security.” (Tr. 165) Olmo further testified that he considered Tarver’s “verbal aggression” towards the guard to be insubordinate. However, on cross-examination, when Olmo was questioned at length about why he believed the guard over Tarver, Olmo was incapable of providing a response. Olmo acknowledged during this questioning that he was confident in Tarver’s skills as a picker and otherwise had a good relationship with him, while the guard was a relatively new employee.

Olmo did not attempt to review video footage of the incident that occurred between Tarver and the guard. Likewise, Olmo did not seek to speak with any other employees who witnessed the incident.

On September 13, when Tarver came to work, Olmo met him on the way in and told him he was suspended “for what took place last night.” (Tr. 94) Tarver asked for a specific reason why he was being suspended. Olmo responded that it was something with the security guard. Tarver said he did not do anything wrong with the guard, and indicated he was going to punch in for work. Olmo told Tarver not to do so. Tarver asked whether Watts was aware of the suspension, and Olmo said he was not. Tarver insisted upon proceeding to work unless his Union representative told him not to do so. Olmo called Watts, talked to him briefly, and handed the phone to Tarver. Watts told Tarver to go along with the suspension and file a grievance for backpay. Tarver handed the phone back to Olmo. Olmo told Tarver he should exercise his rights. Tarver gathered his belongings and left.

During the remainder of the week, Tarver talked to Watts about scheduling a grievance meeting. Watts initially advised Tarver it would be held later in the week, but subsequently said it could not be held at that time because not all the parties were available.

On the evening of September 23, Olmo called Tarver and told him he was terminated. Olmo told Tarver to speak to Watts about any further details. Tarver called Watts and asked how he could be discharged before a grievance meeting was held. Watts said it was out of his hands and they would take the matter to arbitration. Tarver told Watts he thought he was discharged in retaliation for whistle blowing and, based on prior experience with the company, did not want to seek arbitration. Tarver said he would handle the matter himself.

At the time of his discharge, Tarver had no prior history of discipline.

Olmo testified that he terminated Tarver because of “insubordinate conduct” during his confrontation with the security guard on September 12. (Tr. 153) Olmo did not discuss the matter with the Union before making this determination. According to Olmo, “I notified [Tarver] first. Then I notified the Union. And they requested the statement from the security [guard] and all the write-ups and my final write-up, along with any other documents that I had, be faxed over to them, which I did.” (Tr. 157) Olmo claimed the Union did not request a grievance meeting until “days later.” (Tr. 158) Olmo further claimed he agreed to hold a grievance meeting and a meeting date was scheduled, but Watts subsequently advised him that Tarver declined union representation.

In about November, Tarver called the Respondent and asked for a termination notice. The person he spoke with told him he did not know who to speak to about that, and Tarver did not follow up with anyone else. Olmo testified that he drafted a document regarding Tarver’s termination and faxed it to the Union, but never gave it to Tarver.

### **Evidence of Disparate Treatment**

In the absence of disciplinary records (which, according to Olmo, he could not find), the General Counsel sought testimony regarding certain disciplinary events. Tarver testified that Haynes was not discharged even though he was caught stealing merchandise. Olmo admitted that, while Tarver was employed, Haynes was caught stealing a case of merchandise. Olmo testified that he caught Haynes stealing by viewing it on a video recording from the security system. Olmo considered Haynes an “elite” or “high-average picker.” Upon catching him stealing, Olmo suspended Haynes for 1 day and placed him on 45-day probation. According to Olmo, if Haynes was caught stealing again during those 45 days, he would have been terminated.

Tarver testified that, while he was the steward, Olmo discharged an employee rolling marijuana in the bathroom. According to Tarver, this employee was reinstated. Olmo confirmed the incident, but did not recall whether the employee was reinstated.

### Analysis

#### 8(a)(3) and (1) Suspension and Discharge of Jamal Watts-Tarver

The General Counsel contends that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Tarver because of his position as shop steward and union activities. For the reasons discussed below, I find that the Respondent violated the Act as alleged. The record contains considerable evidence that the Respondent’s suspension and discharge of Tarver were discriminatory, including evidence that the Respondent’s stated reason for those actions (i.e., his September 12 involvement with the security guard) was pretextual. However, even if this were not the case, I would find that Tarver’s interaction with the guard on September 12 was protected union activity, which was not rendered unprotected by any misconduct in which Tarver engaged.

#### 2(11) Supervisor Status of Izzy Pollack

I find that, at all relevant times, Pollack was a supervisor of the Respondent within the meaning of Section 2(11) of the Act. Initially, I reject any assertion by the Respondent or testimony by Olmo that Pollack was not employed by the Respondent. The Respondent refused to produce subpoenaed payroll records without any excuse or legitimate explanation for doing so. Accordingly, it is appropriate to render an adverse inference against the Respondent in finding that it did, in fact, employ Pollack. *Bannon Mills, Inc.*, 146 NLRB 611 (1964).

The credible evidence also established that Pollack hired and subsequently suspended Tarver for 3 days. Olmo did not specifically or credibly contest these events. Further, Olmo failed to produce subpoenaed disciplinary records (Olmo claims he could not find them) which might have shed light on Pollack’s authority to discipline employees. Hiring and the imposition of discipline are supervisory authorities under Section 2(11), and I find that Pollack was a supervisor of the Respondent as defined by the Act.

#### Wright Line Analysis – Jamal Watts-Tarver Suspension and discharge

The Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), to determine whether an employer discriminatorily discharged an employee because of his union position

and/or activities. *Approved Electric Corp.*, 356 NLRB 238 (2010). Under *Wright Line*, “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). 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 employment action, departures from past practice, disparate treatment, shifting or inconsistent explanations for the treatment of discriminatees, an irrational explanation or other 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).

### **General Counsel’s Prima Facie Case**

Tarver was known by management to be the Union shop steward from mid-July to his suspension on September 13. Even before he became shop steward, Tarver successfully pursued a grievance in which he received backpay after being improperly suspended by Pollack. Shortly after Tarver became steward, he intervened and spoke on behalf of a new employee that Olmo suspended. Tarver also confronted Olmo twice about performing unit work (picking). Tarver spoke to Pollack about employee concerns that the bonus system was rigged in favor of certain individuals and proposed a system of merit pay increases in lieu of the bonus system. Tarver spoke to Pollack about this merit pay increase proposal several times and, as noted above, I have found Pollack to be a supervisor of the Respondent. However, even if Pollack were not a supervisor or agent of the Respondent, Olmo testified that he understood the merit pay increase proposal (proposed to him by Watts) to have come from Tarver. Accordingly, the record contains significant evidence which supports the first two elements of the General Counsel’s prima case. That is, Tarver was known by the Respondent to have held the position of shop steward and to have engaged in considerable union activity.<sup>14</sup>

In my opinion, the record also contains more than enough evidence to establish, by a preponderance of the evidence, that the Respondent was hostile toward Tarver because he held the position of shop steward and aggressively engaged in union activity.

Olmo’s comments to Tarver indicate he equated a union steward dealing directly with management as insubordination and was hostile toward Tarver for directly contesting his actions (as opposed to simply reporting his conduct to Watts). The collective-bargaining agreement specifically states that a “Steward shall have the right to take up with a representative of the Employer all grievances arising out of this Agreement.” However, when Tarver notified Olmo he had been appointed steward, Olmo warned Tarver to be careful because the previous steward had been discharged for insubordination. Olmo did not seek to explain the difference between protected and unprotected activity. Rather, Olmo effectively suggested that any activity by a shop steward could be considered insubordination and result in discharge. Shortly thereafter, Olmo warned Tarver he was being insubordinate by advocating

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<sup>14</sup> As addressed below in a separate section of this analysis, I find that Tarver’s interaction with the security guard on September 12 was protected union activity as well.

on behalf of a new employee that Olmo suspended. The record contains no evidence that, on this occasion, Tarver refused a direction by Olmo or did anything other than adamantly disagree with Olmo's disciplinary determination. Finally, on September 12, when Tarver asked Olmo whether he should be performing unit work, Olmo (as per his own testimony) told Tarver to call the Union instead of questioning him directly about what he was doing. Olmo's warnings and directions to Tarver, as described above, suggest that Olmo was hostile to Tarver for being a union shop steward who aggressively and directly sought to contest managerial conduct that arguably violated the collective-bargaining agreement.

The timing of Tarver's suspension, the day after Tarver questioned whether Olmo should be performing unit work and 3 days after Tarver confronted Pollack about the merit pay increase proposal, also suggests a discriminatory intent. It is telling that Olmo objected to Tarver taking pictures of him performing unit work (saying, "come on J") and immediately asked Tarver to come speak to him. Tarver asked whether this meeting was disciplinary, and the record does not indicate that Olmo denied it was. This occurred early in the evening at about 10:30 p.m. It is suggestive of an unlawful intent that Olmo sought what was arguably a disciplinary meeting with Tarver before Tarver had any interaction with the security guard (which occurred later in the evening).

The manner in which Olmo suspended and discharged Tarver contains numerous discrepancies and strongly suggests that the Respondent's reason for doing so was mere pretext for its true discriminatory motive. First, Olmo went out of his way to convince Tarver to meet with him alone regarding the incident with the security guard even though he knew Tarver did not want to discuss the matter without a Union representative present. I credit Tarver's testimony that, at about 2 p.m. on September 12, Olmo asked him into the office to speak, "just two guys talking off the books." This suggests that Olmo was intent on conducting a disciplinary interview of Tarver without the interference of Watts. This, in turn, suggests that Olmo was more concerned about orchestrated Tarver's suspension and/or discharge than handling the matter in a fair and open-minded way.

Olmo's failure to offer any explanation for believing the security guard's version of events over Tarver's account also suggests pretext and an unlawful intent. Olmo admits he understood the guard's claim that Tarver was verbally aggressive to be the only significant difference in their respective descriptions of the incident. Olmo further admits he discharged Tarver because the guard accused him of "verbal aggression." However, Olmo was unable to articulate a reason why he believed the guard over Tarver. Olmo's determination in this respect is particularly surprising since Tarver was admittedly a good employee who was trusted to perform the more difficult work, while the guard, conversely, was just recently hired.

Given that Tarver and the guard offered two different accounts of their interaction, it is particularly surprising that Olmo's investigation of the matter was entirely deficient. *Aliente Gaming, LLC*, 364 NLRB No. 78 (Aug. 25, 2016) (an employer's failure to conduct a meaningful investigation of alleged wrongdoing by an employee is indicia of pretext and discriminatory intent). Olmo did not attempt to review a video recording of the incident even though he admitted he previously used a video recording to determine that Haynes should be suspended for theft of merchandise.

It is equally surprising that Olmo did not attempt to speak to any of the employees who, according to the guard and Tarver, were present and witnessed the event. These employees could have helped resolve any dispute between Tarver and the guard as to what transpired. However, it is also noteworthy that the security guard said he felt threatened by Tarver and other employees in the vicinity. Olmo did not ask the guard what these employees were doing or saying to make him feel threatened, and did not speak to the employees themselves to follow

up. Rather, Olmo took issue only with Tarver's alleged verbal aggression. In this regard, Olmo's response to the incident not only smacks of pretext because he failed to conduct a meaningful investigation, but also smacks of pretext because it suggests disparate treatment.

5 I also find Olmo's response to the events of September 12 to be inherently suspicious. Tarver had an initial exchange with the guard and left to continue his work. It is undisputed that the guard subsequently confronted Tarver and said, "you're funny" or "you think you're funny." The guard apparently admitted to Olmo that he removed his hat and that "[Tarver], in return became 'verbally aggressive'," (the conduct, for which, Tarver was suspended and terminated).  
 10 Olmo testified that he assumed the guard removed his hat because "[h]e must have been hot, or whatever the case was." However, the guard's removal of his hat, particularly given Tarver's description of the guard's conduct, could surely be construed as an invitation or prelude to a physical confrontation.<sup>15</sup> The notion that the guard removed his hat because he "must have been hot" is exceedingly generous. Thus, the guard admittedly stopped Tarver while he was  
 15 performing his work, instigated a confrontation with Tarver by saying "you think you're funny," and removed his hat as an arguable prelude to physical violence. Nevertheless, Olmo abruptly suspended Tarver for being "verbally aggressive" even though Tarver disputed the guard's account, had a good relationship with Olmo, and was trusted by Olmo to perform the most difficult work. I find Olmo's response to these events to be inherently dubious and further  
 20 evidence of pretext. See *Classic Sofa, Inc.*, 346 NLRB 219, 236 (2006) (discharge of employee who was indisputably one of the highest-skilled employees with positive record of production seemed irrational and pretextual under the circumstances).

25 The record also contains significant evidence of the Respondent's disparate treatment of Tarver and other employees. Haynes was only suspended for 1 day after he was caught stealing a case of product even though theft of merchandise is specifically listed in the collective-bargaining agreement as a reason for immediate discharge. Olmo offered no other explanation for the leniency he showed Haynes compared to Tarver. Another employee was discharged for possession of marijuana. However, according to Tarver, this employee was  
 30 reinstated. Like theft of merchandise, the use of narcotics is listed as a reason for immediate discharge. Although Olmo could not recall whether the employee was reinstated, the Respondent refused to produce subpoenaed payroll and disciplinary records which could have resolved the issue. Accordingly, an adverse inference is warranted, and I find that the employee was reinstated. *Bannon Mills, Inc.*, 146 NLRB 611 (1964). The Respondent's more  
 35 lenient treatment of these two employees, compared to Tarver, reflects its discriminatory intent.

I also find it noteworthy that Olmo initially suspended Tarver rather than discharge him. As discussed above, Olmo only suspended Haynes for 1 day after he was caught stealing. To the extent Olmo was, if at all, concerned about Tarver's "verbal aggression" toward the guard, it  
 40 would stand to reason that Tarver, like Haynes, should be suspended (not terminated) as well. Olmo testified that the Union requested "all the write-ups and my final write-up, along with any other documents that I had, be faxed over to them, which I did." Accordingly, we are left to question whether the initial write-up was for a suspension and the "final write-up" was for a  
 45 discharge. If so, why was the suspension changed to a termination? Nothing happened which would require an elevation of the disciplinary suspension to a discharge between September 13 and September 23. I find this sequence of events to be further evidence of pretext and the Respondent's intent to manufacture the removal of an aggressive shop steward because of his union activities.

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<sup>15</sup> This may have been easier to determine if Olmo viewed a video of the incident, but he failed to do so.

Based upon the foregoing, I find that the General Counsel established a strong prima facie case that the Respondent suspended and discharged Tarver because of his union position and activities.

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### **The Respondent's *Wright Line* Defense**

The Respondent failed to establish a *Wright Line* defense that it would have suspended and discharged Tarver regardless of his union position and activities. I need not repeat the oddities and discrepancies described above which suggest that the Respondent's stated reason for suspending and discharging Tarver was mere pretext for unlawful discrimination. That is, the Respondent seized upon Tarver's interaction with the security guard in order to retaliate against a steward because of his position and union activities.<sup>16</sup> I add only that the Respondent made no effort to establish that other employees have been discharged for conduct similar to that of Tarver. Rather, as discussed above, the evidence suggests that Tarver was treated disparately. Thus, the Respondent did not establish that it would have suspended and discharged Tarver for his interaction with the guard regardless of his union position and activities. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act as alleged.

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### **Atlantic Steel Analysis - Jamal Watts-Tarver Suspension and discharge**

In the *Wright Line* analysis above, I found that the Respondent discharged Tarver because of his union position and activities. I further found that the Respondent's stated reason for suspending and discharging Tarver (i.e., his interaction with the security guard) was mere pretext for an ulterior unlawful motive. Finally, even if the Respondent was at all concerned with Tarver's interaction with the security guard, I found that the Respondent would not have discharged Tarver for the incident regardless of his union position and activities. However, even if I made no such determinations, I would find that Tarver's interaction with the security guard was protected union activity and was not, under the Board's analysis in *Atlantic Steel Co.*, 245 NLRB 814 (1979), rendered unprotected by any misconduct in which he engaged.

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Tarver received complaints from employees that the new security guard was monitoring them too aggressively and invading their privacy. The Respondent had, only recently, retained security guards and such "investigatory tools or methods used by an employer to ascertain whether any of its employees has engaged in misconduct" are generally mandatory subjects of bargaining. *Colgate-Palmolive Co.*, 323 NLRB 515 (1997). Tarver spoke to the security guard to evaluate whether he presented a problem the Union should be concerned about. This was appropriate activity for a union steward and activity protected by Section 7 of the Act.

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Since Tarver's alleged outburst or "verbal aggression" occurred in the context of what was otherwise protected union activity, his suspension and discharge on that basis would only be unlawful if he, within that context, engaged in conduct so egregious as to lose the protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814 (1979). In *Atlantic Steel*, the Board identified four factors to be balanced in this determination: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. 245 NLRB at 816. As the

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<sup>16</sup> Olmo did not testify that Tarver was suspended or discharged because he slowed down or his productivity dropped. Accordingly, I need not address Tarver's conduct in this regard in analyzing the Respondent's *Wright Line* defense.

Board has observed, "The Act allows some latitude for impulsive conduct by employees in the course of protected concerted activity, but, at the same time, recognizes that employers have a legitimate need to maintain order." *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010)

5           Here, the evidence did not establish that Tarver engaged in an outburst during his interaction with the security guard on September 12. Tarver made a joke in telling other employees who were present they did not need to listen to the guard, but immediately retracted the comment. This hardly qualifies as an "outburst" and was, in fact, provoked by the guard's outburst. Olmo did not witness the event and the Respondent did not, apparently, make any effort to secure the guard's testimony. Olmo's testimony regarding the guard's description of the incident was hearsay and not admissible to determine the truth of what Tarver did or said. Indeed, although it too would be hearsay, the Respondent failed to locate and produce the guard's written statement. Thus, the uncontested evidence indicates that Tarver engaged in typical steward conduct in a largely congenial manner despite being provoked by the security guard. Under these circumstances, *Atlantic Steel* factors 2 and 3 weigh strongly in favor of a finding that Tarver's conduct was protected. And while factors 1 and 4 do not necessarily weigh in favor of protection, they do not, in my opinion, weigh strongly against a finding that Tarver's conduct was unprotected.

20           Accordingly, even if I were to find that the Respondent discharged Tarver for his interaction with the guard and would have done so regardless of any other union activity in which Tarver engaged before that incident, I would still find Tarver's interaction with the guard to be protected union activity and his discharge on that basis unlawful.

25           Based on the foregoing, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Tarver because of his union position and activities.

### Conclusions of Law

30           1. The Respondent Gowanus Staffing, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and Local 713, International Brotherhood of Trade Unions is a labor organization within the meaning of Section 2(5) of the Act.

35           2. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Jamal Watts-Tarver because of his union position and activities.

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

### 40           The Remedy

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

45           The Respondent, having unlawfully suspended and discharged Jamal Watts-Tarver, must offer him reinstatement to his former job or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed. The Respondent shall make Tarver whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The Respondent shall also be required to remove from its files any references to the unlawful suspension and discharge of Tarver, and to

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notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

5 The make whole remedy 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 Tarver for his search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim  
10 employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Tarver for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New  
15 Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of 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. 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 shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the facility of J&J Farms Creamery Inc., 57-48 49th Place, Maspeth, New York, the only facility involved herein, wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its  
25 contents. 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or is otherwise prevented from  
30 posting the notice at the facility, 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 September 13, 2017. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 29 of the Board what action it will take with respect to this decision.  
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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>17</sup>

### Order

40 Respondent Gowanus Staffing, Inc. of Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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<sup>17</sup> 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.

(a) Suspending, discharging or otherwise discriminating against employees for holding the position of union shop steward or engaging in union activities.

5 (b) 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.

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

10 (a) Within 14 days from the date of the Board's Order, offer Jamal Watts-Tarver reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

15 (b) Make Tarver whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Compensate Tarver for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

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

25 (e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Tarver, and within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

30 (f) 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  
35 Order.

(g) Within 14 days after service by the Region, post at the facility of J&J Farms Creamery Inc., 57-48 49th Place, Maspeth, New York, the only facility involved herein, copies of the attached notice marked "Appendix."<sup>18</sup> Copies of the notice, on forms provided by the  
40 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  
45 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

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<sup>18</sup> 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."

by any other material. If the Respondent has gone out of business or closed, or is 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 September 13.

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(h) 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.

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Dated: Washington, D.C. April 26, 2019



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Benjamin W. Green  
Administrative Law Judge

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**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** suspend, discharge, or otherwise discriminate against you for holding a union position, such as shop steward, or engaging in union activities.

**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 full reinstatement to Jamal Watts-Tarver to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

**WE WILL** make Jamal Watts-Tarver whole for any loss of earnings and other benefits resulting from our unlawful suspension and discharge of him, less any net interim earnings, plus interest, and **WE WILL** also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

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

**WE WILL**, within 14 days from the date of this Order, remove from our files any and all references to the unlawful suspension and discharge of Jamal Watts-Tarver, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that we will not use the suspension and discharge against him in any way.

**GOWANUS STAFFING, INC.**

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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

2 Metro Tech Center  
100 Myrtle Avenue  
5th Floor  
Brooklyn, NY 11201-4201  
Phone: 718-330-7713  
Hours: 9:00 a.m. to 5:30 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/29-CA-208094](http://www.nlr.gov/case/29-CA-208094) 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.