U.S. Cosmetics Corporation *and* Tyler Hoar *and* William St. Hilaire. Cases 01–CA–135282 and 01–CA–139115

July 8, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On May 17, 2016, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed a limited cross-exception and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.[3]

For the reasons set forth in his decision, we adopt the judge's findings that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by, first, coercively interrogating employee Michael McCoil about whether he knew who had posted two union signs and about his communications with a Board agent and, second, by offering employees the legal assistance of its attorney during the Board's investigation.[4]

As discussed below, we reverse the judge's findings that the Respondent violated Section 8(a)(1) by timing the announcement and implementation of a long-planned wage increase in order to discourage union activities, and that it violated Section 8(a)(3) and (1) by discharging employees William St. Hilaire and Tyler Hoar. We also reverse the judge's finding that the Respondent violated Section 8(a)(1) when it questioned production employees about their communications with St. Hilaire and requested to see their cell phones during an investigation into the vandalism of an employee's locker.

1. The Announcement and Implementation of the Wage Increase

Beginning in March 2014,[5] the Respondent started actively working on revisions to its pay structure for production employees, in order to better attract employees and remain competitive. In mid-June, the Respondent's production manager, Dennis Desjardin, requested separate, individual wage increases for several of the key employees under his charge. In response, the Respondent's president, Tim Takagi, informed Desjardin that, rather than grant individual increases at that time, the company "would review and implement [the] new salary rate program for everyone together." By late June, Human Resources Manager Judy Jones had researched wage rates in the area and prepared a structure for the wage increase, including possible pay ranges. On June 20, Takagi approved the new pay structure, which would need to be approved by the Respondent's Chairman before it could go into effect. Sometime in late June, according to the credited testimony of technical center manager Allen Tiebout, Desjardin told him that management had given final approval for the skills-based wage increase program and that the program was going to be implemented "very shortly," but Desjardin did not give him a specific date when this would occur. Two employees—including Charging Party William St. Hilaire—also testified that they knew in June about an upcoming wage increase. By July 1, Jones had prepared and circulated a spreadsheet reflecting the proposed new pay rate for each employee, as well as the effect that the pay increases would have on the Respondent for the remainder of its fiscal year.

Takagi received the necessary authorization for the new pay structure from the Respondent's Chairman by July 8. On July 8, in response to an email from Desjardin, who was anxious to grant the wage increases he had requested in June, Takagi asked for a meeting to discuss the new pay structure. Jones scheduled the meeting for 2 p.m. the next

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

[2] By unpublished order issued on January 7, 2019, the Board granted a joint motion to remand complaint allegations that the Respondent's maintenance of several rules in its employee handbook was unlawful. On January 10, 2019, the Acting Regional Director for Region 1 approved an informal settlement agreement resolving those issues. Accordingly, we do not rely or pass on the judge's discussion of the rules issue in his decision.

[3] We shall amend the judge's conclusions of law consistent with our findings herein, modify the judge's recommended Order to conform to the Board's standard remedial language and the violations found, and substitute a new notice to conform to the Order as modified.

[4] We find it unnecessary to pass on whether the Respondent's interrogation of Andrew Rucci about the posting of prounion signs was also unlawful because finding this violation would be cumulative and would not affect the remedy. Consequently, we also find it unnecessary to pass on whether the judge properly admitted Rucci's affidavit as substantive evidence.

[5] All dates are in 2014 unless otherwise indicated.

day, July 9. On that day, before the scheduled meeting took place, the Respondent discovered the two signs posted at the doors to the plant entrances, which encouraged employees to "Vote Union." As discussed below, these signs were posted the night before by St. Hilaire and Tyler Hoar, the alleged discriminatees in this case. After discovering one of the signs, manager Tiebout took it to Jones and then showed it to Takagi. Shortly thereafter Jones emailed Takagi, stating: "Please note—we have not been targeted yet. And I firmly believe we won't be targeted if we take action this week on the wages, announce the coming sick pay and vacation enhancements, and stay vigilant on watching over the employees in the hottest areas of the plant(s)."

At the meeting, after making minor changes to the individual pay rates of a few employees (including three of the four employees for whom Desjardin had initially requested increases), the Respondent finalized the new pay rates per the Chairman's prior authorization. The newly discovered prounion signs were not discussed at this meeting. The subject was brought up at a second management meeting, held at 4:30 p.m. The new pay plan was announced to employees at a meeting on July 10.

In concluding that the Respondent had unlawfully accelerated the timing of the announcement because of the discovery of the prounion signs, the judge relied on his finding that the Respondent had not set "firm dates" for announcing and implementing the wage increase prior to July 9. We disagree. The purported lack of "firm dates" leading to the July 9 meeting does not suggest that the Respondent made any changes to its plans to *finalize* the increase on July 9 before learning about the posting of prounion signs. In fact, the record establishes that the Respondent had received the necessary authorization for the wage increases before July 9, had detailed plans for the new wage rates from Jones prior to that date, and approved those plans with only minor changes at the July 9 meeting. We therefore find, contrary to the judge and our dissenting colleague, that the meeting was scheduled on a "firm date" before the discovery of the prounion signs, and that the General Counsel did not establish that the Respondent took any action in finalizing wage rates at the July 9 meeting that had not previously been planned. Nor is there evidence about events prior to or at that meeting showing that the Respondent would have announced or implemented the increase at some later date had it not been for the prounion signs.[6]

We also disagree with the judge and our dissenting colleague that the July 9 email Jones sent Takagi about the union signs is evidence that the wage increases were timed to dissuade employees from supporting a union. This email does not state that the Respondent would need to change the timing of the wage increase or otherwise modify any of its actions to deter unionizing efforts. Instead, it only expresses Jones's belief that, if the Respondent followed the course of action that was already determined, the Respondent would not be targeted in the future. Although Jones may have believed that the wage increases would deter employees' interests in a union, the email does not, as our colleague contends, constitute evidence that the Respondent actually changed the timing of the increases for that purpose. And, as noted above, the judge found that the Respondent had already scheduled the meeting to finalize the wage increases before the union signs were discovered and before Jones sent the email. An email that Takagi sent the Respondent's Chairman on July 11, which the judge and the dissent here also cite, similarly does not suggest that Respondent changed the timing of the wage increase due to the union signs, and refers to the discovery of the union signs as a coincidence.

In sum, the General Counsel failed to meet his burden of proving that the Respondent changed the timing of the wage increases in response to the posting of prounion signs. Accordingly, we dismiss this allegation.

2. The Discharges of William St. Hilaire and Tyler Hoar

We also reverse the judge's findings that the Respondent violated Section 8(a)(3) and (1) by discharging employees St. Hilaire and Hoar in response to their posting of the two prounion signs at the Respondent's facility on the evening of July 8. As previously stated, the Respondent's officials discovered the signs on the morning of July 9. Later that day, St. Hilaire threatened Jon Lasko, a

[6] Contrary to our dissenting colleague, we do not rely on the discredited testimony of Respondent's officials. We have no reason to disturb the judge's findings that the final wage rates were not determined prior to the week of July 7. However, those findings do not conflict with the undisputed facts that *during that week* and prior to the discovery of the pro-union signs, (1) a wage increase was authorized, (2) employees anticipated an increase, (3) Jones had prepared a skill set matrix and spreadsheet detailing the plans for an increase, and (4) a July 9 meeting was set to discuss those plans. Under these circumstances, we find that the General Counsel failed to meet his burden of showing that the Respondent's officials would not have done what they did at the scheduled meeting—approving the wage increase plans with minor change—if not for the discovery that morning of the prounion signs.

The judge and our dissenting colleague rely heavily on the timing of the wage increase immediately following discovery of the prounion signs. We readily acknowledge that timing alone may be sufficient to infer unlawful motivation. *Emery Air Freight Corp.,* 207 NLRB 572 (1973). However, the operative word is "may," not must, and in the circumstances described above we find no basis for drawing that inference. Thus, contrary to our dissenting colleague, the Respondent has no burden to disprove what the General Counsel failed to establish, and we do not improperly "shift" to the General Counsel a burden that has remained his throughout this proceeding.

coworker, with physical violence over a personal dispute. On July 10, Lasko reported St. Hilaire's threats to Jones and Desjardin and showed them one of the threatening texts St. Hilaire had sent him. When asked if there was anything that would make him think that St. Hilaire would carry out his threats, Lasko told Jones and Desjardin that St. Hilaire had a temper, was the subject of a restraining order, and had previously slashed someone's tires. Lasko also expressed his fear that St. Hilaire might be violent against him at work. When St. Hilaire came to work on Monday, July 14, he admitted making the threats and was suspended for 3 days. On July 17, he was discharged for violating the Respondent's Code of Conduct.

On July 23, an employee complained to Human Resources that he had seen Hoar stealing an armload of coffee packets from the cafeteria. On July 24, a second employee corroborated this accusation and, further, informed management that Hoar would take home soup packets and leftovers from the free lunches. The Respondent discharged Hoar the same day.

Applying the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge concluded that both discharges violated Section 8(a)(3). Contrary to the judge, we find that the General Counsel failed to make the requisite initial showing under *Wright Line* that the Respondent knew that either St. Hilaire or Hoar had posted the prounion signs.

There is no direct evidence that the Respondent knew that St. Hilaire and Hoar had posted the two union signs. However, the judge found there was circumstantial evidence sufficient to warrant an inference of knowledge, thus meeting the General Counsel's initial *Wright Line* burden. We disagree.

It is well established that an employer's knowledge of employees' union activities may be inferred from circumstantial evidence based on the record as a whole. See, e.g., *Montgomery Ward & Co.*, 316 NLRB 1248, 1254–1255 (1995) (discharges for "incredible reasons"), enfd. mem. 97 F.3d 1448 (4th Cir. 1996); *Greco & Haines, Inc.*, 306 NLRB 634, 634, 638 (1992); *Abbey's Transp. Services, Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988). Again, the operative word for drawing such an inference is "may," not must, and unlike in those cases, we find that such an inference is not warranted based on consideration of all the circumstances in this case. Instead, we find that the General Counsel has failed to meet his initial burden of proving that the Respondent knew or suspected St. Hilaire and Hoar had posted the signs when it discharged each of them for facially legitimate reasons.

The judge's finding of knowledge is, in fact, based on multiple unsupported inferences. For instance, he relied on an inference drawn from the timing of the discharges, which occurred soon after St. Hilaire and Hoar had posted the signs. We find that the timing is of negligible evidentiary weight because both employees were accused of serious misconduct by other employees within a short time after the signs were posted. St. Hilaire threatened physical violence against a fellow employee on July 9, the day after the signs were posted, and employees complained about Hoar's theft of coffee on July 23.

The judge also inferred knowledge from the fact that St. Hilaire and Hoar are the only two individuals whom the Respondent has terminated since 2011. As with the timing of the discharges, this evidence is of limited value given that discharge for the misconduct at issue was permissible under the Respondent's discipline policy. There is no dispute that the Respondent only took action against St. Hilaire and Hoar in response to coworkers' complaints and that it reasonably believed each had engaged in the misconduct for which they were discharged.

The judge additionally inferred that the Respondent knew of St. Hilaire and Hoar's union activity because, during the week of July 16, Jones asked employees McCoil and Andrew Rucci if they knew who had posted the union signs. It is undisputed, however, that both McCoil and Rucci told Jones that they did not know who had posted the signs. There is no evidence that any question posed to them evinced a suspicion of involvement by St. Hilaire and Hoar. Moreover, there is no evidence or allegation that the Respondent questioned any other employee about the signs.

The judge further relied on Rucci's statement in his pretrial affidavit that, on July 9, employees were discussing the union signs and speculating that St. Hilaire had put them up. Again, however, there is no evidence that managers were present when these discussions occurred and no basis for imputing the employees' suspicions about coworkers' union activities to their employer. See, e.g., *Paragon Systems, Inc.*, 362 NLRB 1561, 1565 fn. 13 (2015).

Accordingly, based on the foregoing, and after consideration of the particular circumstances of this case, we find that an inference cannot reasonably be drawn that the Respondent knew or suspected that either St. Hilaire or Hoar had engaged in the protected union activity of posting the prounion signs.[7] In the absence of such evidence of

[7] We recognize that evidence of animus can in certain circumstances support an inference of knowledge of union activity. In this respect, the only unfair labor practice contemporaneous with the discharges was the coercive interrogation of McCoil about the posting of union signs. While this evidence may support finding that the Respondent bore animus against that activity, it does not, standing alone, warrant the inference

knowledge, the General Counsel did not meet his initial *Wright Line* burden.[8] Accordingly, we reverse the judge and dismiss the complaint allegations that the Respondent discharged St. Hilaire and Hoar in violation of Section 8(a)(3) and (1) of the Act.

3. The Interrogation Regarding Vandalism to Martin Lasko's Locker

Finally, we reverse the judge's finding that the Respondent violated Section 8(a)(1) when Jones questioned employees about their communications with St. Hilaire and requested to see their cell phones.

On August 20, Lasko discovered that his locker had been vandalized and reported it to management. Jones interviewed 15 production employees that day and the next, asking whether they knew anyone who would want to annoy or prank Lasko and whether they were aware of anyone "putting someone up to" the vandalism. In light of St. Hilaire's threats to Lasko, Jones asked employees whether they had communicated with St. Hilaire and asked to see at least two employees' cell phones to look at any texts they might have exchanged with him. There is no evidence that she asked about union or other protected activities. Nevertheless, the judge found that Jones' questioning amounted to unlawful interrogation because employees could reasonably suspect that she was seeking information about their union activities.

In so finding, the judge primarily relied on Rucci's partial response to a question at the hearing. Specifically, when the Respondent's attorney asked Rucci what Jones was investigating, he started to answer, "Billy [St. Hilaire] with the whole union—" before the attorney cut him off. The judge "credited" this as evidence that employees reasonably could have concluded that Jones was seeking information about St. Hilaire's union activities when she asked to see their cell phones, rather than whether St. Hilaire had solicited someone to vandalize Lasko's locker.[9] Somewhat inconsistently, however, the judge also found that Jones reasonably believed that St. Hilaire was involved in the vandalism and that she had an obligation to investigate.

In determining whether the questioning of an employee about union or other protected activity constitutes an unlawful interrogation, the Board considers the totality of the circumstances, including whether the employee is an open and active union supporter; whether there is a history of employer antiunion hostility or discrimination; the nature of the information sought; the position of the questioner in the company hierarchy; and the place and method of interrogation. See *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Here, there is no evidence that Jones asked about union or other protected activity in the first instance. Rucci's utterance at the hearing reveals nothing about Jones' actual questioning, which is what we are tasked with evaluating. Further, Jones made it quite clear to employees that the purpose for her questioning was to investigate the vandalism and whether St. Hilaire had put anyone up to it. Absent evidence of any questions about union or protected activities or any specific line of questioning that would lead employees to believe that Jones had an ulterior motive, we reverse the judge and dismiss the allegation.

ORDER

The National Labor Relations Board orders that the Respondent, U.S. Cosmetics Corporation, Dayville, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their or their coworkers' union activities.

(b) Coercively interrogating employees about their communications with agents of the National Labor Relations Board.

(c) Discouraging employees from cooperating in the Board's investigation of unfair labor practice charges filed against the Respondent by offering them the legal assistance of the Respondent's attorney when they meet with a Board agent.

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

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

(a) Within 14 days after service by the Region, post at its facility in Dayville, Connecticut, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 1,

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that the Respondent knew or suspected that St. Hilaire and Hoar had engaged in this activity.

[8] Our dissenting colleague concurs in finding that St. Hilaire's discharge was lawful, but she would find, essentially for the same reasons as stated by the judge, that Hoar's discharge was unlawful. Unlike her, we find for the reasons stated above that the General Counsel failed to meet the initial *Wright Line* burden of proving that the Respondent had knowledge of either employee's union activity when it discharged them. Specifically, as to Hoar, the Respondent therefore had no burden to prove that it would have discharged him for his theft of coffee even if it knew about his union activity.

[9] Counsel for the General Counsel followed up to ask Rucci whether he meant to say that Jones was asking about unionization. He said, "No," which the judge discredited because he found that Respondent's counsel had coached Rucci. Contrary to the judge, we find nothing conclusive in this testimony.

[10] 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

after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed 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 July 16, 2014.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 1 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. July 8, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.

This case presents an unfortunately all too familiar story of an employer resorting to unlawful conduct in order to nip a nascent organizing campaign in the bud. As the judge correctly found, in response to the posting of two signs in support of unionization at its facility, the Respondent unlawfully accelerated planned wage increases; interrogated several employees; offered free legal assistance during the Board's unfair labor practice investigation; and terminated employee/union activist Tyler Hoar, who was accused of taking freely-provided coffee from the employee breakroom. The majority adopts some of the judge's findings but errs in concluding that the Respondent acted properly with respect to the wage increase and the termination of Hoar. In addition, unlike the majority, I would reach, and adopt, the judge's finding that the Respondent unlawfully interrogated employee Andrew Rucci.[1]

I. ACCELERATED WAGE INCREASES

It is established Board law that "the grant of a benefit may constitute a violation because of the time it is given, regardless of when it was planned." *Emery Air Freight Corp.*, 207 NLRB 572, 575 (1973). In determining whether the employer's motivations were unlawful, the crucial fact is not whether the employer would have increased wages "at some time or another," but "whether the increase was granted *when it was* because of union activities." *Revco Drug Centers of the West*, 188 NLRB 73, 77 (1971) (emphasis added). Further, the timing alone of a benefit may be unlawful, particularly where it occurs in the midst of a union organizing campaign. See *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002); see also *Onan Corp.*, 338 NLRB 913 (2003). Once the General Counsel has demonstrated that the timing of the increase is suspect, "the burden shifts to the employer to come forward with an explanation for the timing" other than the organizing activity. *Emery Air Freight*, supra, 207 NLRB at 575–576, citing *The Singer Company,* 199 NLRB 1195, 1195–1196 (1972), enfd. 480 F.2d 269 (10th Cir. 1973). Careful examination of the record evidence here reveals that, as the judge found, the Respondent unlawfully accelerated the announcement and implementation of the wage increases for hourly employees on July 10, 2014, in order to discourage their support for union organizing.

A.

In early 2013, the Respondent began discussing changes to the formulation of a skill-based wage structure for its hourly employees. However, no further steps were taken until Human Resources Manager Judy Jones was hired in March 2014. Shortly after her arrival, Jones prepared a review of her department's objectives for the period from

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I join the majority's findings that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employee Michael McCoil about the unionization campaign and by offering legal assistance to employees involved in the Board's investigation of the unfair labor practices.

I also agree with the majority's reversal of the judge's finding that the Respondent unlawfully discharged employee William St. Hilaire. In dismissing that allegation, I would rely only on the ground that, even assuming that the General Counsel established that St. Hilaire's union activity was a motivating factor in the Respondent's decision, the Respondent proved that it would have discharged St. Hilaire in any event based on his alleged threatening behavior toward a coworker.

Last, because I would find that the Respondent unlawfully interrogated both employee Rucci and McCoil, I find it unnecessary to pass on the judge's further finding that the Respondent also unlawfully interrogated other employees about their communications with St. Hilaire.

March 10 to December 31, which identified modifying the pay structure as only a "medium" priority. Consistent with that prioritization, Jones did not schedule the wage increase for immediate attention, but rather set August 31 as an interim time target for completing the following steps: researching competitive rates; defining roles and skill levels; and, recommending a new wage structure. She set December of that year as a goal for implementation of those changes.

What followed next in the Respondent's decision-making process as to the wage increases was disputed at trial. The judge discredited the Respondent's chief witnesses who testified to "finalizing" the pay rates and structures before July 9.[2] The documentary evidence supports the judge's findings. On the morning of July 7, Production Manager Dennis Desjardin sent an email to the Respondent's President Tim Takagi, requesting separate, individual pay increases for several of the key employees under his supervision. On the morning of July 8, Takagi requested that the parties set up a meeting to discuss global wage increases, rather than grant individual increases at that time. Takagi wrote: "Can we discuss the operation new job skill/level matrix and as below salary rate this week? Please set ups[sics] meeting." Desjardin asked Jones to send him pay scale levels and rates of pay in order to review. Jones agreed to the meeting and proposed: "let's meet tomorrow (7/9) as an add-on to our 2 pm meeting," attaching the skill set matrix and a spreadsheet showing the impact of the recommended rates.

Then other events intervened. On the evening of July 8, between 9 and 10 pm, employees Tyler Hoar and William St. Hilaire posted the following sign at the doors to the two entrances of the plant:

WOULD YOU LIKE?
*BETTER WAGES
*BETTER BENEFITS
*BETTER WORKING CONDITIONS
VOTE UNION YES

The following morning, Technical Center Manager Allen Tiebout arrived at the plant between 6:30 and 7 am, removed the signs, and informed Human Resources Manager Jones of the signs when she arrived at work. At 9 am, Jones sent Tagaki an email attaching a picture of the sign and stating, "Please note—we have not been targeted yet. And I firmly believe we won't be targeted *if we take action this week* on the wages, announce the coming sick pay and vacation enhancements, and stay vigilant on watching over the employees in the hottest areas of the plant(s)." (Emphasis added.)

Two management meetings took place on July 9: one at 2 pm and one at 4:30 pm. At the 2 pm meeting, the Respondent discussed the skill set matrix, levels/rates of pay, and the impact of the recommended rates. As found by the judge, "the wage rates were evidently discussed and finalized at [the 2 pm] meeting," as evidenced by a document containing the "final rate adjustment" for production and other employees, bearing the handwritten notation, "7/9 after meeting changes." The judge discredited the Respondent's witnesses who testified that the union signs were not discussed at the earlier meeting.

At a July 10 regular morning meeting, management announced the increased pay rates (effective July 7), and changes in compensation and benefits, reflected in employees' July 17 pay check. In a July 11 email from President Takagi to the Respondent's Chairman Miyoshi, Takagi described the posting of the union signs on the front door, speculated that an "insider" was likely responsible, and noted that the timing of the wage rate changes was "perfect." He further wrote: "[t]he contents of the attachment [referring to the prounion sign], although this was a coincidence, were posted immediately the next day and dealt with, so the situation should be carefully monitored for a while but the opinion inside the company is that it is very likely that any new activities similar to that one will quiet down."

Based upon the testimony and the documents admitted at trial, the judge found:

> The General Counsel does not dispute that the Respondent was contemplating changing the wage structure prior to July. However, management representatives were not consistent, definitive or credible on the events leading up to the implementation of the rate increase; and documents pertaining thereto were introduced in a piecemeal and confusing manner and utterly fail, collectively, to show that final wage rates were determined prior to the week of July 7.

[2] The majority's reliance on Allen Tiebout's testimony to demonstrate that the Respondent gave "final approval" for the wage increase program in late June is incorrect. The judge explicitly found that the actual amounts of wage increases were not finalized, which in my view means "final approval" was lacking:

> Thus, [Tiebout] testified that when Desjardin told him in approximately late June that management had given final approval for the wage increases, he took this as meaning that Takagi had given final approval for the skills-based wage system concept (*not the actual amounts of wage increases*). (Emphasis added.)

The majority further equates a "plan to finalize the increase" (which the Respondent assertedly made prior to the flyer posting) with the actual finalization of the decision. But an intention to finalize a pay increase in the future is just that—an intention—without approved, actual numbers attached. Although the majority maintains that the plans were approved "with only minor changes at the July 9 meeting," that step was not a foregone conclusion prior to the meeting.

Citing *Emery Air Freight*, supra, the judge concluded that the Respondent unlawfully accelerated the announcement and implementation of the wage increases for hourly employees.

B.

Contrary to the majority, the judge's conclusion is well supported by the record and by his credibility determinations.

The timing of the announced pay increase (i.e. 2 days after the flyers were posted) created an inference that the wage increase was granted in order to thwart union activity. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 399 (2004) (acceleration of mid-year benefit is unlawful even where the benefit was previously planned), enfd. mem. 156 Fed.Appx. 386 (2d Cir. 2005).[3] While this timing alone supports finding a violation, the Respondent's motive here is substantiated by its other contemporaneous unfair labor practices, including its retaliatory dismissal of William Hoar and its unlawful interrogations of employees, including Andrew Rucci, about the prounion signs, violations discussed below.

Because the General Counsel established the inference that the wage increases were granted in order to ward off the organizing campaign, the burden shifted to the Respondent to prove that it would have implemented those increases when it did in any event. On the record here, the Respondent cannot carry its burden. Although the pay increases were approaching finalization prior to the union activity, the evidence does not establish that the approval would have happened when it did, absent the nascent organizing campaign. As described, the Respondent had been considering changing employee wage rates as far back as early 2013. But when Human Resources Manager Jones was hired in March 2014, she earmarked these potential changes as only a "medium priority" to be implemented by December of 2014, some 5 months later. And while there was further talk of wage increases immediately prior to the posting of the prounion signs (in July of 2014), there was no consensus on what form those increases would take. As described, Production Manager Dennis Desjardin was requesting individual pay increases for several of the key employees under his supervision, while President Takagi favored global wage increases. In those circumstances, the judge properly found that the Respondent failed to show that "final wage rates were determined prior to the week of July 7."

The majority's contrary conclusion is flawed in several key respects. First, despite the majority's insistence otherwise, it seemingly contradicts the judge's credibility-based determinations. Thus, the judge broadly discredited President Takagi's testimony that the timing of the wage increase was completely disconnected from the posting of the prounion signs. More specifically, the judge explicitly discredited several of the Respondent's witnesses on the issue final approval:

> With respect to the wage increase, it is undisputed that Miyoshi had to give final approval. Yet, Takagi testified that the announcement of the wage increase was planned 30 days prior to July 10, and Desjardin testified at one point that he learned at least a week before on or about 10 July that the final announcement would be made. To the contrary, Jones testified that Takagi did not give her his final approval until July 9, after he returned from a trip to Japan and saw Miyoshi.

Thus, there was a direct conflict between Desjardin and Jones about when the wage increase was approved. Absent some adequate explanation, the majority errs in giving little if any weight to the judge's conclusion that the Respondent's managers "were not consistent, definitive or credible on the events leading up to implementation of the increase."[4]

Second, the majority's interpretation of the Respondent's documentary evidence is flawed as well. The majority relies on documents purportedly showing that the wage increase plans were approved prior to the employees' union activity. In fact, as found by the judge, the documents show the contrary. As described, in an email sent on the morning of July 8, Desjardin asked permission for "going ahead with the proposed raises I had requested earlier" regarding only three employees. Rather than approving the pay increases immediately, Takagi responded that he wanted a meeting to "discuss the operation new job skill/level matrix and as below salary rate this week." Jones agreed to the meeting and proposed: "let's meet tomorrow (7/9) as an add-on to our 2 pm meeting." Thus, contrary to the majority's finding, the Respondent's own emails demonstrate that, as of July 8, the proposed rates

[3] The majority improperly shifts the burden of proof to the General Counsel to prove a negative—i.e. "the Respondent's officials would not have done what they did at the scheduled meeting—approving the wage increase plans with minor change—if not for the discovery that morning of the pro-union signs." The majority further asserts that, while the timing of the announced benefits—shortly after discovering the nascent union campaign—"may" justify a finding of animus, it is not necessarily always the case. Both of these arguments are contrary to Board law which explicitly places the rebuttal burden on the Respondent to demonstrate that it would have implemented its pay raises when it did, regardless of employee unionizing conduct. See, e.g., *Kokomo Tube Co.*, 280 NLRB 357, 357–358 (1986) (employer, having learned of union campaign, failed to demonstrate that it would have granted wage increases absent knowledge of the campaign).

[4] See *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950) (Board should give full effect to a judge's factual and credibility findings unless the "clear preponderance of all the relevant evidence convinces the Board that they are incorrect."), enfd. 188 F.2d 362 (3d Cir. 1951).

remained under discussion—and were certainly neither decided upon nor approved.[5]

Further, other emails actually affirmatively link the Respondent's rush to implement the pay increase to the posting of the prounion signs. In an email sent on July 9 to the Respondent's President Takagi, HR Director Jones wrote "Please note—we have not been targeted yet. And I firmly believe we won't be targeted *if we take action this week* on the wages, announce the coming sick pay and vacation enhancements, and stay vigilant on watching over the employees in the hottest areas of the plant(s)." (Emphasis added.) This email clearly reveals the Respondent's desire to accelerate the wage increase to thwart the employees' organizing efforts. Similarly, in subsequent email correspondence between President Takagi and the Respondent's Chairman, Miyoshi, Takagi assured Miyoshi that: "[t]he contents of the attachment [referring to the prounion sign], although this was a coincidence, were posted immediately the next day *and dealt with*, so the situation should be carefully monitored for a while but the opinion inside the company is that it is very likely that any new activities similar to that one will quiet down." (Emphasis added). This portion of the email begs the question of how the Respondent "dealt with" the prounion signs, if not by immediately granting the wage increase.

Finally, the Respondent's own internal "rate adjustment" document—bearing the revised pay scales along with the handwritten notation "7/9 after meeting changes"—provides the definitive evidence that finalization (and acceleration) of the pay increases was made on that date—after the union signs were discovered that morning. While the majority maintains that Takagi received the authorization for the new pay structure from the Respondent's Chairman by July 8, the documentary evidence and testimony demonstrate otherwise.[6] Thus, the judge found that "Jones testified that Takagi did not give her his final approval until July 9, after he returned from a trip to Japan and saw Miyoshi."

Here, the majority has "fail[ed] adequately to explain why it has rejected the arguments for a different understanding of the evidence," that is, the understanding reflected in the judge's decision and well supported by the record considered as a whole.[7] Given the record, the Board should adopt—not reverse—the judge's decision and should find a violation of Section 8(a)(1).

II. INTERROGATION OF EMPLOYEE ANDREW RUCCI

It is well established that an employer's direct questioning of an employee about his protected concerted activity, or that of another employee, violates Section 7 of the Act if it tends to "interfere with, restrain, or coerce an employee" in the exercise of his protected rights. See *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).[8] Here, the majority declines to pass on whether the Respondent unlawfully interrogated employee Andrew Rucci, although it properly finds a separate interrogation violation with respect to employee Michael McCoil. As I will explain, the Rucci interrogation was unlawful as well.

A.

As noted, employees St. Hilaire and Hoar posted two prounion signs on the entrance to the Respondent's facility on the evening of July 8. Neither St. Hilaire nor Hoar were secretive about their involvement. Indeed, on the morning of July 9, shortly after the signs were discovered, Hoar informed his coworkers that he had posted the prounion signs. Employee Rucci testified that many of his coworkers discussed that St. Hilaire had posted the signs. Additionally, both St. Hilaire and Hoar testified that they had been speaking openly to employees about their interest in unionizing.

During the week of July 16 McCoil and Rucci were called into the office of Human Resources Manager Jones,

[5] The majority asserts that the judge's finding that the Respondent had not set any "firm dates'" for announcing and implementing wage increases prior to July 9 "does not suggest that the Respondent made any changes to its plans on July 9." Whether or not changes were made to the pay structures on July 9, the wage rates were not finalized until explicitly approved on July 9 at the meeting.

[6] Additionally, at least one employee perceived the pay increase to be linked to union activity, as evidenced by Andrew Rucci's statement to St. Hilaire that he would "like to thank the person" who posted the flyer and got employees the raises. While the standard is an objective one, this testimony tends to demonstrate that a reasonable employee would have linked the raise to the union organizing activity. Nor did the Respondent attempt to disclaim the reasonable inference that an employee might draw from the timing of the two events.

[7] *Arc Bridges, Inc. v. NLRB*, 861 F.3d 193, 196 (D.C. Cir. 2017) (reversing Board's decision, based on failure to give rational explanation for rejecting conclusion of administrative law judge). Under Sec. 10(f) of the Act, the Board's factual findings are "conclusive" on review if—but only if—they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. §160(f).

[8] To determine whether questioning is unlawfully coercive, the Board applies the "totality of circumstances" test articulated in *Rossmore House*, supra, at 1176–1178, including the so-called "*Bourne* factors," so denominated after the Second Circuit's decision in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), which factors the court of appeals characterized as "fairly severe standards," id. at 48: (1) the background of the question, i.e., whether there was an atmosphere of employer hostility and discrimination toward the union; (2) the nature of the information sought, i.e., whether the employer was seeking information that could have been used to take action against individual employees supporting the union; (3) the identity of the questioner, i.e., the rank of the employer representative asking the question; (4) the place and method of the interrogation, e.g., whether the employee was directed to leave his or her work station and report to a manager's office for questioning; and (5) the truthfulness of the employee's reply. Id.

where they each had separate one-on-one meetings with her. Jones asked Rucci at that meeting who had posted the union signs, and he replied that he did not know. Separately, Jones asked McCoil the same question—whether he had seen the sign. When McCoil denied that he had, Jones persisted in questioning him, indicating her disbelief that McCoil did not see the sign since he had arrived early for work.

I would find that both of these events—and not just the questioning of McCoil—constituted unlawful interrogations in violation of Section 8(a)(1) of the Act.[9] Jones' questioning of Rucci had all the hallmarks of a coercive employee interrogation: Jones (i.e. the highest-ranking HR official at the facility) questioned Rucci in her private office regarding his involvement in protected union activity (i.e. the prounion sign posting) against the backdrop of the Respondent's other unfair labor practices. Such questioning would certainly have had the tendency to restrain or coerce Rucci in the exercise of his own protected Section 7 rights.

III. TERMINATION OF TYLER HOAR

Applying the Board's seminal decision in *Wright Line*,[10] the judge found—largely based on his credibility determinations—that employee Hoar was terminated for engaging in protected activity (i.e. the posting of two prounion signs). Under *Wright Line*, the General Counsel's initial burden is to show that protected activity was a motivating factor in the employer's adverse action. Specifically, the General Counsel must show: (1) union or protected activity, (2) employer knowledge of that activity, and (3) union animus on the part of the employer. If the General Counsel makes that showing, the burden then shifts to the employer to show that it would have taken the same action even absent the employees' protected activity. *Wright Line*, supra, at 1089. The majority errs in finding that the General Counsel failed to prove employer knowledge here. The other elements of the General Counsel's initial burden were clearly satisfied, and because the Respondent's stated reason for firing Hoar was demonstrably pretextual, the Respondent by definition cannot establish a defense.

A.

That Hoar engaged in protected activity by posting the prounion signs is indisputable. According to the Respondent, however, Hoar was fired not for posting the prounion signs, but rather for stealing coffee—a chronic offense in the Respondent's workplace that had never before resulted in termination.

The Respondent regularly provided free coffee and dry soup packages for employees at the cafeteria in plant 1 and at break rooms in other plants. Every 3 or 4 weeks, the Respondent provided a free lunch for employees in the cafeteria, and on very hot days, the Respondent would provide free Gatorade for employees. The Respondent had no written policies regarding removal of coffee or food from the refrigerator; however, Desjardin frequently told all of the employees on his team that taking home any of the disposables was wrong, cost the company money, and lessened the opportunity to get wage increases. Despite this warning, as the judge found, "employees did take home from the cafeteria disposables, including coffee, on a recurring basis. . . management knew of this; and that management considered it to be an ongoing problem but not one serious enough to warrant discipline or even to be the subject of a written policy."[11] Prior to Hoar's termination, no employee was ever disciplined for such actions.

On about July 12, employee Rucci testified that he heard office employees complain that coffee seemed to be disappearing very quickly. On July 23, Rucci reported to Human Resources Manager Jones that he had seen Hoar carrying an armload of coffee packets out to his car in the parking lot the previous week. Jones brought in one other witness, production employee Jacob Rodriquez, who corroborated this account, but Jones did not take written statements from either Rucci or Rodriguez. On July 24, based upon these accounts, Jones wrote a half page memo in which she stated that she and Desjardin decided to terminate Hoar for violation of the code of conduct (i.e. stealing). She later brought Hoar to her office to ask if he stole coffee (which he denied) and terminated him. As I will explain this was a pretext.

The majority reverses the judge's finding of a violation not because it accepts the Respondent's explanation for

[9] As noted, the majority finds a 8(a)(1) violation with respect to Jones' interrogation of McCoil, but finds it unnecessary to pass on the judge's finding that this questioning was an unlawful interrogation as to Rucci as well. In passing on the Rucci interrogation, I agree with the judge's assessment that Rucci's affidavit was admissible as an exception to the hearsay rule pursuant to Federal Rule of Evidence 801(d)(1)(A), despite some inconsistencies with his later testimony at the hearing. The judge explained his decision to credit Rucci's affidavit account over his subsequent inconsistent testimony as necessary due to possible "witness intimidation." See *Conley Trucking*, 349 NLRB 308, 312–313 (2007) (crediting witness affidavit despite contrary hearing testimony in light of judge's first-hand observation of witness at hearing and possible witness intimidation), enfd. 520 F.3d 629 (6th Cir. 2008).

[10] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[11] The Respondent had a progressive disciplinary policy, providing that "one or more verbal warnings should be followed by a written warning, followed at the next infraction by suspension or discharge." However, the employee handbook provided that for "serious offenses," such as fighting, theft, insubordination, threats of violence, the sale or possession of drugs or alcohol on company property, etc., termination may be the first and only disciplinary step taken.

Hoar's discharge, but rather because—in its view—the General Counsel failed to prove that the Respondent knew of Hoar's union activity, an essential element of a *Wright Line* violation. To be sure, there is no *direct* evidence that the Respondent knew that Hoar had posted the prounion signs. But there is more than sufficient circumstantial evidence to infer the Respondent's knowledge, and, consistent with our case law, the Board should draw that inference.

The Board has long held that the trier of fact must make a wide-ranging inquiry on the issue of employer knowledge, taking into account both direct evidence and "circumstantial evidence from which a reasonable inference of knowledge may be drawn." *Montgomery Ward & Co*., 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). The Board, for example, may infer knowledge where the reasons for the discipline are baseless, unreasonable, or contrived so as to raise a presumption of wrongful motive, or where the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." *Montgomery Ward & Co.,* supra. Such an inference is fully warranted here.

Hoar was not secretive about his union activity. He testified that, even before posting the signs, he had been speaking openly to employees about their interest in unionizing. Then, on the morning of July 9, shortly after the prounion signs were discovered, Hoar informed his coworkers that he had posted the signs, which his coworkers had been openly speculating about on the plant floor. Further, as described, the Respondent was coercively questioning employees about their knowledge of the signs. In those circumstances, it is a fair inference that the Respondent, too, learned of Hoar's involvement in the posting of the signs, whether through lawful means or not.

That inference is further supported by the timing of Hoar's discharge. As noted by the judge, Hoar was terminated in the very same month as he had engaged in openly discussing the union with his coworkers and posted two prounion signs.[12]

Once knowledge is inferred, the *Wright Line* violation here quickly follows. The Respondent's contemporaneous Section 8(a)(1) violations—including its interrogations of employees McCoil and Rucci to discover the identity of the person who posted the signs—amply demonstrate animus towards Hoar's protected conduct.[13]

Finally, the asserted justification for firing Hoar was clearly pretextual. The Respondent had a progressive discipline policy allowing for automatic termination for "serious offenses" such as "theft," but the evidence fails to support that the Respondent actually treated the taking of freely-provided food as theft. Indeed, the Respondent had no written policy against the taking of free food supplies, and there was evidence that the Respondent had tolerated such conduct in the past. The Respondent could not provide an example of even a single infraction comparable to Hoar's in which a similar discipline was imposed—i.e. termination—for "stealing" freely offered food.[14] Moreover, there were obvious anomalies in the Respondent's investigation of this offense, further revealing pretext. After Rucci reported Hoar,[15] the Respondent failed to conduct an adequate investigation—it did not even interview Hoar himself before deciding his fate. Nor, contrary to its established procedures, did the Respondent consult with upper management before implementing the discipline.[16]

In sum, the credited evidence as a whole fully warrants drawing the inference that the Respondent knew about Hoar's union activity. Animus is clearly established, and the Respondent's asserted reason for discharging Hoar was pretextual. In this respect, too, the Board should adopt, not reverse, the judge's finding of a violation.

IV.

The majority properly finds that the Respondent's unlawfully opposed the employees' nascent unionizing campaign by interrogating an employee as to the origin of the prounion sign postings. It properly finds that the Respondent unlawfully offered legal assistance to employees in connection with the Board's investigation of unfair labor practices. But it falls short in failing to recognize the extent of the Respondent's unlawful conduct. The record

[12] See *Lucky Cab Co*., 360 NLRB 271, 274 (2014) ("The Board has long held that the timing of adverse action shortly after an employee has engaged in protected activity, or close to the filing of an election petition, may raise an inference of animus and unlawful motive."); *Real Foods Co*., 350 NLRB 309, 312 (2007).

[13] See *Print Fulfillment Services, LLC,* 361 NLRB 1243, 1245 (2014) (employer's animus in disciplining prounion employee supported by its multiple contemporaneous unfair labor practices).

[14] In fact, the judge found that in the four years prior to Hoar's discharge, no employee had been disciplined (save St. Hilaire for misconduct noted above). Far more frequent was the Respondent's imposition of verbal or written warnings, but none of those warnings concerned food-related "theft" issues. As the judge further noted, a year after Hoar was discharged, the Respondent failed to discipline another employee for taking a "handful" of Gatorade.

[15] Ironically, Rucci himself (Hoar's accuser) had previously been reported for taking free Gatorade from the Respondent, but that report did not result in any investigation. Moreover, the Respondent was aware that employees had violated the policy against taking home free food after company luncheons—a practice "technically" not allowed without permission—yet the Respondent had never imposed any discipline for such an infraction.

[16] See *St. Paul Park Refining Co., LLC,* 366 NLRB No. 83, slip op. at 15, 16 (2018) (pretext may be demonstrated by an indifferent or inadequate investigation into an employee's alleged misconduct).

here amply demonstrates that the Respondent unlawfully accelerated wage increases in response to this unionization effort, unlawfully interrogated Rucci, and unlawfully terminated Hoar for his role in supporting the campaign. Accordingly, I dissent.

Dated, Washington, D.C. July 8, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your or your coworkers' union activities.

WE WILL NOT coercively interrogate you about your communications with agents of the National Labor Relations Board.

WE WILL NOT discourage you from cooperating in the Board's investigation of unfair labor practices filed against us by offering you the legal assistance of our attorney when you meet with a Board agent.

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

U.S. COSMETICS CORPORATION

The Board's decision can be found at www.nlrb.gov/case/01-CA-135282 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.

JoAnn P. Howlett, Esq., for the General Counsel.
Kristan Peters-Hamlin, Esq., for the Respondent.
Robert V. Scalise, Esq., for Charging Party Hoar.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of a consolidated complaint and notice of hearing (the complaint) issued on August 28, 2015, against U.S. Cosmetics Corporation (the Respondent or the Company),[1] stemming from unfair labor practice (ULP) charges filed by Tyler Hoar and William St. Hilaire, individuals.

Pursuant to notice, I conducted a trial in Hartford, Connecticut, on November 17–20 and December 7–9, 2015, and February 22–24, 2016, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

I will not address the myriad of accusations made during the trial, other than to strenuously deny the assertions of the Respondent's counsel that I was biased against her or her client and demonstrated that bias in my rulings. She did not formally request that I recuse myself, but I advised her that she had the right to file a request for a special appeal to the Board under Board's Rules Section 102.26 if she felt as though I could not be fair and impartial. She did not do so.

During the investigation, the Respondent furnished documents pursuant to the Board's May 15, 2014 Order (GC Exh. 23), denying the Respondent's motion to revoke the Region's subpoena duces tecum. The Respondent also furnished documents pursuant to the General Counsel's subpoenas duces tecum, both before and during the trial. The General Counsel did not ask that I impose sanctions for subpoena noncompliance. In any event, production of documents at various times, and (sometimes acrimonious) disputes concerning such production, complicated and unduly prolonged the proceeding, as did the inability of the parties to reach stipulations on facts or documents. In addition, the Respondent's counsel's constant interruptions impeded getting reliable witness testimony into the record in an orderly fashion.

[1] The name of the Respondent recently changed to Miyoshi America, Inc.

Issues

(1) On about July 10, 2014,[2] did the Respondent time the announcement and implementation of a wage increase for its hourly employees to discourage them from engaging in a union organizational activities, or was the timing purely serendipitous vis-à-vis the posting of two copies of a sign in favor of unionization (the union sign) at the Respondent's facility on July 8?

(2) During the week of July 16, did Human Resources (HR) Manager Judy Jones (aka Judy White) interrogate Michael McCoil and Andrew Rucci about their and other employees' union activities by asking if they knew who had posted the union sign?

(3) On July 17, did the Respondent terminate St. Hilaire because he had threatened fellow employee Jon Lasko by text or telephone during non-work hours, after learning that Lasko was dating his ex-wife; or because he had engaged in union activities, more specifically, posting the union sign?

(4) On July 24, did the Respondent terminate Hoar because he had taken packets of coffee from the cafeteria and placed them in his car on about July 15; or because he had engaged in union activities, more specifically, posting the union sign?

(5) On August 20 and 21, did the Respondent, by Jones, interrogate McCoil, Rucci, and other employees about their union activities, in connection with an investigation into the vandalism of Lasko's locker?

(6) On November 6, did the Respondent's issuance of a written memorandum that offered employees free legal representation from the Respondent's counsel when they met with a Board agent discourage employees from engaging in protected activities, and otherwise interfere with their Section 7 rights?

(7) On about November 8, did Jones interrogate McCoil about his protected concerted activities, to wit, his participation in the Board's investigation of ULP charges?

(8) Has the Respondent maintained rules in its employee handbook (the handbook) that interfere with employees' Section 7 rights?

Witnesses and Credibility

The witnesses, with their job titles at all times relevant, were as follows.

The General Counsel called Hoar, production employee McCoil and, as adverse witnesses under Section 611(c), the following Company representatives: President Kaoru "Tim" Takagi; Treasurer and HR Director Louise Pockoski (to whom Jones reported); and Jones.

The Respondent's counsel called St. Hilaire as an adverse witness under Section 611(c), as well as production employees Lasko and Rucci. She also called Pockoski, Jones, Production Manager Dennis Desjardin, Senior Technical Center Manager Allen (Al) Tiebout, Jr., and Team Leader Jason Martin.[3]

The following individuals are no longer employed by the Respondent: Desjardin retired; Jones resigned to take other employment; and McCoil was terminated. The circumstances of McCoil's termination are not before me. In making my credibility resolutions of witnesses, I have fully taken into account the evidence of criminal convictions contained in the record. None of the conduct occurred at the Respondent's workplace, and I will not subject the individuals in question to unnecessary embarrassment by going into the details of the offenses.

Deciding most of the issues in this case hinges on credibility resolution, including the plausibility of certain accounts of conversations and actions. Before going into specifics, I cite the well-established precept that "'[N]othing is more common in all kinds of judicial decisions than to believe some and not all' of a witness' testimony." *Jerry Ryce Builders,* 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). The trier of fact must consider the plausibility of a witness' testimony and appropriately weigh it with the evidence as a whole. *Golden Hours Convalescent Hospitals,* 182 NLRB 796, 787–799 (1970).

The Respondent's Witnesses

The primary management witnesses were Takagi, the highest ranking official at the facility; and Jones and Desjardin, who were most directly involved in the planning and implementation of the pay increase, the terminations of Hoar and St. Hilaire, and other incidents forming the basis of the complaint allegations.

Pockoski was more peripherally involved in the pay increase process and the terminations. Moreover, although Takagi, Jones, and Desjardin all testified about management's reaction to the union sign, and the timing of the announcement and implementation of the pay increase, Pockoski did not.

Tiebout's testimony was limited to his discovering the union sign, discussions with Desjardin in 2013 regarding changing the pay structure to be skills based, and a conversation with Desjardin in June 2014 concerning implementation thereof.

For reasons described below, none of management's primary witnesses were satisfactorily reliable. On important matters, all of them contradicted their own and/or each other's testimony; were contradicted by other evidence that the Respondent furnished; offered explanations or descriptions that were implausible; and failed, collectively, to provide a coherent, consistent, and credible explanation of why the Respondent took certain actions.

President Takagi

Based upon email communications that Takagi had with Jones on July 9 and Company Chairman Taizo Miyoshi in Japan on July 11,[4] I find unbelievable his testimony that the timing of the wage increase was completely disconnected from the union sign; that at a 4:30 p.m. management meeting held on the afternoon of July 9, Jones brought up the union sign but no one asked any questions, and there was no discussion about it; and that the union sign was not discussed at any other management meetings. In this regard, the following testimony shows that management

[2] All dates hereinafter occurred in 2014 unless otherwise indicated.

[3] The Respondent's answer admitted that Martin was a supervisor within the meaning of Sec. 2(11) of the Act and an agent of the Respondent within the meaning of Sec. 2(13) of the Act. However, at trial, the Respondent's counsel represented that this had been an error and that his status as a supervisor and agent was denied. I allowed her to amend her answer accordingly. I need not address the General Counsel's suggestion (GC Br. at 11) that such conduct by the Respondent's counsel may subject her to disciplinary action under Sec.102.21 of the Board's Rules.

[4] GC Exhs. 20, 35(a) (certified translation of GC Exh. 20).

did have discussions on the subject. Thus, Tagaki testified that he advised Miyoshi in the email that "[w]e through [sic] of two possibilities" as to who had posted the union sign: "some union organization" or an "internal person." He further told Miyoshi that they considered the first possibility "very low" because other companies in the industry in the area did not have that kind of activity, and the Respondent was a small business.[5] Takagi said the exact opposite in his sworn declaration of January 21, 2015 (GC Exh. 21 at 2), that the Respondent provided, "I assumed that was done by an outside organizer who was posting such signs around town at a number of companies."

With respect to the wage increase, it is undisputed that Miyoshi had to give final approval. Yet, Tagaki testified that the announcement of the wage increase was planned 30 days prior to July 10, and Desjardin testified at one point that he learned at least a week before on or about 10 July that the announcement would be made. On the contrary, Jones testified that Tagaki did not give her his final approval until July 9, after he returned from a trip to Japan and saw Miyoshi. I note here that none of the documents that the Respondent submitted, either before or during the trial, definitively establish the dates on which the final wage rates were decided or would be announced to employees. Indeed, some of them appeared contradictory.

As to Hoar's termination, Tagaki testified that either before or after he went to Japan in July, he had a conversation with Jones and Desjardin in his office about Hoar stealing coffee, that they recommended Hoar be terminated, and that he agreed because Hoar's conduct violated the Company's code of contact. However, this testimony is contradicted by July 24 and 25 emails between Desjardin and Tagaki (R. Exhs. 2 and 18), showing that Tagaki was not aware that Hoar had been terminated, or the reasons why, until Desjardin notified him when he was away on vacation, presumably in Japan.

HR Manager Jones

Jones seemed nervous, was frequently evasive, directly contradicted herself a number of times, and sometimes provided testimony that was wholly unbelievable.

Based upon the contents of Jones' July 9 email to Tagaki, as well as Tagaki's July 11 email to Miyoshi, I do not believe her testimony that that the timing of the wage increase had nothing to do with the posting of the notice and that she did not give any thought to who had posted it.

I will not hazard to speculate on why she offered the following utterly perplexing testimony.[6] The Respondent furnished to the General Counsel a document (GC Exh. 16), which was an email from Jones to Takagi sent at 8:41 a.m. on July 9, with the subject "Sign on front door 7-9-14." It states, "As discussed . . . ." The rest of the page is blank, other than a handwritten notation on the bottom, "attorney/client privileged." Jones testified she wrote that in and that no one asked her to write it.

> Judge: "[H]ow did you decide that it was attorney/client privileged?
>
> Answer: I don't—honesty, I don't understand the term.
>
> . . . .
>
> Judge: So you wrote that, but you didn't know what it meant?
>
> Answer: Right.

She then offered the unconvincing explanation that she meant it was confidential. She repeated that it was her decision to write "attorney/client privileged" but could not recall when she wrote it. She indeed may have written it but, based on her own testimony, I seriously doubt that she did so sua sponte.

With further regard to attorney/client privilege, Jones offered directly conflicting testimony on what she did after Rucci came to see her about his conversation with Board Agent Essie Ablavsky, who was investigating the ULP charges against the Respondent. She first testified that she did not take notes of her conversation with Rucci, write anything afterward, or send an email about it to anyone. However, she later testified, "I took down as much information as he could give me. . . ."[7] And, her earlier testimony was contradicted by her November 6 email to Attorney Peters-Hamlin, in which she described her conversation with Rucci and sought counsel's advice.

In connection with the investigation of vandalism to Lasko's locker in August, Jones interviewed 15 employees on August 20 and 21. General Counsel's Exhibit 13 consists of her interview notes. Page one lists a series of questions. After questions regarding knowledge of who was responsible, are the following:

> Are you aware anyone put someone up to it?
> Have you been talking to him
> May I see your phone/text history?

The notations in her interview notes, consistent with McCoil's testimony and Rucci's affidavit, reveal that even when the employee answered that he was not aware of anyone putting someone up to the vandalism, Jones nevertheless specifically asked about the employee's communications with St. Hilaire (see the repeated references to "Bill," which she acknowledged was St. Hilaire); and, further, that she asked to see the employee's cell phone communications with him.

In this regard, her answers to questions regarding certain notations revealed a lack of credibility. When the General Counsel asked her about the notation, "FB only. Don't know if Bill would do that" (id. at 3), Jones answered that she was not sure what she meant and could not recall if she asked the employee if he had communicated recently with St. Hilaire. She then said that the note was there because he must have volunteered the information.

The General Counsel asked her about the notation (id. at 8): "N/A. Didn't bring phone. Think you're trying to get me to say it was Bill. Don't get that."

> Ms. Howlett: If he didn't suspect anyone why would you ask to see his phone?
>
> Answer: I can't answer that.
>
> . . .
>
> Ms. Howlett: Why would you have followed up with a question if he told you he didn't think anyone did it and he didn't

[5] Tr. 387, 468.

[6] Tr. 1046–1047.

[7] Tr. 2198.

mention Bill?

Answer: I don't know. [8]

Finally, as to the notation on page 10, "Was not approached by Bill":

Ms. Howlett: [I]s it fair to assume that you asked him if he had been approached by Bill?

Answer: We could assume. [9]

Despite the above, Jones testified "I don't believe I ever asked to see anybody's phone,"[10] and that she did not ask specifically ask about communications with St. Hilaire.

As to Hoar's termination, Jones first testified that she took statements from Rucci and Rodriguez (on July 23 and 24, respectively), concerning what they had observed. Later, she testified that she asked Rodriguez to sign a statement, and he agreed. However, the Respondent never produced statements from either Rucci or Rodriguez from July. I therefore draw an adverse inference against the credibility of Jones' testimony from the Respondent's failure to provide documents that would reasonably be assumed to be favorable to its position. See *PCC Fabricators, Inc.*, 352 NLRB 701 fn. 5 (2008); *Martin Luther King Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977).

Further as to Hoar's termination, Jones testified at one point that when Desjardin and she had Hoar brought in, he was given an opportunity (to defend). However, she contradicted this with other testimony. Thus, she also testified that based on what Rucci and Rodriguez reported, she and Desjardin decided to terminate Hoar before they met with him. In this respect, she testified that when Hoar first came into her office, she told him, "You've been called in because you were seen stealing coffee packets from the cafeteria. It's against our code of conduct, that's stealing. You're being released today."[11]

When Jones was questioned why an employee (Bryan Kelly) who had engaged in "loan-sharking" was not terminated but instead received a final written warning, Jones replied that loan-sharking was not a criminal act, whereas Hoar's theft and St. Hilaire's threats of violence were. However, Kelly's warning notice—which Jones herself signed on July 17—specifically states, "It is illegal to loan-shark. . . ."[12] She also testified that Hoar and St. Hilaire were terminated because their conduct violated the code of conduct but that Kelly was not because loan sharking is "not specifically called out in the handbook,"[13] even though she herself said in Kelly's warning notice that loan sharking "is against our company code of conduct."

Moreover, the way that Jones conducted the investigations that led to the terminations of St. Hilaire and Hoar also raises serious questions about her reliability as a witness. I will discuss this in the facts and analysis sections.

Production Manager Desjardin

I do not believe Desjardin's testimony that he never saw the union sign prior to the date when he testified (February 23) and that he chose not to look at it if it was passed around at the 4:30 p.m. meeting on July 9. That would not have been a normal reaction, especially when other evidence shows that management was quite concerned.

Desjardin's testimony of when he learned the wage restructuring had been finally approved was contradictory and totally confusing. He testified that he received an email from Jones in June stating that Tagaki had approved the pay restructuring but that it was a different email from Respondent's Exhibit 3. Later, he back-tracked, equivocating on whether there was another email. Desjardin testified at another point that he learned of the final approval at a June 20 meeting with Tagaki, Jones, and Pockoski. At yet another point, he testified that he understood that Tagaki had given final approval by telephone after the June 20 meeting. However, Desjardin also testified that Tagaki told him personally in June that Miyoshi had given final approval to the wage increases, contrary to Jones' testimony.

Desjardin testified that no changes were made after June 20 in the pay rates that employees would be receiving. However, internal management documents, including General Counsel's Exhibits 38, 39, and 42, contradict him, as does Jones' testimony that at a June 20 meeting, Tagaki indicated only that he favored the concept of skill-based pay, not any specific rates.

Both Jones and Lasko testified that when the latter reported what had occurred with St. Hilaire, he stated that he had deleted the threatening messages and had to call his girlfriend to send him one of the texts. Neither Jones nor Lasko said that Lasko took out his phone and showed Jones and Desjardin the texts, as Desjardin initially testified. Then, obviously prompted by the Respondent's counsel, he changed his version to comport with Jones' account. Further as to St. Hilaire, Desjardin's testimony about the nature of the threats that Lasko reported was inconsistent with both Jones' complaint investigation (R. Exh. 13) and Jones' testimony.

Contrary to Jones' testimony that the decision to terminate Hoar had been made before she and Desjardin met with him regarding the accusations against him, Desjardin testified that the decision had not been made because they wanted to hear his side. Desjardin's description of what Hoar purportedly said at the meeting was purely nonsensical:[14]

> He had all of the time to explain anything as to what was the reason—he denied putting it in. It wasn't about anything. He denied putting it in his car. It wasn't about were you taking it somewhere else. We told him what people had seen. He didn't deny not putting it in his car. But he didn't give us a reason why he put it in his car.

HR Director and Treasurer Pockoski

Pockoski made obvious attempts to minimize Martin's authority, even though she at one point, perhaps inadvertently, volunteered that that the team leaders (including Martin) attended a meeting of managers and supervisors regarding a new anti-harassment policy that the Respondent implemented. Moreover,

[8] Tr. 884–885.
[9] Tr. 893.
[10] Tr. 842.
[11] Tr. 2296.
[12] GC Exh. 7 at 13.
[13] Tr. 2233.
[14] Tr. 2459.

her professed total ignorance of Martin's pay vis-à-vis other production workers was suspicious considering her position in the Company. In any event, with regard to Martin's authority, Pockoski had little direct first-hand knowledge.

Pockoski was also unconvincing in emphasizing that the Respondent felt obliged to terminate St. Hilaire for violating the antiharassment policy in order to practice what it preached. In this regard, neither Jones, Desjardin, nor Tagaki specifically mentioned the antiharassment policy when they recited the reasons for St. Hilaire's termination.

Manager Tiebout

Tiebout was the sole fully credible management witness. He consistently answered questions readily and smoothly and at no time demonstrated unease or an apparent effort to stilt his testimony in the Respondent's favor. Thus, he testified that when Desjardin told him in approximately late June that management had given final approval for the wage increases, he took this as meaning that Takagi had given final approval for the skills-based wage system concept (not the actual amounts of wage increases). He further testified that Desjardin told him that the program was going to be implemented "very shortly" but did not give him a specific date that this would occur.[15]

Team Leader Martin

Martin, who has been a team leader for about 11 years, seemed ill at ease and often hesitated in answering questions, particularly on cross-examination (when his face flushed). He seemed to deliberately downplay his authority, particularly with respect to the disciplinary actions in General Counsel's Exhibit 7 that he signed on behalf of management. Martin was markedly evasive on recross-examination when asked if Desjardin ever requested that he tell employees something on Desjdardin's behalf ("My memory's not that good"),[16] and to describe his role in counseling employees on attendance. Finally, I find unbelievable his testimony that he did not even hear about the posting of the union sign until after the instant trial was scheduled. Inasmuch as both he and Desjardin were not credible witnesses, I consider other evidence in the record more reliable than their testimony.

As was Martin, Lasko seemed uneasy and somewhat reticent, but I recognize that he was largely testifying about an unpleasant personal situation and will not consider this to reflect negatively on his credibility.

Lasko's testimony about the nature and extent of St. Hilaire's July 9 threats, by phone or text, was fairly consistent with the complaint investigation documents (R. Exh. 13). Moreover, he generally seemed to answer questions spontaneously and without attempting to calculate what he should say. Thus, when the General Counsel asked him to whom he reports, he readily answered, "Jason Martin . . . . [H]e's one of my bosses . . . . ever since I was there," with the title of floor manager,[17] contrary to the Respondent's position that Martin is not a supervisor.

On two specific points, I credit St. Hilaire's denials of the following. The first is Lasko's testimony that St. Hilaire threatened to slash his tires. Jones' notes of her interview with Lasko state, "I asked Jon if there was anything else that he was aware of that would make him think Bill would carry out his threats . . . He has slashed tires . . . ." (id. at 2 (emphasis added)). There is no other mention of slashing tires in her notes.

Secondly, Lasko testified that during the course of the threatening communications, St. Hilaire mentioned the pay increase and did not want him to say anything to St. Hilaire's ex-wife because she might go after him for more child support. St. Hilaire might have said this to Lasko at some later date, but I highly doubt that he would have thought of this and brought it up during the highly emotionally-charged time when he was verbally attacking Lasko for betraying their friendship.

Production Employee Rucci

Rucci was an exceptionally enigmatic and unbelievable witness. Throughout his testimony, he seemed to go out of his way to stress points and volunteer information that supported the Respondent's position, as though trying to curry favor with management rather than to provide a truthful recitation of the facts. Related to this, as I will describe in more detail below, he repudiated numerous statements antithetical to the Respondent's case that he made in a Board affidavit of January 16, 2015 to Board Agent Ablavksy (GC Exh. 40, which I received over the Respondent's objections).

Rucci confirmed that the signature on page six of the affidavit was his. He averred, however, that he did not read the top of page six and did not read (nor was shown) the previous five pages, because he was in a rush to pick up his child, and Ablavsky said that he could sign the affidavit without reading it and showed him only the last page. Moreover, he denied writing in the initials "AR" at the bottom right hand corner of each page.

He did concede that Ablavsky asked "a lot of questions," that there was "[a] lot of back and forth" because the restaurant was noisy, that he frequently asked her to repeat or rephrase a question, and that "a couples of times when I said something, sometimes she would read it back and then I would say no, that's not what I said. And she's like oh, I'm sorry, it was loud. Can you rephrase it? Or can you tell me what you meant and stuff like that."[18]

On re-direct examination, Rucci denied the following statements in his affidavit are true:

(1) "Jason Martin hired me."

(2) "Both [Martin and LePage] . . . have the authority to issue discipline."

In denying this, Rucci testified that Martin told employees "way back" that all discipline went to HR or Desjardin."[19] I note that even though Rucci at one point testified that he did not consider a team leader a supervisor, he later testified that Team Leader Martin was "[m]anager to me. I thought, he was, you know, a manager."[20]

(3) Regarding the July 9 afternoon management meeting, "Coworkers said that they were probably discussing the union

[15] Tr. 2940.
[16] Tr. 2384.
[17] Tr. 1814.
[18] Tr. 2860, 2919, 2925.
[19] Tr. 2883.
[20] Tr. 2747, 2771.

signs."

(4) As to the July 10 wage increase announcement, "Employees were suspicious that the wage increase was in reaction to the union signs and believed that it was designed to discourage forming a union."

(5) After Jones called him into her office in the third week of July, "[Jones] asked me if I knew who had posted the union signs."

When specifically asked if ever told this to Ablavsky, he replied no.

(6) A couple of days later, "I was approached by Jason Martin while working. He told me that he heard from someone that I knew who posted the union[sic]. I told him I didn't know who did it. He asked me if I was sure but I affirmed that I did not know."

When asked if he told this to Ablavsky, he replied no and, in response to Ms. Peters-Hamlin's question "So this is just made up?" answered "Yeah."[21]

(7) Regarding the incident between St. Hilaire and Lasko, "[A]ll production employees indicated that Jon Lasko had also been threatening Bill St. Hilaire by text message."

Ms. Peters-Hamlin: Did you tell that to Ms. Ablavsky?

Answer: No.

Ms. Peters-Hamlin: Did that ever happen?

Answer: No.[22]

(8) Concerning the investigation into the vandalism of Lasko's locker, "[A]pproximately five employees were called into [Jones'] office and asked to bring our phones. This included me. . . . "

On the contrary, Rucci testified, he volunteered to bring it in.

(9) When Jones saw Rucci and others in her office, she asked to look at their phones and said that "it would be suspicious if we didn't hand over our phones."

In denying that Jones said this, Rucci stated, "[S]he didn't even ask. I offered my cell phone to her."[23] However, he testified at another point, "She asked me if it was okay if I could show her if I talked to Billy [St. Hilaire]," to which he replied yes, that he had nothing to hide.[24]

(10) After McCoil and Rucci were written up by Jones for horseplay revealed during that investigation, "McCoil said that if the written warnings don't get removed from our records he would be calling Board Agent Essie Ablavsky at the NLRB to report the incident."

Rucci specifically denied telling this to Ablavsky.

I do not credit Rucci's testimony that he told Jones when she interviewed him in August that he heard a rumor that St. Hilaire had offered to pay people $20 to vandalize Lasko's locker. Neither his affidavit nor Jones' notes of her conversation with him (GC Exh. 13 at 3) show any indication that he said this, even though the "$20" appears in her notes of conversations with other interviewees. Nor do I credit Rucci's testimony that St. Hilaire called him 3 weeks before Jones' interviewed him and asked if he knew somebody who would vandalize Lasko's car. He admittedly failed to mention this to Jones, nor did he mention it in his Board affidavit, and I suspect that this was concocted.

On the other hand, I do credit Rucci's testimony that he was upset at Hoar and others for taking food from the cafeteria on various occasions and that he brought this to the attention of Jones and Martin prior to July. He expressed what appeared to be genuine emotion when testifying thereon, and such testimony was consistent with his complaint about Hoar's taking coffee in July, as set out in his affidavit and Jones' notes.

Whether statements in Rucci's affidavit should be admitted as substantive evidence hinges on the answers to the following:

(1) Are the statements reliable, considering both the contents of the affidavit as a whole and their consistency with other credible evidence of record?
(2) If so, are such statements admissible as nonhearsay under Federal Rule of Evidence (FRE) Rule 801(d)(1)(A); alternatively, should such statements be admissible even if they are not encompassed by that rule?
(3) Has the Respondent had an adequate opportunity to address and rebut those statements?

(1) Reliability

I discredit Rucci's attempt to disavow the affidavit by claiming that Ablavsky was guilty of fabricating statements in the affidavit, of fraudulently putting his initials on the pages, and of telling him to sign the statement without reading it. I do not believe that she engaged in such unprofessional—possibly criminal—misconduct. Based on his own description of their communications when she was typing up his statements, and their joint efforts to accurately put down what he was saying, I am satisfied that the affidavit accurately reflects what he in fact told her.

The dates of events described in the affidavit are consistent with the dates that I find that they occurred, based on documents of record. His statements of what Jones asked him in the third week of July about knowing who put up the sign and what she said to him in August about wanting to see his cell phone are very similar to the testimony of McCoil, which I credit. Moreover, his statements concerning Martin's supervisory status are consistent with the testimony of McCoil, Hoar, and St. Hilaire, and with documents of record. The affidavit's description of events is appropriately detailed in addressing events that occurred approximately 6 months earlier.

Also noteworthy is that although many statements in his

[21] Tr. 2893–2894. The General Counsel has not alleged this as a violation of Sec. 8(a)(1).
[22] Tr. 2984.
[23] Tr. 2898.
[24] Tr. 2778.

affidavit are adverse to the Respondent and favor the General Counsel's case, this is not always the case. Thus, Rucci corroborates Jones' account of what he related to her regarding what he observed about Hoar taking coffee. Furthermore, even though Rucci states in the affidavit that many employees suspected that St. Hilaire had posted the union sign, he mentions nothing anywhere in the affidavit about actual or perceived union activity by Hoar.

Based on all of the above factors, I find that Rucci's affidavit is reliable.

(2) FRE Rule 801(d)(1)(A)

Rule 801(d)(1)(A) provides that a prior statement of a witness is not hearsay if:

> The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a declaration. . . .

The Board in *Alvin J. Bart & Co.*, 236 NLRB 242, 242 (1978), enf. denied on other grounds 598 F.2d 1257 (2d Cir. 1979), strongly suggested that sworn pretrial affidavits may be regarded as depositions that fall within the exception to the hearsay rule ("And there is good reason to treat them as such because there is no requirement under the Federal Rules that the prior statement embodied in a deposition be subject to cross-examination when made."). In *P*I*E* Nationwide*, 297 NLRB 454,455 (1989), the Board discussed the holding in *Bart* and also implied support for the proposition that sworn pretrial affidavits fall under the hearsay exception of Rule 801(d)(1)(A):

> The statements discussed in *Bart* were of such high evidentiary value that the Board stated that they were arguably not even hearsay, as they were given under oath and the declarant was subject to cross-examination at the hearing concerning them.

The Congressional subcommittee that considered proposals to permit broader substantive use of prior inconsistent statements, which ultimately led to the adoption of Rule 801(d)(1)(A), stated that the legislative purpose of this was "based largely on the need to counteract the effect of witness intimidation." H.R. Commn. Print at 26–27 (June 28, 1973), included in the Hearings on Proposed Rules of Evidence before the H.R. Subcomm. on Criminal Justice of the Commn. On the Judiciary, 93rd Cong. (1973) at 170–171, *reprinted* in 1974 U.S.C.C.A.N. 7075, 7086–7087.

As Judge David Goldman aptly observed in *Conley Trucking,* 349 NLRB 308 (2007), enfd. 520 F.3d 629 (6th Cir. 2008), in determining whether to admit portions of a witness' Board affidavit as substantive evidence:

> The danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted. . . . [D]ue to the "peculiar character of labor litigation[,] the witnesses are especially likely to be inhibited by fear of the employer's . . . capacity for reprisal and harassment." *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976). Accord: *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977).

Here, Rucci's transparent and strained attempt to give testimony favorable to the Respondent, his flat-out repudiation of numerous portions of his affidavit that could be considered unfavorable to the Respondent, and his preposterous attempts to deny responsibility for the statements therein on the basis that the Board agent fabricated them, lead me to suspect that Rucci was intimidated from giving truthful testimony by an agent or agents of the Respondent, either intentionally or unintentionally. I can think of no other conceivable reason for his incredible about-face.

In light of expressed Congressional intent, especially in the context of the employee witness in a ULP hearing, and the Board's *Bart* decision, I conclude that the hearsay exception in FR 801(d)(1)(A) should apply.

However, recognizing that the law on this point is unsettled, I will address in the alternative whether the affidavit, if considered hearsay, should nonetheless be received.

Section 10(b) of the Act, 29 U.S.C. §160(b), provides that ULP proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." In *Bart*, above at 242, the Board cited Section 10(b) and specifically considered and rejected the proposition that pretrial affidavits are necessarily inadmissible on the grounds of hearsay: "We would be reluctant to adopt a rule . . . which mechanically excludes evidence, regardless of its intrinsic reliability, because it is technically hearsay. Administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent qualities justifies." The Board noted that in administrative proceedings, there is discretion to receive in evidence and rely on hearsay as substantive evidence. Id. at 243.

In *St. John Trucking*, 303 NLRB 723, 723 fn. 1 (1991), citing *Bart*, the Board rejected the specific exception that the judge erred in crediting an employee's affidavit over his testimony at the hearing, stating that "we note that this action is well within settled Board precedent." In that case, the employee-witness, as did Rucci, disavowed statements in his affidavit adverse to the respondent, testified that he did not read the affidavit before he signed it, and claimed that the affidavit was inaccurate. The judge noted in particular that, as here, the affidavit on its face contained an acknowledgement by the witness that he read the affidavit before signing it. Id. at 726.

In this respect, in *Conley v. NLRB* (520 F.3d at 639–641), the Sixth Circuit Court of Appeals stated that the germane inquiry in deciding whether to admit portions of an employee's affidavit was:

> whether the relaxation of the Federal Rules of Evidence by the administrative law judge was reasonable under the circumstances and limited in its application to the practicalities of the situation. Here, the administrative law judge's first-hand observations of Jeremy Thompson's demeanor raised a concern that the company, wielding superior economic power, had intimidated Thompson at a time when, as an employee, he was

> still dependent upon the company for his livelihood. The judge clearly found that, without adoption of a relaxed evidentiary rule to permit a more complete picture of the situation faced by Conley Trucking's workers, there was a distinct possibility that company officials would succeed in suppressing evidence otherwise available for consideration in determining whether an unfair labor practice had occurred.

As in *Conley Trucking*, the fact that the Respondent objected to the use of the affidavit is not controlling. Indeed, to allow the Respondent in the circumstance presented to preclude use of the affidavit as substantive evidence because it is hearsay would lead to the untenable result of turning the search for truth on its head and reward the Respondent for what I perceive to have been witness intimidation.

Accordingly, I conclude that statements in the affidavit should be admissible even if they are considered hearsay.

(3) The Respondent's Opportunity to Defend

The Respondent had a full opportunity to address and rebut all of the pertinent statements in Rucci's affidavit that he denied.

Conclusion: Based on all of the above, statements in Rucci's affidavit are appropriately treated as substantive evidence.

The General Counsel's Witnesses

Hoar

Hoar appeared straightforward, he testified consistently and in detail, and he had a good recall. However, his testimony was not flawless.

As to the alleged theft of coffee, the Respondent did not call Rodriguez, so I will not consider hearsay evidence of what he witnessed, nor do I believe that Rucci was a trustworthy witness on the stand. However, for reasons that I have stated, I am confident that the affidavit Rucci gave to the Board was reliable, as opposed to his testimony.

In the affidavit, Rucci's account of observing Hoar take coffee out of the cafeteria and place it in his car is detailed and I can think of no reason why Rucci would have invented such a story out of thin air, particularly when he told Jones that Rodriguez was also a witness, and Rodriguez confirmed his account. Thus, one would have to conclude that both Rucci and Rodriguez conspired to falsely accuse Hoar. Such a conclusion is too farfetched to be plausible. I therefore credit the account in Rucci's affidavit and, further, find that he did report that to Jones.

Even had Rucci and Rodriguez lied, it is what they reported to Jones, and management's reaction, that are determinative of whether Hoar's termination did or did not violate the Act.

St. Hilaire

In a rather unusual scenario, St. Hilaire's only testimony was as an adverse witness under Section 611(c); the General Counsel did not call him in her case in chief or ask him any questions after his 611(c) testimony.

St. Hilaire was poor on recalling specific dates and had a tendency to rush when giving his answers, sometimes providing more information than necessary. He also exhibited something of an aggressive personality. On the other hand, his testimony about what he told Lasko by text, and then Jones and Desjardin when he met with them, was appropriately detailed and internally consistent. Moreover, he seemed candid, as reflected by the fact that his testimony about what he told Lasko was stronger than the words contained in Jones' complaint investigation ("I'm going to kick your butt" and similar words.)[25]

Because of my previously-stated issues with Jones', Desjardin's, and Lasko's credibility concerning the events surrounding St. Hilaire's termination, I credit his accounts of what occurred over theirs. This includes crediting his unrebutted testimony that Lasko also threatened him in their telephone communications on July 9.

Production Employee McCoil

McCoil testified in a low key but straightforward manner and answered questions as readily on cross-examination as he did on direct. He did not appear to be trying to slant his testimony against the Respondent, as reflected by his testimony that he had heard about a possible wage increase for a little over a year before it was announced.

Significantly, McCoil's testimony that Jones called him into her office about a week after the sign was posted, and asked him if he knew who had put it up, was remarkably similar to what Rucci stated in his affidavit. The same holds true for what Jones asked them during her investigation of the vandalism to Lasko's locker. On these matters, I credit McCoil and what Rucci averred in his affidavit over Jones, reiterating that she was not a generally believable witness.

For all of the above reasons, and taking into account that McCoil was terminated, I also credit him in general and where his testimony diverged from that of management's witnesses.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, as well as the posttrial briefs that the General Counsel and the Respondent filed, I find the following.

I will first address the allegations that certain written promulgations of the Respondent violate the Act on their face: the offer of free legal assistance from the Respondent's counsel, and certain provisions in the employee handbook. After that, I will address facts pertaining to the other allegations.

Offer of Free Legal Assistance

Board Agent Ablavsky, who was investigating the charges in the instant matter, called Rucci on about November 4 and asked him his knowledge of who had posted the union sign. The next day, Rucci went to see Jones and expressed to her concerns about answering Ablavsky's questions. On November 6, Jones sent an email to Attorney Peters-Hamlin, in which she described her conversation with Rucci and asked for counsel's advice.[26]

On November 6, the Respondent announced and disseminated to employees a "Statement to Employees about Legal

[25] Tr. 2631.

[26] GC Exh. 37. The Respondent's counsel provided this to the General Counsel but objected to its receipt on the grounds that her disclosure of the document was the result of an "inadvertent error" (see Federal Rule of Evidence Rule 502(b)), and because only the client could waive the privilege. I told her that I would reconsider my ruling admitting it if she provided me in her brief with persuasive authority in support of her position. Her brief does not address the issue.

Services."[27] Here is its full text:

- We wanted to let our employees know that a college student named Essie, who is interning at the NLRB, has called one of our employees yesterday and stated that she plans to call other employees.
- We have engaged an attorney to represent our company in relation to this matter.
- We understand that most employees would feel more comfortable having an attorney available to them to represent them in relation to investigatory questions being asked by the NLRB, and therefore we have agreed to make our attorney available to all employees who want the attorney to represent them in such an investigation. The services of the attorney, Kristan Peters-Hamlin, will be provided free of charge to our employees, as the company will pay for her services.
- Certainly, having an attorney available to you to participate in such an interview would make it less likely that your words could be misinterpreted or misquoted.
- We do not know which of you will be called by the NLRB, or whether any of you will be. However, if you are called, and you inform the NLRB that you are represented by counsel and would like your counsel to participate in any such call or interview, it is the obligation of the NLRB to stop the interview to allow you to have your counsel present. If the NLRB does not allow you to have your counsel present, you can pause the interview to allow yourself the requested opportunity to get your counsel to participate before proceeding further.
- We thought you should all know about this free service the company is affording you and we encourage you to take advantage of it.

Kristan Peters-Hamlin[sic] contact number is 203-504-2050

Analysis and Conclusions

The Respondent (R. Br. at 29) cites two circuit court of appeals cases in support of its position that its offer of free legal services did not violate Section 8(a)(1). The first is *Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979), in which the company advised employees that they had a right to consult with counsel before talking with the agent and that the company could recommend an attorney if the employee so desired. Nothing was said about the company paying any of the costs. The second is *NLRB v. Garry Mfg.,* 630 F.2d 934 (3d Cir. 1980), which involved two letters. The first explained that employees were not obligated to talk to a Board agent or sign anything; the second, issued after a ULP charge, advised employees that they were free to talk to a Board agent and explained the agent's role. Neither letter mentioned attorney representation.

In any event, the Board found those cases distinguishable in *S. E. Nichols*, 284 NLRB 556 (1987), enfd. 862 F.2d 952 (2d Cir. 1988), where the employer's agent told employees that "if [they] needed any protection [when they met with Board agents] he would get his lawyer to sit in on the meeting" and could see the company's attorney if they needed help in connection with anticipated requests by Board agents for employee statements.

The Board held:

> Essentially, telling employees that they might need protection in an action against the Respondent would tend to dissuade them from cooperating with the Board. Secondly, here the Respondent did not recommend obtaining independent counsel but offered only its own attorney, thus, in the judge's words, "temptingly proposing a serious conflict of interests."

284 NLRB at 559 fn. 9.

The Second Circuit Court of Appeals, which has jurisdiction over this case, affirmed the Board's finding that the employer's statements violated Section 8(a)(1). The court specifically cited and distinguished *Florida Steel Corp.*, stating:

> [T]he company objects to a finding that it violated the Act by telling employees that they could receive the advice of the company's attorney in connection with interviews by Board investigators. Nichols claims that it was simply advising workers of their right to counsel. The ALJ discounted this explanation because the advice seems to imply the need for protection and would have the effect of dissuading employees from cooperating with the Board's investigation since the "most fearless employee would find it difficult to provide the Board with information against his employer when he was accompanied and being 'advised' by the employer's counsel." The Board agreed, and so do we.

862 F.2d at 959. See also *KFMB Stations*, 349 NLRB 373 (2007) (Board affirmed judge's finding that offering free representation by the respondent's counsel to employees who had been subpoenaed during a Board-conducted investigation violated the Act).

In sum, I conclude that the offer here was improper. It clearly suggested to employees' that their words would be misinterpreted or misquoted by the Board agent unless they had an attorney present, and that they needed an attorney, thus discouraging them from cooperating in the investigation. More egregiously, it sought to inject the Respondent's counsel into the Board's interviews with employees—gutting the confidentiality of Board affidavits and compromising the integrity of the Board's investigatory process. Thus, the presence of the Respondent's counsel would discourage employees from giving honest answers adverse to the Respondent and would reveal to the Respondent the protected activities of the witness and of other employees.[28]

I therefore conclude that this offer of free legal assistance coerced employees and violated Section 8(a)(1) of the Act.

[27] GC Exh. 14.

[28] In this regard, Attorney Peters-Hamlin would face a conflict of interest situation inasmuch as she would essentially occupy the position of a dual-agent; her fiduciary duties to the Company and her fiduciary duties to the employee witness might well conflict, particularly as to what matters she could disclose to each client without running afoul of attorney canons of ethics. See *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384,1386 (2d Cir. 1976) (an attorney owes a client the "fiduciary duty of undivided loyalty and allegiance.").

Handbook Provisions

The August 2014 handbook (GC Exh. 8) contains the following ten rules that the General Counsel contends are coercive. A number of changes in these rules were made in the September 2015 revised handbook (R. Exh. 23). I have starred the four rules that were eliminated. I will not venture to render an opinion on whether modifications to other rules cure any of their defects. Number references track their order in the complaint.

Two of the rules expressly prohibit employees from discussing their pay with other employees:

> *(3) **Code of Ethics and Conduct** (p. 15): "Under no circumstances may an employee . . . [d]iscuss [his or her] pay rate with other employees, or ask fellow employees about their pay rate."
>
> *(5) **Payment of Wages** (p. 21): "Pay rates are personal and confidential and are not to be shared with fellow employees."

Three limit what kind of language can be used on social media:

> (4) **Code of Ethics and Conduct** (p. 16): "Under no circumstances may an employee . . . [p]ost financial, confidential, sensitive or proprietary information about the Company, clients, employees or applicants on social media. Additionally, employees may not post obscenities, slurs or personal attacks that can damage the reputation of the Company, clients, employees or applicants. . . ."
>
> (8) **Electronic Communication and Internet Use** (p. 39), prohibiting employees from "using disparaging, abusive, profane or offensive language; creating, viewing or displaying materials that might adversely or negatively reflect upon USCC or be contrary to USCC's best interests. . . ."
>
> (10) **Social Media--Acceptable Use** (p. 40): "Employees may not post obscenities, slurs or personal attacks that can damage the reputation of the company, clients, employees or applicants."

The following four rules concern confidentiality:

> (1) **Welcome** (p. 3): "This handbook and the information in it should be treated as confidential. No portion of this handbook should be disclosed to others, except USCC employees and others affiliated with USCC whose knowledge of the information is required in the normal course of business."
>
> (2) **Code of Ethics and Conduct** (p. 15): "Under no circumstances may an employee . . . prematurely disclose confidential and proprietary information to any unauthorized person."
>
> (6) **Confidentiality** (p. 36), relating to clients and other parties with whom the Company does business: "It is our policy that all information considered confidential will not be disclosed to external parties or to employees without a 'need to know.' If an employee questions whether certain information is considered confidential, he/she should first check with his/her immediate supervisor."
>
> *(9) **Social Media**–**Acceptable Use** (p. 40): "Employees may not post financial, confidential, sensitive or proprietary information about the company, clients, employees or applicants."
>
> *The final rule (7) **under Confidentiality** (p. 36) is: "All inquiries from the media must be referred to Human Resources."

Jones testified that the language in rule 5 prohibiting employees from discussing their wages was removed from the electronic form of the handbook in January 2015, and that the Respondent made certain at the time that every employee got a revised page 21 and signed off on it. However, the Respondent provided no documents to substantiate these claims or a valid explanation of why they could not be produced. I again draw an adverse inference against the credibility of Jones' testimony from the Respondent's failure to provide corroborating documents. See *PCC Fabricators, Inc.*, supra; *Martin Luther King Sr. Nursing Center*, supra. I also note that neither of the current employees whom the Respondent called as witnesses (Lasko and Rucci) offered any testimony supporting her claim. Accordingly, I do not find as a fact that the Respondent did this. Jones also testified that the revised page 21 was read to employees at a morning meeting, but she gave no date or time frame, thus failing to lay a proper foundation.

Analysis and Conclusions

The leading decision in this area is *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The Board therein held the following.

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. In determining whether a challenged rule is unlawful, the Board must give the rule a reasonable reading, refrain from reading particular phrases in in isolation, and not presume improper interference with employee rights. The first inquiry is whether the rule explicitly restricts Section 7 activities; if so, the rule is unlawful. If the rule does not explicitly restrict Section 7 activity, it violates the Act if one of the following is shown: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

I will first address the impact of the Respondent's elimination of some of the rules in September 2015. Under *Pasavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978), an employer may relieve itself of liability from unlawful conduct by (1) repudiating that conduct, if the repudiation is timely, unambiguous, and specific to the coercive conduct; (2) adequately publishing the repudiation to the employees; (3) not engaging in any further proscribed conduct; and (4) giving employees assurances that in the future, the employer will not interfere with the exercise of their Section 7 rights.

The Respondent's conduct here failed to meet the *Pasavant* standard for repudiation. First, the revisions were untimely. In *Passavant*, the Board found that a repudiation made just prior to the issuance of the complaint was untimely; it follows that

revisions made after issuance of the complaint are similarly untimely. *Lily Transportation Corp.*, 362 NLRB 406 (2015), citing *Fresh & Easy Neighborhood Market, Inc. v. NLRB*, 468 Fed. App. 1 (D.C. Cir. 2012) (unpublished decision).

Secondly, there is no evidence that the Respondent distributed the revised handbook to all employees.

Thirdly, even if the Respondent distributed the revised handbook to employees, the Respondent took no steps to admit any wrongdoing or to assure employees that, going forward, it would not interfere with the exercise of their Section 7 rights. See *Boch Honda*, 362 NLRB 706, 706 fn. 3 (2015); *Lily Transportation*, above, slip op. at 1; *Intermet Stevensville*, 350 NLRB 1349, 1350 fn. 6, 1383 (2007). As the Board stated in *Casino San Pablo*, 361 NLRB 1350, 1355 (2014) (fn. omitted), "[T]he Respondent did not effectively repudiate the unlawful handbook rules simply by issuing a revised handbook subsequently that deleted the rules."

Accordingly, I will now address the rules contained in the August 2014 handbook, noting that the elimination of certain rules affects the remedy.

Rules prohibiting employees from discussing their pay rates

Board law is well settled that an employer violates Section 8(a)(1) of the Act in a nonretail setting by maintaining a rule prohibiting employees from discussing their earnings. See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enf. granted as modified, 414 F.3d 1249 (10th Cir. 2005); *Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165 (1997). Therefore, these rules expressly restrict employees' Section 7 rights and are hence unlawful.

Rules limiting permissible language on social media

As in *Costco Wholesale Corp.*, 358 NLRB 1100, 1101 (2012), each of these rules "clearly encompasses concerted communications protesting the Respondent's treatment of its employees" and contain nothing "even arguably suggesting that protected communications are excluded from the broad parameters of the rule." Employees reading these rules would reasonably assume that the Respondent would regard statements of protest or criticism as "damaging" the Company's reputation or "adversely or negatively reflecting" upon it. See *Karl Knauz Motors, Inc.*, 358 NLRB 1754, 1754 (2012). Therefore, employees would reasonably construe them as prohibiting Section 7 activity.

Rules concerning confidentiality

Rules prohibiting employees from disclosing "confidential" information are unlawfully broad if they could "reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages…." *University Medical Center*, 335 NLRB 1318, 1320 (2001); see also *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999).

Numbers 1 and 9 clearly could encompass information about employees' pay and other benefits, and numbers 2 and 6 contain such vague terms ("prematurely," "unauthorized person," "confidential," and "need to know") that an employee would have no way of knowing if and when he or she could discuss terms and conditions of employment. Nothing in any of them clarifies that they do not apply to the employees' right to discuss such information. Thus, all of these rules would reasonably tend to chill employees in the exercise of their Section 7 rights.

Rule regarding media inquiries

It has long been settled that employees seeing to "improve terms and conditions of employment or otherwise improve their lot" have the Section 7 right to seek the support for their cause "outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566, 569–570 (1978); see also *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808 (2d Cir. 1980). This protection extends to a variety of communications with third parties, including appeals to the press. For example, in *Trump Marina Associates, LLC*, 354 NLRB 1027 (2009), affd. 355 NLRB 585 (2010), enfd. 435 F.3d Appx. 1 (D.C. Cir. 2011), the Board found unlawful a rule prohibiting employees from releasing statements to the news media without prior authorization. And, in *Crown Plaza, Hotel*, 352 NLRB 382, 386 (2008), a rule prohibiting employees from talking to the press was found to be unlawfully broad because it could reasonably be construed as "prohibiting all employee communications with the media regarding a labor dispute;" or at the very least, the rule could be viewed as "ambiguous."

Although this rule relates to communications initiated by the media, rather than to employee-generated contact, the same rationale is appropriate. Indeed, in light of the importance of allowing employees unimpeded access to public forums, applying different standards would be illogical and anomalous.

In *Eschostar Technologies, LLC*, 2012 WL 4321039 (2012), Judge Clifford H. Anderson addressed a rule similar to this one. Even though his decision is not precedential, I find his reasoning persuasive and adopt it here. He held that an instruction to employees to direct media inquiries to the corporate communications department was overbroad insofar as it did not clarify that employees might also choose to speak to the inquiring media about labor disputes on their own behalf. Similarly, this rule is susceptible to the reasonable interpretation that it bars Section 7 activity.

Accordingly, I conclude that all of the ten cited rules are coercive and violate Section 8(a)(1).

The Respondent's Business Operation

The Respondent is a subsidiary of Miyoshi Group, an international conglomerate headquartered in Japan. It is a Delaware corporation with an office and place of business located in Dayville, Connecticut (the facility), where it engages in the manufacture of cosmetic products. The Respondent has admitted jurisdiction as alleged in the complaint, and I so find.

The facility consists of four buildings in an industrial complex, at three of which employees work full time. There are five designated plants, with plant 5 physically located within plant 1. Management offices and the cafeteria are in plant 1; the other plants have smaller lunch or coffee rooms.

President Takagi is the highest-level management official at the facility, and he reports to Chairman Miyoshi in Japan. At all times material, HR Director Pockoski reported to Takagi, and HR Manager Jones reported to her.

In July, the facility had about 65–70 employees, of whom Manager Desjardin supervised about 23 production or manufacturing employees, and five shipping and receiving employees.

He had two salaried team leaders, Martin and LePage, assisting him in the production department.

On a daily basis, management regularly held 8 a.m. meetings in the training room with all employees, for reports by the various departments. Afterward, Desjardin sometimes continued meeting with the employees who reported to him. On most days, meetings of management took place in the main conference room at 4:30 p.m.

Martin's Status under Section 2(11)

As previously noted, the Respondent first admitted Martin was a supervisor, then later amended its answer at hearing to deny it.

Section 2(11) of the Act defines "supervisor" as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Possession of any one of the indicia is sufficient to make its possessor a supervisor. *Sheraton Universal Hotel*, 350 NLRB 1114, 1115 (2007); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1056 (2006). The burden of proving supervisory status falls on the party asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001).

In General Counsel's Exhibit 7, the disciplines issued from January 1, 2011, to the date of the trial, one of the forms used was entitled Employee Warning Notice. In that form, the supervisor's name is typed in at the top, and there is a box for "management signature." On three of them, Martin's name alone is given, and he signed as the management representative; on a fourth, Desjardin, Martin, and LePage are listed (LePage signed it for management). On two other disciplines, Martin signed as "production supervisor." Martin also signed as the supervisor on the written warning that St. Hilaire received on January 31, 2011.[29] No other supervisor's or manager's name appears in those disciplines.

Although evasive, Martin conceded that he initiated the disciplines that he signed, that there was a "good chance" that he was the one who prepared the narratives contained in them, and that he presented them to employees after receiving approval from HR.[30] The Respondent cited no instance in which HR or other management disapproved Martin's recommended discipline. Consistent with these written documents, Rucci stated in his affidavit that that both Martin and LePage had authority to issue discipline.

Despite the obvious efforts of Martin and members of management to minimize his role in disciplining production employees, I find that he had the authority to issue discipline on his own or, at the very least, to effectively recommend it. Accordingly, I find that he was a supervisor within the meaning of Section 2(11) and an agent within the meaning of Section 2(13).

In the alternative, the testimony of production workers called by both the General Counsel and the Respondent abundantly reflects that they uniformly and reasonably believed that Martin reflected company policy and spoke and acted for management. Accordingly, he had agency status under Section 2(13) regardless of whether he was or was not in fact a supervisor within the meaning of Section 2(11). See *Albertson's, Inc.*, 344 NLRB 1172, 1172 (2005); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001); *Waterbed World*, 286 NLRB 425, 426–427 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992).

Events prior to July 2014

Hoar's and St. Hilaire's Employment

For many years, the Company utilized staffing agencies to furnish temporary production employees. Typically, if the employees were good workers, they were hired as permanent employees after they completed 520 hours (after 520 hours, the staffing agency did not charge a fee).

In mid-October 2013, Advance Staffing sent Hoar to the Company to be interviewed. He met with Martin and LePage. Shortly afterward, Advance Staffing told him to report there the following Monday. On about March 17, he was notified of his conversion to permanent employee status, as a production operator.[31] The Respondent's counsel represented at trial that the sole reason that Hoar was terminated was for taking coffee from the cafeteria, on about July 15,[32] although she expanded this in her brief to alleged theft of both coffee and soup."[33]

St. Hilaire worked for the Respondent for approximately 9 years and was either first or second in seniority among the 23 or so production employees.[34] The sole reason that the Respondent advances for St. Hilaire's termination was his threats of physical violence to Lasko on about July 8.

Prior to July, Hoar and St. Hilaire talked in favor of unionization to other production employees at work, but there is no direct evidence of management knowledge of this.

Employee Wage Increase

As a result of changes that had occurred in the nature of the business, resulting in more skills being required of production employees, Managers Desjardin and Tiebout first discussed in early 2013 the formulation of a skill-based structure for hourly employees.

The record does not reflect that management took any further steps along these lines until after Jones was hired in March 2014. Shortly after her arrival, she prepared a self-review for the period from March 10—December 31,[35] which included a listing of her goals for that time frame. She deemed three items as "high" priority, and six items as "medium" priority. Among the latter was "[r]eview compensation structure for production hourly employee," in order to make the pay structure more competitive to lower turnover and to begin the culture change from entitlement to merit/skill based pay. She would research competitive rates, define roles and skill levels, and recommend structure. The time

[29] GC Exh. 27 at 11.
[30] Tr. 2373–2376.
[31] See GC Exh. 34.
[32] Tr. 552.
[33] R. Br. at 20.
[34] Tr. 1815 (Lasko).
[35] GC Exh. 10.

frame was completion by August 31 for implementation in December.

The General Counsel does not dispute that the Respondent was contemplating changing the wage structure prior to July. However, management representatives were not consistent, definitive or credible on the events leading up to implementation of the wage increase; and documents pertaining thereto were introduced in a piecemeal and confusing manner and utterly fail, collectively, to show that final wage rates were determined prior to the week of July 7.

Antiharassment Policy

In around April,[36] the Respondent promulgated an antiharassment policy,[37] on which it trained both supervisory and nonsupervisory employees. It states that harassment will not be tolerated and describes three categories of prohibited conduct: discrimination, harassment (including sexual), and sexual harassment. The discipline to be imposed for violating the policy is dependent on (i) the severity, frequency and pervasiveness of the conduct, (ii) prior complaints made by the complainant, (iii) prior complaints made against the respondent, and (iv) the quality of the evidence (first-hand knowledge, credible corroboration, etc.).

Events the Week of July 7

July 7–8

General Counsel's Exhibit 39 consists of the following emails. On the morning of Monday, July 7, Desjardin sent an email to Tagaki, "checking to make sure I understood you correctly in going ahead with the proposed raises I had requested earlier" regarding three employees.

On the morning of July 8, Tagaki responded with an email to Desjardin and Jones, stating, "Can we discuss the operation new job skill/level matrix and as below salary rate this week? Please set ups[sic]meeting." Desjardin replied in part, "Judy, would you please send me what you had sent to Takagi san in regards to the levels/rate of pay? I believe that you had made changes to my proposed numbers and want to review them tonight at home so I can add to the discussion." Finally, Jones told Tagaki and Desjardin, "Yes, let's meet tomorrow (7/9) as an add-on to our 2 pm meeting. Dennis, I've attached the skill set matrix and a spreadsheet showing the impact of the recommended rates."

On the evening of July 8, between 9 and 10 p.m., Hoar and St. Hilaire posted the following sign[38] at the doors to the two entrances at plant 1 used by production employees (the main entrance) and office employees, respectively:

WOULD YOU LIKE?
*BETTER WAGES
*BETTER BENEFITS
*BETTER WORKING CONDITIONS
VOTE UNION
YES"

July 9

When Manager Tiebout arrived at between 6:30 and 7 a.m., he saw the union sign at the outside door to the main entrance. He took it down and brought it to Jones after she arrived to work that morning. Moments later, she and Tiebout brought it to Takagi. Tiebout told them that another such sign had been found. Jones told Takagi that Tiebout or someone else had investigated to see if other nearby plants had received similar postings, and they had not. Either then, or shortly later, Takagi asked Jones to scan and send the sign to him by email.

At 8:41 a.m., Jones sent Takagi an email with the subject, "Sign on front door 7-9-14,"[39] with the sign attached.

At 9 a.m., Jones sent Tagaki another email,[40] stating, "Please note–we have not been targeted yet. And I firmly believe we won't be targeted if we take action this week on the wages, announce the coming sick pay and vacation enhancements, and stay vigilant on watching over the employees in the hottest areas of the plant(s)." She attached a page from HR Specialist entitled "Unions in the spotlight: What employers can and can't do."

The subject of the union sign was brought up at the 4:30 p.m. management meeting that day. The only witness who testified about it was Tagaki and, as earlier noted, I discredit his testimony that no one asked any questions about it and that there was no discussion about it, as well as his testimony that the subject was never brought up at any other meetings.

Another management meeting took place that day at 2 p.m. to discuss the skill set matrix, levels/rates of pay, and the impact of the recommended rates.[41] The wage rates were evidently discussed and finalized at that meeting. Thus, General Counsel's Exhibit 38, which the General Counsel received from the Respondent pursuant to subpoena, contains the final rate adjustments for production and other employees. At the top of page 1 is the handwritten notation, "7/9 after mtg.," and at the top of page 3 is the handwritten notation, "7/9 changes." The Respondent's counsel refused to stipulate whose handwriting that is, but I have to logically assume that someone from management wrote in those notations and that they accurately reflect that changes were made that day.

Hoar told other employees that morning that he had posted the union sign, and Rucci heard many of his coworkers say that day that St. Hilaire had posted them.[42]

July 10

At a regular morning meeting, management announced to employees the contents of General Counsel's Exhibit 18, along with a power point presentation:[43]

(1) Skill level definitions.

(2) Approved pay rates effective July 7.

[36] See GC Exh. 12 at 9.
[37] GC Exh. 12 at 1–8.
[38] GC Exh. 16 at 2.
[39] Id. at 1.
[40] GC Exh. 17.
[41] GC Exh. 39.
[42] GC Exh. 40 at 2.
[43] Jones at 1052; R. Exh. 17, Tr. 2292–2293.

(3) Changes in compensation and benefits, including introduction of a paid sick time benefit; an enhanced paid vacation time benefit; replacement of monthly sales goal and gas incentive programs by automatic pay increases; and for the production and shipping/receiving crew, a new pay structure based on skill set. The changes in pay rates would be reflected in the pay check next Thursday, the 17th [July 17].

The increased remuneration applied to both rank-and-file hourly employees and supervisory employees.

July 11

Tagaki sent an email to Chairman Miyoshi, with the subject line, "Sign on front door 7-9-14 and Employee Code of Conduct."[44] He began by describing the circumstances in which the two signs were discovered. In the second paragraph, he stated that either an outside labor union organization or an "insider" was responsible, with the first possibility being "extremely low due to the content of the attachment, its geographic particularity and the fact that no attachments were found on a business-wide level at USCC or in other companies."[45]

In the third paragraph, Tagaki turned to the subject of the wage rate changes and stated that timing was "perfect." He next described planned improvements to the air conditioning systems in the plants. In the concluding sentence, he stated, "The contents of the attachment, although this was a coincidence, were posted immediately the next day and dealt with, so the situation should be carefully monitored for a little while but the opinion inside the company is that it is very likely that any new activities similar to that one will quiet down."

The email had two attachments: (1) the union sign; and (2) a code of ethics and conduct. With regard to the latter, Tagaki stated:

> [S]tarting this week for the first time at USCC – we set up a Code of Ethics/Code of Conduct and from this past Monday until yesterday we conducted training for all employees except for several people who were absent.

The code of ethics and conduct set out in the handbook (General Counsel's Exh. 8 at 14–16), sets out a wide range of prohibited actions. I earlier addressed those that the General Counsel contends violate Section 7.

Jones' Interrogation of McCoil and Rucci the Week of July 16

McCoil and Rucci were called to Jones' office, where they each had separate one-on-one meetings with her. Jones asked Rucci if he knew who had posted the union signs, and he replied that he did not know. She asked McCoil if he had seen the sign. He said no, and she asked what time he had arrived. He replied, usually around 5:15 a.m. Jones made a comment similar to, "[Y]ou got there early and didn't see the sign?"[46] She then asked him if he knew who had put it up. He told her no.

St. Hilaire's Termination

General Counsel's Exhibit 8 is the employee handbook issued in August. Pockoski testified there was an earlier version, issued in late May, but the Respondent did not produce it. The progressive discipline policy, set out on page 23, states that "[d]egrees of discipline are generally progressive and are used to ensure that the employee has the opportunity to correct his or her performance . . . . In general, one or more verbal warnings should be followed by a written warning, followed at the next infraction by suspension or discharge...."

The following factors are to be considered:

*how many different offenses are involved
*the seriousness of the offense
*the time interval and employee response to prior disciplinary action(s)
*previous work history of the employee

The policy also states that for "serious offenses," such as fighting, theft, insubordination, threats of violence, the sale or possession of drugs or alcohol on company property, etc., termination may be the first and only disciplinary step taken. Furthermore, any step or steps may be skipped after investigation and analysis of all of the circumstances.

The normal procedure for disciplining production workers was that Desjardin and Jones discussed a situation; decided on a recommended discipline; and reviewed it with Pockoski and Tagaki, who always made the final decision.[47]

Prior to July, St. Hilaire and Lasko were longtime good friends outside of the workplace. However, on about July 9, St. Hilaire learned that Lasko was dating St. Hilaire's ex-wife, Tara St. Hilaire (Tara), and on July 9, obviously agitated, St. Hilaire initiated an angry exchange of phones calls or texts with Lasko. St. Hilaire accused him of betraying their friendship, and they made threatening remarks to one another.

The following morning, Lasko reported to Desjardin that he had received threatening calls and texts from St. Hilaire. Desjardin and Jones then met with Lasko in Jones' office.

Lasko reported that St. Hilaire had called him the previous evening after learning of his relationship with Tara. St. Hilaire had stated that he was going to hit Lasko if Lasko looked his way at all the following Monday (St. Hilaire was on leave on July 10 and 11). He further stated that he had also received a threatening text from St. Hilaire. Jones asked to see it. Lasko replied that he had erased St. Hilaire from his contacts list but had forwarded one of the texts to Tara. He called Tara, who forwarded the text to him. It said words to the effect of don't get near me. Jones asked how long this had been going on, and Lasko replied that it had just started. Lasko expressed fears that St. Hilaire might be violent against him at work. Jones "encouraged" Lasko to call the police,[48] but he did not do so. Lasko testified without controversion that he had no further meetings with Jones on the subject. [49]

[44] GC Exh. 20 (in Japanese); GC Exh. 35(a) (certified translation into English).

[45] GC Exh. 35(a) at 1. As I noted earlier, he directly contradicted this in the declaration that the Respondent's counsel submitted, GC Exh. 21. I must believe that he was truthful with his superior.

[46] Tr. 1215.

[47] Tr. 2434 (Desjardin).

[48] Tr. 1859 (Lasko).

[49] To the extent that Jones stated in the complaint investigation (R. Exh. 13 at 3) that she and Desjardin spoke with Lasko on July 11, neither

When St. Hilaire came to work on Monday, July 14, Jones and Desjardin met with him. Jones began by asking if something had happened that weekend, and he said no. She then stated that she had seen the text messages that he had sent to Lasko and that they were threatening and serious. St. Hilaire agreed that he had had a heated argument with Lasko, that they had gone back and forth by phone and texts, and that both he and Lasko had made threatening remarks to one another. St. Hilaire asked them to see his side, that he had just found out something personally devastating—that his best friend had betrayed him. However, he emphasized that he did not have a problem with Lasko now and could go up, shake his hand, and work with him.[50]

Jones and Desjardin asked St. Hilaire to wait outside, after which they told him that he was being suspended for 3 days until they did further investigation. They gave him nothing in writing about the suspension. Desjardin testified that there was no further investigation before the decision was made to terminate him.

When St. Hilaire returned on July 17, he was terminated for the threats to Lasko. Any termination letter that he received is not in the record. St. Hilaire testified without controversion that Desjardin told him afterward, "I fought to keep you here, but we just can't have it here."[51]

Jones' complaint investigation concluding statement, General Counsel's Exhibit 27 at 1, states that she, Tagaki, Pockoski, and Desjardin all agreed that

> "[T]he Company could not forgive Bill St. Hilaire's threatening behavior toward Jon Lasko. The risk was too high that the behaviors would continue and employees would be put in danger of physical harm or vandalism . . . . It was agreed that [he] would be released from employment for violation of Company Code of Conduct."

She noted that St. Hilaire had participated in antiharassment on May 7 and company code of ethics/code of conduct training on July 9.

Inasmuch as the stated reason for St. Hilaire's termination was violation of the code of conduct, not the antiharassment policy, I need not detail testimony that management turned a blind eye toward frequent incidents of blatant sexual harassment, perhaps amounting to bullying, in the locker room.

Her concluding statement makes no mention of his being terminated because the conduct was illegal (as Jones testified) or because of the Company's fear of legal liability (as Tagaki testified). According to Jones and Pockoski, St. Hilaire's prior employment record was not considered, although that is a factor mentioned in the progressive discipline provisions in the handbook.

Hoar's Termination

The Company provided free coffee and soups for employees at the cafeteria in plant 1 and at break rooms in the other plants. The stock of such products was kept in the kitchen cabinets in the plant 1 cafeteria, and designated individuals made deliveries to the other plants when they ran out of products. Every 3 or 4 weeks, the Company provided a free lunch ("outing") for employees in the cafeteria. On very hot days, the Company would also furnish free Gatorades.

The Company had no written policies regarding removal of coffee or foodstuffs from the cafeteria, but at least six times a year at morning meetings, "on a normal regular basis," Desjardin told all of the employees on his team that taking home any of the disposables (coffee, sugar, scrub brushes, etc.) was wrong, cost the Company money, and lessened the opportunity to get wage increases.[52] He also told employees that drinks were not allowed in production areas. Other than Hoar, no employees have ever been disciplined for coffee-related or food-related offenses.

Rucci and Martin, who testified after McCoil, failed to rebut the following testimony of McCoil, which I credit. On one hot summer day in 2015, McCoil observed Rucci take a handful of Gatorade to his car and place them inside. Martin came out from his office and asked where Rucci was. McCoil replied that he thought Rucci had gone out to his car, and Martin went outside to Rucci's car. A day or two later, McCoil was present on the floor when Martin commented that he did not know if the Company would continue to give out free Gatorade since Rucci had stolen them all.

Rucci testified without controversion that he complained to Martin in approximately April that "people," including Hoar, were taking food from the free luncheons to their cars, to take home. Martin replied that he would look into it, and the next day he warned employees on the floor that they could lose that benefit. Rucci heard nothing further after that. Rucci also testified without controversion that about 2 weeks before the coffee incident, he went to see Jones and asked her if employees were allowed to take pizza home from the free lunches because "other people such as Tyler took it home."[53] She replied, "[T]echnically not, unless . . . you ask permission. . . .," evincing a rather lackadaisical attitude toward Rucci's complaint. Again, Rucci's very words reflect that Hoar was not the only employee who engaged in such conduct.

Finally, Rucci's affidavit states that a few days after he observed Hoar take an armload of coffee on about July 15, he heard office employees complain that coffee seemed to be disappearing very quickly, and Jones testified that Rucci reported this to her on July 23. There is no other allegation that Hoar took coffee on any other occasion, and it is inconceivable that the single instance of his taking an armload of coffee would have seriously depleted the entire coffee supply for approximately 65–70 employees.

From the above, I find that employees did take home from the cafeteria disposables, including coffee, on a recurring basis; that management knew of this; and that management considered it to be an ongoing problem but not one serious enough to warrant

she nor Desjardin so testified. Thus, her written account constituted uncorroborated and inadmissible hearsay. See *Midland Hilton & Towers*, 324 NLRB 1141, 1141 fn. 1 (1997).

[50] This credited testimony of St. Hilaire is corroborated almost word-for-word by Desjardin at Tr. 2433 and supported by Jones' complaint investigation concluding statement, GC Exh. 27 at 1.

[51] Tr. 2643.

[52] Desjardin at Tr. 2552; see also Tr. 2755–2756 (Rucci).

[53] Tr. 2761.

discipline or even to be the subject of a written policy. To date, the Respondent has issued nothing in writing thereon.

On July 23, Desjardin and Rucci went to Jones' office. Rucci reported that he had seen Hoar carrying an armload of coffee packets out to his car in the parking lot the previous week. He also said that Jacob Rodriguez, another production employee, had seen this; that the women in the office had commented that coffee was disappearing quickly; and that he did not want to see employees lose this nice benefit.

The following day, July 24, Jones called Rodriguez to her office, where he confirmed to her and Desjardin that he had seen Hoar take an armload of coffee packets out of his cafeteria and put them into his car. Rodriguez further stated that Hoar would take soups packets and leftovers from the free lunches.

Inexplicably, Jones did not take written statements from either Rucci or Rodriguez but merely related what they told her in a half-page memorandum,[54] which states that she and Desjardin decided to terminate Hoar for violation of the code of conduct. She noted that Hoar had not been a "model employee" and had not improved since having been issued a verbal counseling for attendance. However, the Respondent's counsel represented that Hoar's attendance record played no role in his termination.

Almost immediately after meeting with Rodriguez, Jones and Desjardin called Hoar to Jones' office.[55] Again inexplicably, Jones did not take a statement from Hoar or even prepare a written report of what he said at the meeting. Following is Hoar's account (Tr. 1405–1407), which I credit over theirs to the extent that there are differences.

Jones asked Hoar if he had stolen anything. He replied no. She then asked, what about the food? He said, "[O]h, you mean the chicken noodle soup from this morning? Yeah. I brought it over to Plant 2. I didn't steal it." She said not soup, coffee. He said no, he did not steal any coffee. Jones stated that she had statements from two people that they had seen him stealing armloads of coffee packets and putting them in his car the previous week. He replied that never happened and asked if it was a joke. She said no, it was serious. Hoar replied that he had no need to steal coffee because he could afford his own. Jones said that they were going to let him go. LePage came into room and escorted Hoar out to his locker to retrieve his personal belongings.

Jones and Desjardin offered conflicting testimony on whether the decision to terminate Hoar was made before they had him brought to her office to address the allegations that Rucci and Rodriguez had made against him. Jones testified that the decision had already been made, whereas Desjardin testified that they first wanted to hear his side. Either way, in contrast to normal procedure and what occurred with St. Hilaire, Jones and Desjardin made the decision to terminate Hoar without consulting with Pockoski or Tagaki.[56]

Other Instances of Discipline

The General Counsel subpoenaed, inter alia, documents showing "all counselings, reprimands, warnings, suspensions, discharges, layoffs and other disciplinary actions" issued to production employees from January 1, 2011, through the present, for any of the following reasons: theft, company code of ethics/conduct violations, harassment, bullying, workplace violence, and/or absenteeism."[57]

General Counsel's Exhibit 7 represents what the Respondent furnished in response to that request. It includes disciplines issued to nonproduction employees. A variety of forms were used. The following disciplines are contained in the exhibit (with the name of the manager or supervisor signing or otherwise appearing on the form, and date of issuance):[58]

(1) Bruce Alexander (maintenance), verbal counseling for performance (Jones, October 23).

(2) Travis Allen (production), 3-day suspension for falsifying production records (Pockoski, September 17, 2013).

(3) Claire Barnes (quality control), unspecified warning for unsatisfactory performance (Manager Sean Hill, November 7, 2013).

(4) Rodney Corriveau (production), first warning for substandard work (Martin, November 18).

(5) Ray Durand (maintenance), first warning for violation of policy/procedure (Manager James Gilloran, September 26).

(6) Krista Field (production), memorandum of verbal warning for not properly communicating with Desjardin (Desjardin, October 1, 2013).

(7) Tyler Hoar (production), verbal counseling for excessive absenteeism (Jones, May 27).

(8) Bryan Kelly (maintenance), first and final warning for loaning coworkers money and charging them interest (loansharking) (Jones, July 17).

See also General Counsel's Exhibit 9, Jones' complaint investigation, wherein she concluded that Kelly's loan-sharking activity violated the Company's code of conduct by using his position to profit from coworkers, and also violated the law—directly contrary to her testimony.

(9) Keith Lewis (production), written warning for not properly following mixing/batching instructions (Martin, March 10).

(10) Mike McCoil (production), unspecified warning for leaving without permission (Martin, May 23, 2013).

(11) McCoil, unspecified warning for approaching a coworker "in a threatening manner" and placing his hands upon his shirt collar, and for overall attitude (Pockoski, October 7, 2013).

[54] R. Exh. 11.

[55] Desjardin testified that they met with Hoar the same day that they met with Rodriguez, and Hoar saw them in the morning.

[56] R. Exh. 18 shows that Jones and Desjardin terminated Hoar and that Desjardin thereafter notified Takagi of this by e-mail.

[57] See GC Exh. 3 at 4.

[58] St. Hilaire's prior disciplines are separately contained in GC Exh. 27 at 6–12.

(12) McCoil, verbal counseling for throwing IPA and water as pranks (Jones, August 26).

(13) McCoil, verbal counseling for absenteeism (Jones, October 1).

(14) McCoil, second counseling for changing his work schedule without authorization (Martin, October 14).

(15) McCoil, unpaid 2-day suspension for violating the antiharassment policy by inappropriate hugging and a verbal comment with sexual innuendo (Jones, December 29).

(16) Ralph Metzermacher (shipping and receiving), first or oral warning for improper use of equipment (signature indiscernible, March 5, 2012).

(17) James Paquin (production), unspecified written warning for a safety violation (Desjardin, March 8, 2012).

(18) Jacob Rodriguez (production), verbal counseling for driving the forklift in an unsafe manner (Martin, October 10).

(19) Rodriguez, second warning for willfully mishandling company equipment (LePage, December 2).

(20) Andrew Rucci (production), verbal counseling for absenteeism (Jones, August 6).

(21) Rucci, verbal counseling for throwing IPA and water as pranks (Jones, August 26).

(22) Khampeth Thavone (production), written warning for improperly running (and ruining) batches and failing to follow verification procedures (LePage, October 23, 2013).

(23) Scott Walker (production), attendance warning letter (Pockoski, January 21).

(24) Walker, first warning for noncompliance with production instructions (Martin, November 18).

(25) Walker, second warning for absenteeism (Jones, September 11).

Pockoski, who has been with the Company since 1991, recalled that one employee, Jacob Perez, was terminated for a reason other than attendance, aside from Hoar and St. Hilaire, but she could not remember the year that occurred. Similarly, she testified that an employee by the name of Efstathios Kotsalidis was terminated in part for absenteeism, but she did not give the year, indicating that it was a long time ago. Neither name appears in General Counsel's Exhibit 7.

Desjardin testified that during his tenure at the Company, from September 2011 until January 2015, an employee was terminated for damaging property and then lying about it. However, none of the disciplines in General Counsel's Exhibit 7 show a termination, and I will disregard this testimony. See *PCC Fabricators, Inc.*, *Martin Luther King Sr. Nursing Center*, cited earlier. Desjardin further testified that prior to his employment, James Paquin was terminated for fighting but was rehired.

Based on the record evidence, I find that no employees other than Hoar and St. Hilaire have been terminated for any reason since at least January 1, 2011.

Lasko's Locker Vandalism Investigation

On the morning of August 20, Lasko discovered that his locker had been vandalized by someone emptying a whole canister of liquid soap over all of his possessions, resulting in damage to his uniforms. He reported this to Desjardin, who went to see it himself. Later that morning, Lasko was called to Jones' office, where he met with Jones and Desjardin. He explained what had occurred, and Jones said that they would investigate.

On August 20 and 21, in her office, Jones interviewed a number of production employees concerning the incident. She used a standard introduction and series of statements and questions, as follows:[59]

I am conducting an investigation into vandalism that took place some time yesterday afternoon in the locker room.

I am asking for your full honest disclosure in response to my questions.

1. Do you know that you are obligated to tell me what you know in an investigation? Withholding information could cause you to lose your job.

2. Do you know you cannot be retaliated against for cooperating with an investigation?

3. One of the employee's lockers was tampered with yesterday. Do you know anything about that?

4. It was Jon Lasko's locker. Do you know anyone that would want to prank or annoy Jon?

5. Can you guess who it might have been?

6. Do you know of anyone who has tampered with anyone's lockers in the past?

7. Where is the liquid hand soap kept?

8. Did you see anyone in that area yesterday?

9. Have you seen anyone joking or teasing Jon Lasko anywhere in the building or in the parking lot?

10. Are you aware anyone put someone up to it?
Have you been talking to him
May I see your phone/text history?
(These questions are handwritten; everything else on the

[59] See GC Exh. 13 at 1.

page is typed.)

At the conclusion, Jones read a provision about confidentiality.

Jones' notes of the employees' answers (General Counsel's Exhibit 13 at 2–17) reflect that she separated "Have you been talking to him" into question 11 and specifically asked whether the employee had had any contact with St. Hilaire. She asked this even if the employee said no to whether he was aware of anyone putting someone up to the vandalism (id. at 3, 4, 7, 8 ("Think yr. trying to get me to say it was Bill. Don't get that"), 13).[60]

McCoil was the only employee whom Jones interviewed twice, on August 20 and 21 (id. at 7, 14). During the course of the August 20 interview, he did not mention St. Hilaire when she asked if he was aware of anyone putting someone up the vandalism. Apparently at the second interview, Jones asked him whether he still communicated with St. Hilaire, and McCoil replied yes, that they communicated quite often. She asked to see his phone. He asked why, and she answered that she wanted to see the texts between him and St. Hilaire. He replied that he would not show her his phone. She asked why, and he responded that it was none of her business what personal matters were on his phone. Jones shook her head and stated that he was not being cooperative.

On August 20, Rucci was called in to see Jones in her office and to bring his phone. When he was there, Jones had St. Hilaire's number on a piece of paper and asked to look at his phone to see if he had been communicating with St. Hilaire. She offered no explanation of why she wanted to see if he was communicating with St. Hilaire but stated that it would be suspicious if he did not hand over his phone. He did so.

Based upon General Counsel's Exhibit 13 and the substantially similar versions in Rucci's affidavit and McCoil's testimony of what Jones said in the interviews, I find the following. Jones asked employees to bring their cell phones when they came to her office. During the course of her questions, she asked them if they communicated with St. Hilaire, whether or not they suggested that he might have been behind the vandalism to Lasko's locker. She also asked to see their phones to look at any texts between them and St. Hilaire without offering a reason.

The following week, the Respondent issued written warnings to McCoil and Rucci, on the basis that the investigation had revealed that they were known to be "prankster[s]," unrelated to the locker vandalism.[61] They threatened to go to the NLRB, and Jones reduced the warnings from written to verbal.[62] The issuance of these warnings is suspicious but, as with McCoil's later termination, management's motivation is not before me.

Interrogation of McCoil on about November 8

I credit McCoil's account (Tr. 1249, et. seq.) as follows. On the afternoon of about November 8, McCoil was called into Jones' office. She asked him if he had seen the offer of free legal assistance from the Company's attorney. He replied that he had. She stated that he might be getting a phone call concerning "the union thing." McCoil told her that he had already received a call from Ablavsky, and Jones asked "exactly what was said?" McCoil "played dumb" as though he had no conversation with Ablavsky. At some point, Jones stated that Ablavsky was "just a student intern doing something in her free time."

Analysis and Conclusions

Timing of the Announcement and Implementation of the Wage Increase

Clearly, the Respondent had planned prior to the week of July 7 to announce and implement at some point a new performance-based pay program that would result in pay increases to production and other employees, including supervisory personnel. However, management witnesses offered contradictory, confusing, and unconvincing evidence to establish that firm dates for these actions were set prior to July 9, the date that the union sign was discovered. Indeed, the Respondent's own documents—management emails of July 8 and 9, and the final wage structure figures—show that final wage rates were not completely formulated until the afternoon of July 9. Jones' email to Tagaki the morning of July 9 shows that the decision to announce the increases to employees and to implement them as soon as possible was timed to fend off unionization.

I therefore conclude that the timing of announcing and of implementing the wage increase for hourly employees on July 10 was designed to discourage their support for organizing and therefore violated Section 8(a)(1). See *Emery Air Freight Corp.*, 207 NLRB 572, 575 (1973); *Revco Drug Centers of the West, Inc.*, 188 NLRB 73, 78 (1971) ("The crucial fact to evaluate is not whether [the Company] would have increased wages at some time or another . . . but whether the increase was granted when it was because of union activities").

8(a)(1) Allegations of Unlawful Interrogation

(1) During the week of July 16, HR Manager Jones called McCoil and Rucci separately to her office and asked each of them if they knew who had posted the union signs the previous week.

Interrogations of employees do not per se violate Section 8(a)(1); instead, the Board uses a totality-of-circumstances test to determine whether an interrogation is coercive of employees' rights under the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom *HERE Local 11 v. NLRB*, 760 F.2d 1065 (9th Cir. 1985). Factors to be considered include any background ULP's, the nature of the information sought, the level of the questioner (how high in the supervisory chain), the place and method of interrogation, and the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000); *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir.1964). Other considerations are whether the employee is an open and active union supporter (*Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985)), and whether the employer has a legitimate reason justifying interrogation concerning protected activities. *Foamex, Inc.*, 315 NLRB 858 (1994).

I conclude that Manager Jones' summoning employees to her office and engaging in one-on-one questioning about their knowledge of union activity reasonably tended to interfere with,

[60] I have to assume that when there is a blank next to question 10, the employee said no one.

[61] GC Exh. 7 at 18, 29.

[62] GC Exh. 40 at 5.

restrain, or coerce employees in the exercise of their Section 7 rights and therefore violated Section 8(a)(1).

> (2) On August 20 and 21, Jones called McCoil, Rucci, and other production employees to her office, where, in connection with the vandalism to Lasko's locker, she interrogated them about their communications with St. Hilaire.

The Respondent undoubtedly had a legitimate right, maybe even the obligation, to launch an investigation in order to determine who had vandalized an employee's locker and thereby damaged his uniforms and personal possessions. Management also could reasonable suspect that St. Hilaire, who had a motive to retaliate against Lasko, might have been behind the vandalism. Even asking employees specifically if they had any information that St. Hilaire was involved was appropriate.

However, Jones went further. Even if the employees did not mention St. Hilaire in any of their earlier responses, Jones nonetheless still asked them about their communications with St. Hilaire and asked to see any messages they had exchanged with him, and she offered no reason why.

Significantly, when Attorney Peters-Hamlin asked Rucci what Jones was investigating in August, he started to answer, "Billy with the whole union—" before she inappropriately cut him off.[63] After the General Counsel rightfully objected, she then asked, "Were you trying to say that she was asking about unionization?" and, obviously getting counsel's signal that his earlier answer was wrong, Rucci then answered "no."[64] I credit his uncoached answer.

Based on all of the above circumstances, I conclude the following. When Jones asked employees about their communications with St. Hilaire and to look at their cell phone messages for such when they had not mentioned St. Hilaire in their earlier answers, and gave no reason why she wanted this information, they could reasonably have concluded that Jones was seeking information about their union activities. Accordingly, Jones violated Section 8(a)(1) by this conduct.

> (3) On about November 8, in her office, Jones asked McCoil whether Board Agent Ablavsky had contacted him and, when he replied yes, Jones asked him "exactly what was said."

In *Acme Bus Corp.*, 357 NLRB 902 (2011), the Board stated that the interrogation of employees regarding statements or affidavits given to Board agents is "inherently coercive," citing *Wire Products Mfg. Corp.*, 326 NLRB 627–628 (1998), enfd. sub nom. *NLRB v. R. T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000). Interrogating employees about their conversations with Board agents is similarly proscribed. *Contris Packing Co.*, 268 NLRB 193 (1983).

Therefore, Jones' interrogation of McCoil on about November 8 violated Section 8(a)(1).

The Terminations of Hoar and St. Hilaire

The General Counsel alleges that the Respondent terminated Hoar and St. Hilaire in violation of Section 8(a)(3) and (1) of the Act.

The framework for analyzing alleged mixed motive violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under the *Wright Line* framework, if the General Counsel makes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. Once this is established, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005). I will treat these as dual-motivation cases inasmuch as coworkers reported their conduct to management, so the issue is whether the Respondent would have taken the same actions against them absent their union activity.

Clearly, the posting of the prounionization sign by Hoar and St. Hilaire on July 8 constituted protected, concerted activity.

There is no evidence of direct knowledge of that activity. However, the element of knowledge can be satisfied by reasonable inference, such as (1) timing of the allegedly discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. mem. 97 F.3d 1448 (4th Cir. 1996); see also *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988).

Here, the only two employees whom the Respondent has terminated since January 2011 were Hoar and St. Hilaire—the only two employees involved in posting the union sign—and both were terminated the same month that they engaged in union activity. Rucci's affidavit shows that employees on July 9 were

[63] Tr. 2895.

[64] Ibid.

discussing the notices and speculating that St. Hilaire had put them up, and the next week, Jones was interrogating employees about their knowledge of who had posted them. All of these factors establish a reasonable inference of knowledge.

The General Counsel's final burden under *Wright Line* is to show that the Respondent harbored antiunion animus and took discriminatory action because of this animus.

As with knowledge, there is no direct evidence of animus. Nevertheless, inferences of animus and discriminatory motivation can be warranted under all the circumstances of a case, even in the absence of direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992); *Electronic Data Systems Corp.*, 305 NLRB 219, 219 (1991), enfd. in relevant part 985 F.2d 801, 805 (5th Cir. 1993).

A number of factors can support an inference of animus, including the following that I conclude have been established.

1. The timing of adverse action shortly after an employee has engaged in protected activity. *Lucky Cab Co.*, 360 NLRB 271, 275 (2014); *Real Foods Co.*, 350 NLRB 309, 312 (2007).

Both Hoar and St. Hilaire were terminated the same month that they posted the union sign. Significantly, when Rucci had previously lodged complaints against Hoar for taking food from the cafeteria, the Respondent took no action whatsoever against him.

2. Failure to conduct a full and fair investigation of an employee's alleged misconduct, abruptness of the adverse action, and the failure to conduct a full and fair investigation, *Dynabil Industries*, 330 NLRB 360 (1999); *Firestone Textile Co.*, 203 NLRB 89 (1973).

As to Hoar, Jones testified that she and Desjardin made the decision to terminate him for stealing coffee even before they even confronted him with the allegations that Rucci and Rodriguez had made against him. She did not take written statements from Rucci and Rodriguez, and she neither took a statement from Hoar nor even memorialized in writing what he said; rather, the only writing she prepared was a half-page memorandum. She did not give Hoar a written statement of the reasons for his termination. Moreover, she did not follow the normal procedure of advising Pockoski and Tagaki of her recommended discipline so that they could make the final decision but instead terminated him immediately.

Although Jones considered Hoar's attendance record as a negative, she totally ignored St. Hilaire's 9-year work history, contrary to the handbook's progressive discipline provisions. Nor did she follow up with Lasko concerning St. Hilaire's assurances that they could work together.

3. Contemporaneous 8(a)(1) violations. *Luck Cab Co.*, above; *Austal USA*, 356 NLRB 363, 364 (2010).

Almost contemporaneously with Hoar's and St. Hilaire's terminations, the Respondent violated Section 8(a)(1) by interrogating employees over who put up the union sign, and by timing the announcement and implementation of the wage increase to discourage unionization—conduct in direct response to Hoar's and St. Hilaire's union activity.

4. Disparate treatment. *Guardian Automotive Trim, Inc.*, 340 NLRB 475, 475 fn. 1 (2003); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002).

Hoar and St. Hilaire have been the only employees terminated since January 2011. St. Hilaire was terminated for making verbal threats occurring away from work, whereas an employee who actually made threatening physical contact at the workplace received only an unspecified warning, an employee, who engaged in illegal loan sharking at the facility received only a written warning, an employee who falsified production records received a 3-day suspension but was not terminated, and employees who employees who willfully mishandled company equipment or ruined batches of product were given only warnings.

Additionally, as to Hoar, the Respondent tolerated employees taking food home from the cafeteria and never issued any disciplines for that reason prior to terminating him. This also amounted to a departure from past practice without a satisfactory explanation. See *Toll Mfg.*, 341 NLRB 832, 833–834 (2004).

5. Failure to follow the progressive discipline system. *Detroit Newspapers*, 342 NLRB 1268, 1272 (2004); *Toll Mfg.*, ibid.

See my discussion under points 2 and 4 above. The Respondent did not take into account St. Hilaire's previous work history (and long tenure as an employee) or the fact that that neither St. Hilaire nor Hoar had any prior similar offenses.

Based on the above, I conclude that counsel for the General Counsel has established all of the elements to meet her initial burden of persuasion under *Wright Line.*

I now turn to the Respondent's burden under *Wright Line* to show that, absent their protected activity, Hoar would have been terminated for taking coffee and St. Hilaire for threats toward Lasko. Based on all of the above considerations, the answer is a resounding no.

Hoar

The Respondent maintained an extremely lax policy regarding employees taking food and other supplies home from the cafeteria. Management was aware that employees did this on a recurring basis but never issued any written prohibition against it or disciplined any employees other than Hoar for that reason. Indeed, Rucci had earlier reported to both Jones and Martin that Hoar and other employees took food from the cafeteria, but management took no action whatsoever against Hoar or anyone else. In marked contrast, after Hoar engaged in union activity, Jones and Desjardin, with great haste and without following the normal procedure of getting approval from Pockoski and Tagaki, made the decision to terminate him even before he was given an opportunity to present his side of the story, and they had him escorted out of the facility immediately after interviewing him. The Respondent offered no explanation for its failure to take written statements from witnesses or from Hoar, or to provide him with a written explanation of the reasons for his termination.

I therefore conclude that the Respondent has failed to meet its burden of showing that but for Hoar's union activity, he would have been terminated or even disciplined at all.

St. Hilaire

St. Hilaire was an employee of 9-plus years, first or second in seniority among approximately 23 production employees, yet the

Respondent disregarded its progressive discipline system and ignored his work history. The Respondent provided no evidence that he ever engaged in violent conduct at work at any time. His threats to Lasko were by text or phone and not in person, occurred over a very short period, and were the result of an intense personal dispute that was quite unlikely to be repeated. St. Hilaire reassured Jones and Desjardin that he was over his distress and willing and ready to work with Lasko, but they ignored his words and failed to convey them to Lasko. Significantly, nothing suggests that St. Hilaire engaged in any improper conduct toward Lasko at the facility or posed a threat to him at work. In contrast, employees who engaged on the job in actual threatening physical behavior, loan sharking or deliberate destruction of company property were warned or suspended but not discharged.

As with Hoar, the Respondent has not met its burden of showing that but for St. Hilaire's union activity, he would have been terminated or even disciplined at all.

Accordingly, I conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Hoar and St. Hilaire.

CONCLUSIONS OF LAW

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

2. By terminating Tyler Hoar and William St. Hilaire, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Timed the announcement and implementation of a wage increase to discourage employees from engaging in union activities.

(b) Interrogated employees about their and other employees' union activities.

(c) Discouraged employees from cooperating in the Board's investigation of unfair labor practice charges filed against the Respondent, and otherwise interfered with their Section 7 rights, by offering them free legal assistance from the Respondent's attorney when they met with a Board agent.

(d) Maintained employee handbook provisions that employees can reasonably construe as prohibiting Section 7 activity.

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.

The Respondent having discriminatorily terminated Tyler Hoar and William St. Hilaire, it must offer them full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and to make them whole for any losses of earnings and other benefits suffered as a result of their terminations. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, the Respondent shall compensate Tyler Hoar and William St. Hilaire for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 1, 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. See *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016); *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

The General Counsel also seeks an order requiring the Respondent to reimburse them for search-for-work and work-related expenses that they have incurred while searching for work regardless of whether they received interim earnings for a particular quarter. Discriminatees are entitled to reimbursement for expenses incurred in their search for interim employment, but at present the Board treats such expenses as an offset to a discriminatee's interim earnings, rather than calculating them separately. *West Texas Utilities Co.*, 109 NLRB 936, 939 fn. 3 (1954). I am obliged to follow existing Board precendent. See *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Therefore, I must deny the General Counsel's request for this additional remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[65]

ORDER

The Respondent, U.S. Cosmetics Corporation, Dayville, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against any employee for engaging in union activities.

(b) Timing the announcement and implementation of a wage increase or other benefits to discourage employees from engaging in union activities.

(c) Interrogating employees about their or coworkers' union activities.

(d) Discouraging employees from cooperating in the Board's investigation of unfair labor practices filed against the Respondent, and otherwise interfering with their Section 7 rights, by offering them free legal assistance from the Respondent's attorney when they met with a Board agent.

(e) Maintaining handbook provisions that employees can reasonably construe as prohibiting Section 7 activity.

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

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

(a) Within 14 days from the date of the Board's Order, offer Tyler Hoar and William St. Hilaire full reinstatement to their

[65] 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.

former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Tyler Hoar and William St. Hilaire whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful terminations of Tyler Hoar and William St. Hilaire, and within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against them in any way.

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

(e) Revise or rescind the following work rules to the extent they are contained in the September 2015 handbook:

(1) Welcome: "This handbook and the information in it should be treated as confidential. No portion of this handbook should be disclosed to others, except USCC employees and others affiliated with USCC whose knowledge of the information is required in the normal course of business."

(2) Code of Ethics and Conduct: "Under no circumstances may an employee . . . [p]rematurely disclose confidential and proprietary information to any unauthorized person."

(3) Code of Ethics and Conduct: "Under no circumstances may an employee . . . [p]ost financial, confidential, sensitive or proprietary information about the Company, clients, employees or applicants on social media. Additionally, employees may not post obscenities, slurs or personal attacks that can damage the reputation of the Company, clients, employees or applicants . . . ."

(4) Confidentiality, relating to clients and other parties with whom the Company does business: "It is our policy that all information considered confidential will not be disclosed to external parties or to employees without a 'need to know.' If an employee questions whether certain information is considered confidential, he/she should first check with his/her immediate supervisor."

(5) Electronic Communication and Internet Use, prohibiting employees from "using disparaging, abusive, profane or offensive language; creating, viewing or displaying materials that might adversely or negatively reflect upon USCC or be contrary to USCC's best interests …."

(6) Social Media—Acceptable Use: "Employees may not post obscenities, slurs or personal attacks that can damage the reputation of the company, clients, employees or applicants."

(f) Within 14 days after service by the Region, post at its facility in Dayville, Connecticut, copies of the attached notice marked "Appendix."[66] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 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 July 10, 2014.

(g) 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. May 17, 2016

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 terminate or otherwise discriminate against you because you engage in union activities.

WE WILL NOT time the announcement and implementation of a wage increase or other benefits to discourage employees from engaging in union activities.

WE WILL NOT interrogate you about your or your coworkers' union activities.

WE WILL NOT discourage you from cooperating in the Board's investigation of unfair labor practices filed against us, and otherwise interfere with your rights, by offering you free legal assistance from our attorney when you meet with a Board agent.

WE WILL NOT maintain the following rules that were eliminated in the September 2015 revised handbook and which the National Labor Relations Board has now found were unlawful:

(1) Code of Ethics and Conduct: "Under no circumstances may an employee . . . discuss your pay rate with other

[66] 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."

employees, or ask fellow employees about their pay rate."
(2) Payment of Wages: "Pay rates are personal and confidential and are not to be shared with fellow employees."
(3) Confidentiality: "All inquiries from the media must be referred to Human Resources."
(4) Social Media—Acceptable Use: "Employees may not post financial, confidential, sensitive or proprietary information about the company, clients, employees or applicants."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL within 14 days from the date of the Board's Order, offer Tyler Hoar and William St. Hilaire full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tyler Hoar and William St. Hilaire whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to our unlawful terminations of Tyler Hoar and William St. Hilaire, and within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against him in any way.

WE WILL revise or rescind the following work rules to the extent they are contained in the September 2015 revised employee handbook:

(1) Welcome: "This handbook and the information in it should be treated as confidential. No portion of this handbook should be disclosed to others, except USCC employees and others affiliated with USCC whose knowledge of the information is required in the normal course of business."
(2) Code of Ethics and Conduct: "Under no circumstances may an employee . . . prematurely disclose confidential and proprietary information to any unauthorized person."
(3) Code of Ethics and Conduct: "Under no circumstances may an employee . . . post financial, confidential, sensitive or proprietary information about the Company, clients, employees or applicants on social media. Additionally, employees may not post obscenities, slurs or personal attacks that can damage the reputation of the Company, clients, employees or applicants. . . ."
(4) Confidentiality, relating to clients and other parties with whom the Company does business: "It is our policy that all information considered confidential will not be disclosed to external parties or to employees without a 'need to know.' If an employee questions whether certain information is considered confidential, he/she should first check with his/her immediate supervisor."
(5) Electronic Communication and Internet Use, prohibiting employees from "using disparaging, abusive, profane or offensive language; creating, viewing or displaying materials that might adversely or negatively reflect upon USCC or be contrary to USCC's best interests. . . ."
(6) Social Media—Acceptable Use: "Employees may not post obscenities, slurs or personal attacks that can damage the reputation of the company, clients, employees or applicants."

U.S. COSMETICS CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-135282 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.