Metro One Loss Prevention Services Group (Guard Division NY), Inc. *and* Allied International Union. Case 2–CA–39315

November 8, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On April 21, 2010, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and Charging Party filed answering briefs, and the Respondent filed a reply brief. The Acting General Counsel filed a 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, cross-exceptions, and briefs,[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions, as modified herein, to modify his remedy, and to adopt the recommended Order as modified.[3]

The judge found, among other things, that Senior Account Manager Grant unlawfully threatened employee Haynes with more onerous working conditions when Grant visited Haynes on the sales floor of Daffy's, the store where he was working, in February 2009 and told him:

> [You] need to be grateful for the number of years that [you] have been working with Metro and for [your] pay rate. It could be worse; it could get much worse in the event the Union comes in.

We agree with the judge's finding that Grant's statements were unlawful.[4] Those statements, taken together, reasonably conveyed to Haynes that he would be jeopardizing his job security and current wage rate by supporting the Union. See, e.g., *Liberty House Nursing Homes*, 245 NLRB 1194, 1198–1199 (1979) (employer unlawfully threatened employees with more onerous working conditions by, among other things, stating that "if the Union came in, times would be even worse"). Their coercive impact was undoubtedly heightened by the unusual nature of Grant's visit: a one-on-one meeting on the sales floor of the Respondent's client, occurring shortly after Haynes became vocal about his support for the Union.

In the cases cited by the Respondent, the Board declined to find violations where employers stated that collective bargaining would not necessarily result in better working conditions for employees. See *Jefferson Smurfit Corp.*, 325 NLRB 280 fn. 3 (1998) (benefits "could go either way" as a result of collective bargaining); *Telex Communications,* 294 NLRB 1136, 1140 (1989) (bargaining was a "give-and-take situation"); *Pilliod of Mississippi*, 275 NLRB 799, 800 (1985) (employer did not have to give anything in negotiations and employees might lose benefits). By contrast, Grant's statements made no reference to the nature of the collective-bargaining process. Instead, without any context, she stated that Haynes's particular working conditions could deteriorate if the organizing drive was successful. The import of Grant's message would have been unmistak-

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] 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.

The Respondent does not except to the judge's finding that Vice President of Operations David Venti unlawfully interrogated employee Anthony Swift about employee Franklyn Haynes' union activities, or to his finding that Senior Account Manager Jennifer Grant unlawfully told Haynes that he would not be showing gratitude by voting for the Union.

We find it unnecessary to pass on the judge's finding that an unnamed manager unlawfully told employees that they would lose their voice if the Union came in, and that employees would be required to go to the Union to request wage increases or transfers. If found, this violation would be cumulative of other violations, and would not affect the remedy.

In adopting the judge's finding that Director of Operations Jason Shaffer unlawfully told Haynes that the Respondent was aware of his union activity, we do not rely on the judge's citation of *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294 (2009).

Also, in adopting the judge's finding that the Respondent had knowledge of Haynes' union activity, we do not rely on his finding that Senior Director of Human Resources Melissa Kirby knew about his involvement because she directed her managers and supervisors to inform her immediately of any conversations they had with employees concerning the Union. There is no evidence that anyone actually reported this information to her. Nonetheless, the record contains ample evidence that the Respondent's managers, including Kirby, had knowledge of Haynes' union activity.

[3] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. Also, we shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[4] In his analysis, the judge inadvertently described Grant's statement as declaring that things "would" get worse. That error, however, does not affect our analysis.

able, especially in light of the Respondent's other unlawful threats directed at Haynes around the same time.[5]

AMENDED REMEDY

The Respondent, having discriminatorily discharged Franklyn Haynes, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Metro One Loss Prevention Services Group (Guard Division), New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its New York, New York facility, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 2, 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. 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 February 1, 2009."

Dated, Washington, D.C. November 8, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Susannah Z. Ringel, Esq., for the General Counsel.

Lee Seham and *Stanley Silverstone, Esqs. (Seham, Seham, Meltz & Petersen LLP),* of White Plains, New York, for the Respondent.

Sumanth Bollepalli and *William B. Schimmel, Esqs. (Weissman & Mintz, LLC),* of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge, an amended charge, and a second amended charge filed on May 21, July 27, and October 20, 2009, respectively, by Allied International Union (Union), an amended complaint was issued on December 17, 2009, against Metro One Loss Prevention Services Group (Guard Division NY), Inc. (Respondent or Employer).[1]

The complaint alleges essentially that the Respondent (a) threatened employees with mass layoff and with more onerous working conditions if they chose to be represented by the Union (b) threatened employees with unspecified reprisals for their union activities (c) interrogated employees about the union activities and sympathies of other employees (d) solicited employees to engage in surveillance of the union activities and sympathies of other employees (e) created the impression among its employees that their union activities were under surveillance (f) threatened employees that they would be discharged because of their support for the Union and (g) told employees that support for the Union amounted to disloyalty towards the Respondent. Finally, the complaint alleges that the Respondent issued disciplinary warnings to its employee Franklyn Haynes and discharged him in violation of Section 8(a)(1) and (3) of the Act because he assisted the Union and engaged in concerted activities.

[5] Member Hayes finds it unnecessary to pass on whether Grant unlawfully threatened Haynes inasmuch as such a finding would be cumulative of other violations found.

[1] The second amended charge and its affidavit of service was not included in the General Counsel's exhibits received in evidence. The General Counsel attached those documents to her brief and requested that they be received in evidence. The Respondent's answer to the amended complaint admitted that the charge was filed and served on it. I hereby receive those documents in evidence.

The Respondent's answer denied the material allegations of the complaint and a hearing was held before me in New York, New York, on January 14, 15, and 19, 2010.[2]

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

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, having an office and place of business located at 43 Park Place, New York, New York, has provided loss prevention and security services to various retail businesses. During the last fiscal year, the Respondent purchased and received at its New York facilities, goods and supplies valued in excess of $50,000 directly from suppliers located outside New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Nature of the Respondent's Business

The Respondent has contracts with large retail stores such as Daffy's and Barnes & Noble pursuant to which it supplies security guards to those stores for the protection of person and property. The Employer operates in about 15 states, and in the New York area employs more than 1000 guards which include uniformed armed and unarmed guards and plainclothes store detectives. The Respondent has contracts with more than 50 stores in the Manhattan and Bronx areas.

The Respondent's hierarchy consists of Lou Granda, the senior vice president of operations, David Venti, the vice president of operations, Jason Shaffer, its director of operations, district manager, Robert Oliver, field manager, Peter Donkor, senior account manager, Jennifer Grant, and senior director of human resources, Melissa Kirby. Its main business office is at 43 Park Place in Manhattan. The Respondent has a scheduling department and dispatchers. Site supervisors work in the stores for part of the day and are involved in the overall supervision of the guards at the worksite. Haynes' site supervisor was Alex Colon, an admitted agent of the Respondent.

Based on the client store's needs, guards are scheduled for duty by the scheduling department located in Staten Island, New York. The scheduling department is responsible to ensure that the shifts required by the client are covered. That department or the dispatchers who work closely with the scheduling department call the store at the start of each shift to make sure that the guards are present at their scheduled time. The scheduling department also determines when disciplinary action is required for reasons such as lateness and absenteeism.

Upon his arrival at the store, the guard calls the scheduling department to notify it that he is at the store. The guards report to their posts, generally at the stores' entrances and exits. A supervisory guard is also assigned to the store.[3] His duties include ensuring that when the guard arrives at the store he is given the appropriate assignment, including which entrance or exit he is to guard. He also supplies the guard with a radio if needed, and makes sure that the guard has checked in properly by signing a timesheet and punching a timeclock. Those records are used to determine the guard's pay. The supervisory guard sometimes temporarily occupies the post of a guard who is not present, and relieves the guard when he takes his break.

The dispatch department, also located in Staten Island, receives calls from the guard if he expects to be late to work or absent. A guard who expects to be late to work must notify that department in sufficient time for the dispatcher to arrange for a replacement. The guard who is late is also supposed to call the dispatcher when he arrives at the store.

B. Background

1. The representation proceeding

On February 27, 2009, the Union filed a petition in Case 2–RC–23369 seeking an election in a unit of all full-time and part-time unarmed security officers employed by the Employer at various locations in Manhattan, Queens, Brooklyn, Bronx, Staten Island, Nassau, Suffolk, and Yonkers. A Stipulated Election Agreement was approved by the Regional Director on March 13, 2009, which provided for a mail ballot in a unit which included all security officers, not just the unarmed officers.

A mail ballot was conducted from March 31 to April 21, 2009, and the votes were counted on April 22, 2009. The tally of ballots demonstrated that 211 ballots were cast for, and 135 ballots were cast against the Union with 95 void ballots and 15 challenged ballots. The Employer filed an objection to the election, and on May 22, the Acting Regional Director issued a Report on Objections and Recommendations which overruled the objection and recommended that a Certification of Representative be issued. No exceptions were filed to the report and on June 22, the Board issued its Decision adopting the Acting Director's findings and recommendations, and a Certification of Representative.

C. Franklyn Haynes

1. Haynes' work duties

Haynes began work for the Respondent in November 2004, as a security guard, earning $7 per hour. He worked in various locations, sometimes as a nonstatutory supervisor. He received

[2] The answer also set forth certain affirmative defenses including laches, and that the precertification allegations were moot because the Union was certified. Those defenses and others have not been proven, and in any event, are without merit. *United Electrical Contractors Assn.,* 347 NLRB 1, 2 (2006). The answer also asserted that the alleged violations committed by Alex Colon and Jennifer Grant, and the issuance of the warnings to Haynes, were barred by Sec. 10(b) of the Act. Those defenses will be discussed below.

[3] At the time of his discharge, Haynes was a supervisory guard. The Respondent does not claim that he was a statutory supervisor within the meaning of Sec. 2(11) of the Act, but admits that Haynes was an employee who is covered by the Act. The General Counsel claims that Haynes was an "assistant supervisor" while the Respondent argues that he was a "supervisor." In view of Haynes' admitted employee status, Haynes' exact title is irrelevant.

a $2 per hour raise in 2005, when he became a supervisor at Barnes & Noble, and in 2006 or 2007, received a $1 raise, bringing his wage rate to $10. Haynes was assigned to Daffy's, a large clothing store in midtown Manhattan, on March 31, 2008. That location uses the services of seven guards to cover six entrances and exit posts, with the seventh guard, a supervisor, manning a central location called 4 Main.

Shortly after Haynes' assignment to Daffy's as a guard, the supervisor quit and Haynes was asked by admitted agent Alex Colon, the Respondent's site manager at Daffy's, to become the supervisor. Haynes testified that Colon told him that he had been doing a good job and was the "best person" to act as supervisor. Haynes agreed to the promotion on the condition that he receives a $1 raise to $11 per hour. Colon said that he would ask Director of Operations Shaffer to approve a raise for him. Haynes stated that he was also told by Shaffer at the store at about that time that he was the best person for the job and there was no one else in the store who could be the supervisor. Haynes agreed to become supervisor but asked Shaffer for a raise. Shaffer promised that he would receive a raise but said that he had to work in that position for 2 months before the raise could be granted. Haynes was also told by Field Manager Jermaine Stevens that he would receive a raise in pay.

Haynes began work as a supervisor, according to the Respondent's records, on May 22, 2008. Colon told Haynes that his duties included training the guards in the store as to the Respondent's and the store's policies, logging in each guard's time, transcribing the guards' hours of work as set forth on the timecards onto the timesheets, and preparing the timesheets for transmission by Colon. Haynes estimated that his duties as a supervisor encompassed only 10 percent of his time, with the remainder of his shift being spent performing regular guard tasks.

In contrast to Haynes' uncontradicted testimony that the Respondent's managers regarded him as the best candidate for promotion to supervisor, the Respondent argued that Haynes' promotion was not due to the Employer's recognition of his superior work, but rather a recommendation from the Daffy's store manager who "reportedly admired his demeanor and presence and asked Metro One to consider promoting him to a supervisor, and Metro One responded to that request."[4] No evidence was offered in support of that claim.

2. Haynes' work record

Haynes had a very poor attendance record with the Employer. He admitted that historically, prior to his discharge, he had been late to work once or twice a week, averaging 15 to 25 minutes late on each occasion. In fact, he further admitted that in his final 20 days of employment prior to his discharge he was late 8 days.

The Respondent's records show the extent of Haynes' lateness. For example, in 2007, he was late to work on 54 days in amounts from 15 to 90 minutes. In 2008, he was late to work 28 times in amounts from 15 to 30 minutes. In 2009, from January 1 to his discharge on April 24, he was late 13 days in amounts from 15 to 75 minutes.

[4] Tr. p. 11.

It should be noted that during his tenure at Daffy's, from March 31, 2008, until prior to his discharge 1 year later, Haynes was late on 35 days, 25 of them as a supervisor, with only one warning for a lateness on one day, April 5, 2008.

Haynes received written warnings for his latenesses. On June 2, 2005, he received an "Employee Disciplinary Review" form which stated that he had been 45 minutes to 2-1/2 hours late on four specific dates, and which served as a first warning. Nearly 3 years later, on April 5, 2008, Haynes received a second warning which stated that he was 15 minutes late for his scheduled assignment.[5] The warning stated that "tardiness for an assigned shift may compromise the protection of client property and personnel by interfering with Metro One's ability to properly staff a location. In addition, tardiness may negatively affect Metro One's reputation and client relationship. This documentation will serve as your second warning; any further violations will result in further discipline, up to and including termination." Haynes refused to sign the form, but wrote on it in the section entitled "employee comments" that he notified the dispatcher of his lateness because he had to appear in court due to an eviction notice that he received. It should be noted that in the section bearing a line for the employee's signature, the manager wrote "refused to sign." Kirby testified that employees are not disciplined for refusing to sign a disciplinary review form. Haynes testified that Manager Grant told him that he did not have to sign review forms that he did not agree with.

One year later, two Review forms were handed to Haynes on April 23, 2009, by Manager Oliver. The first, dated April 22, stated that Haynes was 1 hour and 15 minutes late for his assignment that day, and was his "second warning," and the second, dated April 23, stated that he was 1 hour late that day and was his "final warning." The letters bore the same standard warning language as the previous one set forth above. The warning letters prompted the discussion with Manager Oliver on April 23, which ultimately led to his discharge as will be discussed below.

There were a number of times in which Haynes was late on two or three consecutive days. In 2007, on April 25, 26, and 27, he was late 60, 60, and 45 minutes, respectively. On May 2 and 3, he was late 165 and 60 minutes. On May 10 and 11, he was late 15 and 30 minutes. On May 22 and 23, he was late 15 and 60 minutes. On May 31 and June 1, he was late 60 and 15 minutes. On June 5 and 6, he was late 15 and 60 minutes. On June 18 and 19, he was late 60 minutes and 15 minutes. On July 17 and 18, he was late 60 and 15 minutes. On September 10, 11, and 12, he was late 60, 15, and 15 minutes. On September 17 and 18, he was late 15 minutes each day.

In 2008, Haynes was late on April 5 and 6, for 30 minutes and 15 minutes, respectively. He received a written warning only for the April 5 lateness which stated that he was late 15 minutes. On May 22, 23, and 24, he was late 30 minutes each day. In 2009, on March 25 and 26, he was late 30 and 15 min-

[5] According to the Employee Schedule Multiweek, GC Exh. 13, Haynes was actually 30 minutes late that day. The following day, April 6, he was 15 minutes late.

utes. Finally, he was late on April 22 and 23, 2009, by 75 and 30 minutes, followed by his discharge on April 24.

Notwithstanding his extensive record of consecutive latenesses, he received a disciplinary notice relating to consecutive latenesses only with respect to the April 22 and 23, 2009 latenesses. Further, even though he was late on April 5 and 6, 2008, he received a disciplinary warning only for the April 5 lateness.

Despite his poor attendance record, Haynes was not discharged for that reason. Rather, he was discharged for insubordination as set forth below. In fact, Senior Human Resources Director Kirby testified that but for his insubordination he would not have been fired.[6]

Apart from his attendance, according to Vice President Venti, Haynes was "client rejected" from three locations—the store management asked the Employer to remove him from the store for various reasons including performance, "ongoing money issues between him and the client's employee," his use of the client's computer, and for lateness. Haynes was not disciplined for any of those reasons, except lateness.

3. Haynes' union activities

On January 26, 2009, Haynes signed an authorization card for the Union. He stated that following his execution of the card he became "very prounion" and began campaigning for the Union on his days off in February and March by visiting stores at which the Employer's guards were employed and speaking to them while they were working. He stated that no Respondent manager saw him engaging in such activity, and he never told any management representative that he was involved in union organizing.

Plainclothes store detective Anthony Swift testified that his duties take him to 13 stores where his job requires him to observe customers who may be shoplifting. He noted that in late 2008, union representatives visited a number of stores where he worked and asked the guards to join the Union. He identified Haynes as a person who was an "adamant pro union" advocate who encouraged him and others to vote, telling them that they should vote "yes or no" in the upcoming election, but adding that unionization would be good since the Union would help them with any problems they had.

D. The Mandatory Meetings

Haynes attended a mandatory meeting in late February at company headquarters. Vice president of Operations Venti, Senior Director of Human Services Kirby, and Director of Communications Larry Charriez and about 25 guards were present. He quoted a "top manager" whose name he did not know, as stating that union dues could be increased at the union's discretion, and that if the "union comes in, our voice would be taken away from us and that we will no longer be able to request a wage increase or a transfer between sites; that we'll have to go directly to Allied [Union] to make these requests. One of the presidents of Allied had gotten arrested, and that it wouldn't be wise for us to vote for a union that had nothing more than criminals in it."

Haynes raised his hand and said that he was owed many months of backpay, and that "Metro [Respondent] is criminal because they've been stealing from my check on a weekly basis. I was filling out numerous, numerous discrepancy forms [where the guard notifies management that he does not agree with the pay received] all of which have been ignored. I know that once a union comes in that this type of affect [sic] could not [sic] longer occur."

Venti then stood and said "Franklyn, Metro One has certainly failed you. I will correct the discrepancies immediately." Haynes went on, saying that that he had also been promised a raise for more than 1 year and "you have not given me a raise. Making these promises just aren't right when you're not correcting anything." Venti then said that he understood and that they would speak after the meeting. Haynes persisted, saying "I'm not just talking for myself. I'm talking for everyone in here, for everyone in the room at that time as well as guards at my store." He mentioned a guard with 7 years of service who was paid $8 per hour. Venti responded that "we'll talk in private," but told the group that the Employer is in the process of "revamping operations" including creating a division which would address the guards' problems, adding that any guard having discrepancies should bring those issues to him directly and he would correct them immediately. None of the managers who were present contradicted Haynes' testimony concerning his or Venti's comments at the meeting.

Other guards said that they also had discrepancy forms and that the Respondent "is nothing more than thieves" since they were not receiving their correct pay according to the time sheets they submitted. In addition, other guards spoke against the Union and others said that they could not afford to pay the Union's monthly dues.

Haynes stated that as he left the meeting he was called into a conference room by Charriez, who took Haynes' discrepancy reports and wrote "approved" across each, promising that they would be "corrected immediately" and that he should receive the money due in his next paycheck, which Haynes did. Venti then called Haynes into his office, telling him that he was doing a good job and that he was "extremely grateful for [his] hard work." Venti told him that he was giving him a $1 raise, "not . . . because you spoke up in the meeting, but . . . because you're a hard worker. Metro One appreciates you." Haynes replied that he was "not going to hold my breath because I've been promised a raise for over a year" whereupon Venti accessed Haynes' employment profile, deleted his current wage rate of $10 and inserted "$11.00." The paycheck he received the following week reflected a wage rate of $11. Venti did not contradict Haynes' testimony concerning their private meeting, and Charriez did not testify.

Two weeks later, in about mid-March, Haynes was directed by the dispatcher to attend a mandatory meeting at company headquarters. As he was about to enter the training room he was stopped by Venti who told him "you're not required to be here." Haynes said "that's fine, I'll just sit in." Venti replied "space is limited. I can't allow you to go in. Just go and enjoy

[6] This is in contrast to the Respondent's answer to the complaint, discussed below, in which it was asserted that Haynes was fired for "chronic tardiness and insubordination."

your day off." Venti denied that Haynes was "banned" from attending any meeting conducted by LRI.

One week later, Haynes was again told by the dispatcher to attend another mandatory meeting. As he entered the training room, Charriez showed him that his name was not included on a list of names of the attendees. Haynes told him that if management did not want him to be at the meetings the dispatchers should be told to stop asking him to attend.

E. The Events of February Through Mid-April

Haynes stated that in February, he received separate visits at his store from Site Manager Colon, and Managers Donkor and Grant, where they spoke to him alone, as follows:

Colon told him that "there are good unions and that there are bad unions, and that Allied [Union] seems to be a bad union. It wouldn't be wise for [you] to align yourself with the Union, and that [you] should not vote yes for the Union." Haynes further stated that Colon "encouraged" him to tell each guard to vote "no." Haynes replied that he had the right to vote "however I wanted" and that he would not tell other guards to vote "no." Colon testified, denying that he asked Haynes or any other employee to campaign against the Union.

Donkor told Haynes that "it wouldn't be wise for us to go forward with a union that we know nothing about." Haynes replied that he knew enough to know that he wanted a union. Donkor answered that if the union "comes in, the contract that Metro One has with the store could be terminated and that could put me [Haynes] as well as all the other guards out of work. It wouldn't be wise for us to vote for the union when we could end up being without work." Donkor did not deny visiting the Daffy's store and speaking to Haynes about the Union, but denied threatening employees during the union campaign regarding their decision to support or not support the Union.

Grant told Haynes that "[you] need to be grateful for the number of years that [you] have been working with Metro and for [your] pay rate. It could be much worse; it could get much worse in the event the union comes in." Haynes replied that "I've never seen a company in which a union didn't benefit the company in some way, even in a small way. Even if all we got was job security, that's something." Grant answered "[you] wouldn't be showing any gratitude if [you] vote yes for the union."

Grant did not deny visiting the Daffy's store and speaking to Haynes about the Union, but denied that she threatened any employees with more onerous working conditions or told them that support for the Union amounted to disloyalty toward the Employer. Instead, she stated that she was instructed by the Respondent to tell the workers, if they asked about the Union, that it was "their decision." She admitted that guards approached her and initiated discussions and had questions about the Union. She told them that the Union could not make promises or guarantees, and that "any matters" must be negotiated.

Haynes stated that in the same month, February, Director of Operations Shaffer visited the store, greeted him and shook his hand, but spoke to every guard except him.

Vice President Venti explained these visits of management personnel to the stores. He stated that the Employer received numerous phone calls from stores including Daffy's complaining about Union solicitation in the stores, so management visited the stores "trying to calm things down and make sure the clients were okay."

Employee Swift stated that in early- or mid-March 2009, Site Supervisor Colon told him at the Daffy's store that "the Union would be a bad thing if we voted them in. They know that Franklyn is doing some organizing outside of the store, and that he's going to have some problems." Swift asked for an explanation, and Colon responded that he was "told by Jennifer [Account Manager Jennifer Grant] that Franklyn would be terminated as soon as the ballots were counted, as soon as they get the results of if we won or lost." Colon testified, denying that he threatened employees with discharge because of their support for the Union, and specifically denied telling anyone that Haynes deserved to be fired. He stated that he was instructed by management to answer employee questions about the Union by telling them to attend meetings scheduled by the Employer. Grant did not testify concerning her alleged statement to Colon concerning Haynes' possible discharge.

Swift testified that on the day after he spoke to Colon, Vice President Venti asked him, at company headquarters in the presence of Managers Charriez and Shaffer, if he knew "if Franklyn was doing any organizing outside of the job." Swift answered that "Franklyn is telling people on the job that it would be a good thing for us to vote for the union because they could do a lot for us if we have any type of problems." Venti, who seemed "upset and agitated" told Swift that "I want you to watch him, and if [you] have any information the following Monday to come back and report to him." Venti added "I don't understand why the security guards want a union in when the company does everything possible that they could do for the security guards, like give them free uniforms, even sometimes having them get away with being late as long as they called the dispatcher's office and let them know that they're in transit." Swift noted that Venti "did not follow up on any requested surveillance" of Haynes after that conversation.

Charriez and Shaffer did not deny this conversation between Venti and Haynes. Venti testified, denying that he interrogated employees as to their union activities or the activities or sympathies of other workers, and further denied that he solicited workers to engage in surveillance of the union activities or sympathies of other employees. He stated that the Employer's policy was that managers were not to interact with employees regarding any union issue, but rather it utilized an outside source, Labor Relations International (LRI), which conducted classes with management and rank-and-file employees concerning issues relating to the union campaign. LRI was hired in late 2007 or early 2008 in order to educate managers concerning what they were permitted to say and could not say to the workers concerning the Union, the Employer's position in the campaign, and how to answer employee questions concerning the campaign. A number of meetings were held by LRI with senior management, lower management staff personnel, and employees. Venti attended between 10 and 20 meetings. Venti and LRI met about five times with 15 to 20 managers.

Venti conceded that he was asked by many guards what procedure to follow when a union representative solicited them at

stores. He advised them to enforce the store's "no-solicitation policy."

Senior Human Resources Director Kirby prepared and distributed a memo to the Respondent's managers in the fall of 2008. It set forth the principle that employees have the right to join a union if they desire. It outlined that managers should not threaten, interrogate or make promises to employees concerning union representation, and that they should not be surveilled. The memo instructed managers to whom questions might be posed by employees concerning the union, to listen to employees' questions or concerns, remain neutral and not discourage them from joining a union. The memo directed that "any conversations regarding union activity must be reported to Human Resources immediately."

Haynes stated that on April 13, he picked up his check at the Employer's Bronx office where Director of Operations Shaffer called him into his office. Shaffer told him that "Metro is aware that [you have] been campaigning and organizing for the union; that they're aware of [your] union activity. Well, a union is not in the best interest of Metro." Haynes replied that "I know that I have the right to educate my co-workers about the union." Shaffer responded "that's fine, but that [I] want you to be aware that Metro is aware of [your] activity and that they're not happy about it." Haynes said "really," and Shaffer replied "yeah, we're not happy about it."

Shaffer did not deny speaking to Haynes at that time, but generally denied threatening reprisals against employees for their union activities. However, he admitted speaking to Haynes about a complaint he received from a manager at Daffy's that "a person inside their building was soliciting union activity with guards." Shaffer decided to investigate, and in early April 2009, visited the store and saw Haynes speaking with a union representative on the sales floor for about 5 to 10 minutes. Shaffer asked Haynes how long he had been speaking to the agent and Haynes said "just a minute." Shaffer advised Haynes of Daffy's no-solicitation policy and informed him that he was present "to uphold that and make sure that you are also being a supervisor within the location." Haynes agreed with this advice and said that it would not happen again. Shaffer took no disciplinary action against Haynes for his conduct that day essentially because he accepted Haynes' "word" on the matter since Haynes told him that he was "antiunion" and did not want anything to do with the Union.

F. The Events of April 22–24 and the Discharge

1. Haynes' version

Haynes stated that on April 22, he knew that he would be late to work and called the dispatcher to inform him that he would be late. The dispatcher told him "fine, just make it into work." Haynes called the dispatcher again when he arrived at work, and then reported to his post. He admits arriving 45 minutes late. As he arrived at work, his coworkers told him that the Union won the election.

The following day, April 23, Haynes was again running late and called the dispatcher, advising him that he was about 35 minutes late. The dispatcher gave him the same advice as the previous day. When he got to the store he called the dispatcher to report his arrival.

That afternoon, Haynes was visited at his post in the store by Field Manager Oliver who told him "[You have] been working with the company for a long time; [you] should not be late; that [you need to be setting a better example for the guards; [you] just shouldn't be late." According to Haynes, Oliver handed him a final warning form and asked him to sign it. Haynes did not look at it or take it in hand and refused to sign it, telling Oliver that "we should not be having this talk on the shop floor" because he was never disciplined on the shop floor before that time. Haynes suggested that they speak in private, in the security office, at which point Oliver raised his voice, saying "you're not going to sign?" Haynes said that he would not sign the paper. Haynes denied yelling at Oliver but admits raising his voice "slightly" only when Oliver raised his when he suggested that they speak in private.

That evening, Haynes was directed to report to the office the following morning. On April 24, Haynes attended a meeting with Oliver and Senior Director of Human Resources Kirby. Haynes stated that Kirby told him that his latenesses and his refusal to sign the write-up were unacceptable. Haynes replied that "it doesn't make any sense because I know a lot of guards who are late to work every day and they never receive any type of reprimand." Kirby responded that "it's not about their latenesses. It's about yours." Haynes said that that was "unfair." Kirby told him "you need to sign this write-up or you're going to be terminated." Haynes refused to sign it because he did not agree with it. Instead, he told the two managers that "I know exactly why this is happening. You guys are aware of my union activity." Kirby replied that "I have nothing to say about that" and yelled "you're fired." Haynes then left.

Kirby stated that when employees refuse to sign a written warning the procedure is to note their refusal on the warning itself. The employee is not given a written warning for refusing to sign the document. Haynes testified that he believed, based on instructions from Manager Jennifer Grant, that if he did not agree with the contents or the "factual basis" of an Employee Disciplinary Review form he was not required to sign it. He maintained that view notwithstanding the plain language on the form which states that, by signing it, the employee only acknowledges that he has received a written warning and disciplinary counseling from a supervisor.

Some time later, in late April, about 1 week after Haynes' discharge, Swift was at company headquarters and remarked to Venti and Schaffer that something "is in."[7] Swift was then told by Venti "by the way, Franklyn got fired."

2. The Respondent's version

a. The disciplinary warnings

Rorrie Lee, the senior scheduling manager in charge of guards' attendance, stated that the Respondent requires its guards to arrive at their assigned store location on time. Such an obligation is vital for the fulfillment of the Respondent's

[7] The transcript records the remark as "wow, the king of zin." The General Counsel asserts that the transcript should read "wow, the union is in." I asked the court reporting service to review the audio and compare it to the transcript. The service reported that the sentence should read "wow, the king is in."

contracts with its clients. In the case of a supervisory guard, such as Haynes, he must arrive early so that he can advise the scheduling department of the attendance of the guards at the location, assign their posts, inspect their uniforms, make sure that they have their identification cards and issue their radios.

Lee's duties include preparing and maintaining the schedule of 1500 guards, and keeping track of guards' calls to report their absence or lateness, and those who do not call in. Three dispatchers report to three scheduling managers who report to him.

Lee stated that if a guard expects to be late for his assignment he must notify the scheduling department of that fact. The scheduling department then advises the client and assigns a field manager to cover the vacant post until the guard arrives.

Lee testified that in early 2009, he told Haynes that he had a "history of being late. You're always running late." Haynes admitted that he had been late but promised to improve. Haynes denied having that conversation with Lee.

Lee's testimony of his actions on April 22 is confused and self-contradictory. He first stated that at Haynes' starting time he received a call from the store manager reporting that Haynes was not present, but later stated that the dispatcher called the store, and then Lee called because Haynes had not called in the roll-call of the guards. Lee stated that he tried to call Haynes but could not contact him. Later, when Haynes, arrived, the store manager and other guards reported that he was 1 hour and 15 minutes late.

In addition, Lee first stated that neither dispatcher told him that he spoke to the store manager, then he stated that he knew that one of the dispatchers spoke to the manager because that was his job. The manager reported to the dispatcher shortly after Haynes was due to start, that Haynes had not yet arrived. Lee responded "no problem." Thirty minutes passed and then Lee called the store manager who said that Haynes had still not arrived.

Then Lee stated that when he called the store and it was reported that Haynes arrived late, Lee spoke to Haynes and asked what happened, informing him that he did not call to say that he would be late. Lee told him that he was late again and that he would have to write him up, and that if he was late thereafter he would be written up again. Haynes apologized, explaining that he had "some problems." Lee directed a dispatcher to issue an Employee Disciplinary Review which was emailed to the human resources department.

Lee stated that the following day, April 23, Haynes arrived 1 hour late and did not call to advise that he would be late. The store manager called to report that Haynes had not arrived. Lee asked to speak to a guard, who confirmed that Haynes was not present. When Haynes arrived, Lee directed a dispatcher to issue another warning.

Lee stated that when he directed that disciplinary warnings be issued to Haynes he did not know that he was involved in a union organizing effort. Lee expected that Haynes would be discharged upon the issuance of the final warning.

Lee said that he has discretion to issue a warning depending on the circumstances of the lateness. For example, if the guard calls, giving him sufficient notice, and says he would be late due to a transportation difficulty such as the subway being slow, or a water main break in the area, he does not issue a warning because his lateness was not his fault, he called to report his expected tardiness, and a substitute could be obtained if necessary. However, Lee also stated that there is "no excuse" for lateness, and if there's a pattern of lateness, the guard will be written up. He stated that if an employee is "repeatedly late" even for a short amount of time, he would be written up "depending on what it is." He further noted that "if I have a guard that's running late constantly I have to write him up or then I'll be in trouble."

Human Resources Director Kirby stated that if a guard notifies the dispatcher that he would be late, the lateness is not excused but the call is treated as a "courtesy" so that the scheduling department can call the client or, if necessary, obtain a substitute guard to cover the shift until the guard arrives.

Kirby stated that on April 22, she was told by the dispatcher that Hanes was 1 hour and 15 minutes late to work, and that he had not called to advise that he would be late. A warning letter was prepared. The following day, April 23, Kirby was again told by the dispatcher that Haynes did not notify him that he would be late. Haynes was 1 hour late, and a final warning letter was prepared. There was some discrepancy as to whether Haynes was 30 or 60 minutes late on April 23. Kirby stated that he was 1 hour late based upon when the dispatcher learned that he arrived at work. The sign-in sheet demonstrated that Haynes was 30 minutes late. Kirby stated that since Haynes "controlled" the sign-in records at the store, the sign-in sheet was less reliable than the dispatcher's record of the time he was told Haynes arrived. In any event, Kirby stated that the discipline imposed on Haynes on April 23, a final warning letter, would have been issued regardless of whether he was 30 or 60 minutes late.

b. The confrontation with Manager Oliver

The two warning letters were hand-delivered by Manager Oliver to Haynes at the Daffy's location on April 23. Kirby stated that written disciplinary letters are delivered to a work site when there is an "immediate need for a change in conduct"—if the employee's actions must be "stopped immediately." Oliver stated that the Daffy's store manager was one of the "strictest and hardest to deal with," having very high standards and being very demanding.

Oliver arrived at Daffy's at 4:15 p.m. and checked the guards' timecards. He noted that Haynes did not clock in that day. Oliver approached Haynes on the open sales floor, 20 to 30 feet from any other person. He asked Haynes why he did not clock in and was told that he had not "gotten around" to it yet.

Oliver testified that he attempted to discuss Haynes' lateness with him but Haynes got "angry" and began speaking in a "very loud and agitated tone of voice" saying that he was very glad the Union had won the election, adding that the Employer had "stolen money" from him in the past. Oliver stated that he remained calm but Haynes "refused to calm down."

Oliver then told Haynes that he was being issued a second and final warning for the latenesses of the past 2 days. Oliver handed the letters to Haynes and asked him to read them, and "sign at the bottom." Haynes refused to do either, but instead

took the letters and made a motion as if to tear them, but did not, and returned them to Oliver. Oliver asked if there was a more private area they could speak in and Haynes took him to a location in the tailor's room which the guards used as an office.

Oliver again tried to speak to him about his lateness, but Haynes again yelled about "unrelated issues" for about 15 or 20 minutes. Their discussion ended when Haynes left the room to return to his post. Oliver followed him and heard him tell guards Hameen Berkley and David Sylvester that Oliver was a "joke."[8] Oliver left the store and called his Manager Jason Shaffer, telling him that Haynes "caused a scene in the store and was very insubordinate to me." Oliver also called Kirby and told her that Haynes was extremely insubordinate, raised his voice to Oliver, called him a joke, made a gesture that he was tearing the warning letters, and would not read, sign, or discuss them with Oliver. Oliver immediately emailed a report to Kirby who directed that Haynes and Oliver meet with her the following morning.

Oliver's written report stated essentially that Oliver went to the location to "investigate the recent allegations of guard tardiness." He asked Haynes how the store was running and how the guards were doing. Haynes answered that "things were very good now after the union had won in the election yesterday." Haynes told him that he was 30 minutes late and had called the dispatcher to notify him of his expected lateness. He said that he did not punch in because when he arrived he was busy getting the guards situated. He admitted being 30 minutes late the day before. Haynes then became frustrated, raised his voice and asked why he was asking about those two latenesses when he had a "great track record" for being on time during the past year. Guard Hameen Berkely was close enough to "potentially overhear" their conversation.

Oliver asked to conduct their conversation in a private area but Haynes refused to do so, speaking in a loud tone, yelling about how the Employer had "stolen money from him in the past and how his pay rate and discrepancies were not fixed until the union first showed up. He continued to say how it was a very good thing that the union won. I told him that his views were his prerogative." Haynes said that "we shouldn't even be having this conversation now and he walked away."

Oliver then told him that the human resources department issued a final warning for the lateness of the past 2 days. "I said he could read and sign the discipline form if he wanted." He took the papers and gestured that he was going to tear them up. He did not and returned them to Oliver. Oliver again asked Haynes to accompany him to a secluded area and they went to the tailor's room. Haynes "continued to rant in a very loud tone stating that many employees have been wronged by Metro One in the past, and that one guard worked for 8 years at $8 per hour and never received a raise. Oliver asked if Haynes believed that Oliver knew of his pay problems or mistreated him. Haynes said no, but that Oliver represented a company that has mistreated him and that he worked for Venti, who had "wronged him." Oliver's report then stated that Haynes "threatened me by saying that he had kept copies of all his old time sheets and he was going to sue me and the company in civil court." He said that now that the vote was done he could do so, and he had the union to back him. Oliver replied that he was a "neutral party" in the matter.

Haynes then began to "rant" that Colon was never written up for being late and that Oliver was "hypocritical" and also said that Venti had "secret meetings" about Haynes, and furiously said that someone told him that Venti mentioned that after the union lost the election he (Haynes) and other guards would be fired. Oliver stated that after "loudly ranting" for 15 to 20 minutes, he calmed down and returned to the sales floor where he told Berkley and David Sylvester that Oliver was a "joke" and also told them that since the Respondent lost the election it was now making a "weak play" of issuing a final warning for lateness but they were "in big trouble with the union," adding that the Employer spent "hundreds of thousands of dollars fighting the Union, but still lost." Oliver asked Haynes, Berkley and Sylvester to return to work. Oliver's report concluded by saying that Haynes was insubordinate, disrespectful, and may have potentially damaged the Employer's reputation by yelling and causing a scene at Daffy's. Kirby directed that Oliver and Haynes attend a meeting the following day.

c. The discharge

A meeting with Kirby, Oliver, and Haynes was held the following day, April 24, at which Haynes arrived 30 minutes late. Kirby stated that she asked Haynes about his late arrivals at work. He gave "vague answers," was "fairly arrogant" but admitted being late, stating that he was "accountable for his behavior," but also said that Colon, too, was late at times. Kirby responded that Colon was in a different position with different responsibilities. Kirby asked for a further explanation of his absences but he gave no definitive answers.

Kirby then said that she needed to investigate what occurred between Oliver and Haynes the prior day, and that she needed both sides of the story to determine what action to take. Haynes admitted that he raised his voice and that he nearly tore the warning letters but decided not to. He gave only "vague answers" to her questions about the meeting.

Kirby told Haynes that she was obligated to investigate the matter and that, according to Oliver's report, the allegations against him were very serious. She told him that if he wanted to dispute any information in Oliver's report he would have to submit a written report because he was not providing enough information during the meeting for her to perform an adequate investigation. Kirby stated that Haynes told her that he would not write a report. Kirby replied that if Haynes did not submit a written report she would have to credit Oliver's report as being more credible than his "vague answers" and he would be terminated for insubordination towards Oliver. She further noted that his refusal to submit a report would be considered a "second act of insubordination" and that she would have no choice but to terminate him immediately. Haynes again refused to submit a written report.

Kirby then told Haynes that he was terminated. Haynes then told her that he had been organizing for the Union. Kirby replied that the discussion was about his insubordination, and not

[8] Haynes denied referring to Oliver as a "joke," but admitted saying "this is a joke" when he was handed the warning. Oliver denied that Haynes said "this is a joke," referring to the warning.

about his union organizing which she would not discuss with him. Kirby testified that she did not believe that she had any alternative but to fire Haynes since he had committed a "very serious act of insubordination." Kirby also noted that Haynes was fired for insubordination for failing to cooperate with the investigation.

Oliver corroborated Kirby's testimony that she asked Haynes to provide a written or oral report of his confrontation with Oliver the prior day, and that Haynes refused to tell her what happened, but admitted that he was "late and loud," taking "full accountability" for his actions. Oliver stated that Haynes was also "very loud and very insubordinate" to Kirby. Oliver noted that Kirby told Haynes that if he did not complete a report she would have to accept Oliver's report as more credible and Haynes would be fired.

Kirby stated that she could not recall any other occasion when an employee refused a direct request from her for a written statement. Nor could she recall any other instance where an employee raised his voice in a hostile manner for a sustained period of time to her, as Haynes did at their meeting.

At hearing, Haynes denied that Kirby asked him to provide a written statement or that she said that without such a statement she would have to credit Oliver's version. However, he admits not providing a written statement or an explanation for his latenesses. He further denied that Kirby told him that his continued refusal to provide a written statement was insubordination for which he could be fired. He also denied telling Kirby that he took the warning letters and was about to tear them up.

At hearing, Kirby was asked whether she sought to corroborate Oliver's statement that Haynes called him a "joke." As noted above, Oliver said that Haynes made that comment in the presence of employees Berkely and Sylvester. Kirby testified that she did not believe that it was necessary to contact them before she fired Haynes for insubordination because he refused to cooperate with her investigation. Nevertheless, she spoke to Berkely a few days after Haynes' termination because she "anticipated litigation" based on Haynes' behavior at the meeting and she wanted to obtain a witness statement in order to be certain that she had all the information she needed. Berkely wrote a statement dated May 1 which related that he saw Haynes and Oliver "exchange words" but he "didn't really see much." Kirby wrote on Berkely's statement that Berkely told her that he could not hear Oliver talking but saw that Haynes was upset over a piece of paper, but that Oliver did not seem upset. Kirby did not contact Sylvester for a statement.

G. The Respondent's Disciplinary Process

Kirby prepared, and in February 2009, issued a letter setting forth the Respondent's disciplinary procedure. The letter advised that in issuing discipline, the manager should determine whether the penalty was "applied equally and consistently amongst all employees" and in cases of "accelerated discipline," what warranted that action as opposed to a written warning, and whether the same penalty applied in similar circumstances.

The letter added that, in "administering a discipline, make every effort to conduct the meeting as discretely and professionally as possible. Avoid making generalizations, judgments or behaving emotionally. A witness should be present whenever possible."

Kirby testified that when she decides what discipline to assess, she considers whether the level of discipline was appropriate to the situation, and whether it was "in line" with discipline issued to other workers, and "generally in accord" with the Employer's progressive discipline guidelines. She stated that generally, the Employer will impose punishment only if it is applied equally and consistently with prior cases. She deems it her responsibility to investigate the matter and ensure that discipline is applied "similarly."

Regarding the delivery of discipline to the guard while on his post, Oliver testified that he is responsible for 50 stores and visits each store depending on which are having problems. For example, he may visit some stores several times a week, while others are visited only once a month. His main job is to speak with guards and managers to learn whether there any problems he can resolve. Oliver stated that he delivers a disciplinary notice to employees between 1 and 5 percent of his time when he visits a store.

Kirby stated that "if possible" discipline is administered in the Employer's Park Avenue office. However, if the misconduct requires management's "immediate attention" it is not always possible to have the employee report to the office, so in such cases a manager issues the discipline to the employee on his post. Neither Haynes nor Swift could recall any instance where an employee was disciplined on his post.

H. Latenesses and Insubordination of Other Employees

1. Lateness

The complaint alleges that the Respondent unlawfully issued disciplinary warnings to Haynes on April 22 and 23.

Kirby stated that the Employer has no rule, specific policy or prescribed number of times an employee may be late, the amount of time the worker is late, or the frequency of latenesses within a specific period of time which will result in a warning being issued. Generally, the scheduling department brings latenesses to her attention and issues a written warning if the employee has been late repeatedly.

Haynes' replacement, Supervisor Pedro Perez, was 15 minutes late for work on May 6, June 3, June 24, and July 15, 2009, and was 30 minutes late on April 29, June 17, July 8 and 22, 2009. Supervisor Colon was also late between 15 and 60 minutes on nine occasions in 2009. There was no evidence that any warnings were issued to Perez or Colon for their latenesses.

The Respondent's records show that in the period October 1, 2008, to November 12, 2009, only one person was discharged for lateness. Keith Wilson was hired on August 7, 2008 and received a first warning 2 weeks later for "no-show no-call." A Disciplinary Review form states that Wilson was 2-1/4 hours late on December 19, and 15 minutes late on December 21, and was spoken to by three managers. He was given a first written warning, dated December 22. On February 8, 2009, he was 25 minutes late and received a second written warning for lateness and a final warning for signing an earlier time than he arrived on his timesheet. On March 16, Wilson was 10 minutes late to work. On March 20, he was 40 minutes late. Although the warning dated March 22 states that it was only a warning, he

was terminated based on that document. His termination date was recorded as April 10, 2009.

2. Insubordination

Two employees were discharged for insubordination prior to Haynes' firing. Kendra Carr, who was employed for 3 months, was fired for threatening a coworker with violence, speaking inappropriately to a client, and walking off her post. Manuela Filangeri, employed for 9 months, was discharged for using "obscene and/or abusive language" while rudely telling the store manager to "shut the doors or I am going to sue this store." The client requested that Filangeri not be assigned to that store thereafter.

Following Haynes' discharge, two other workers were fired for insubordination. The first, Dominique Headley, was discharged on May 29, 2009. She was counseled by the store manager for improperly giving one store customer the bag of another customer. Headley responded with obscenities and referred to the manager as a "clown." An Employer recruiter witnessed the insubordination and it was noted that Headley "continued to discuss the issue in front of store associates." The second, Dickens Celestin, left her post without authorization and without notifying her supervisors. The following day, while speaking with an Employer manager, she was disrespectful, refusing to leave the office when asked.

I. Credibility

Both Haynes and Swift impressed me as being honest witnesses. Their testimony was straightforward and delivered without hesitation. Haynes' detailed testimony concerning his outspokenness at the mandatory meeting in February was not contradicted in any way by any of the three managers present who testified. That supports a finding that Haynes' testimony is believable. In addition, Swift was a current employee at the time he testified. There was some question, during his testimony, whether he was technically still employed because he had not renewed his guard's license. However, inasmuch as he apparently had not been notified, prior to the hearing, that he was no longer employed, I accept his testimony as that of a current worker. The Board has stated that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests . . . [t]hus, a witness' status as a current employee may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues." *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995).

Further, Haynes and Swift gave similar testimony that the Respondent's agents Colon and Shaffer mentioned that they were aware of Haynes' activities in behalf of the Union. The timing of Haynes' discharge on the day following the counting of the ballots supports a finding that Colon's statement to Swift that Grant said that Haynes would be fired as soon as the election results were announced serves to corroborate that Colon gave that warning to Swift, and supports a finding that Swift's testimony is believable. Grant did not deny making that comment to Colon.

The Respondent's witnesses generally denied violating the Act, and in some instances denied the statements attributed to them. For example, Donkor generally denied threatening employees during the campaign regarding their decision to support the Union, but did not testify specifically about his statement to Haynes that if the union comes in the contract with the Employer and Daffy's could be terminated which would result in the guards being laid off.

Regarding the allegation that an unknown agent threatened employees with more onerous working conditions if they chose to be represented by the Union, this refers to Haynes' testimony that, at a mandatory meeting in February attended by Managers Grant, Venti, and Charriez, the unknown agent union said that dues would be increased at the Union's discretion and that if a union organized the employees the workers would not be able to ask for a wage increase or a transfer between sites, but would have to ask the Union to make those requests. None of the Employer's managers who were present at the meeting denied that those remarks were made. Rather, Kirby simply testified that the allegation did not provide enough information for her to investigate, and that she investigated all of the allegations attributed to specific managers and she believed them all to be false, noting that such a threat would have violated company policy which would have subjected the manager to discipline.

Further, regarding Swift's testimony that, in the presence of Charriez and Shaffer, Venti interrogated him and solicited him to surveill Haynes' union activities, only Venti testified, generally denying that he interrogated Swift or directed him to watch and report on Haynes. He did not deny the conversation with Swift, and neither Charriez nor Shaffer denied that the conversation occurred.

Similarly, although Grant generally denied threatening employees with more onerous working conditions or telling them that support for the Union constituted disloyalty toward the Employer, she did not deny the detailed statement attributed to her that she told Haynes that his pay rate would get much worse if the Union came in, and that he was not showing gratitude if he voted for the Union.

Accordingly, Haynes and Swift gave rich, specific details of their conversations with the Respondent's representatives containing word-for-word quotations of the remarks by both individuals. In contrast, for the most part, the Employer's witnesses' testimony concerning their discussions with the two men lacked the significant detail and supportive facts which would inspire confidence in their recitations and their credibility. *Mr. Z's Food Mart*, 325 NLRB 871, 888–889 (1998); *Laser Tool, Inc.*, 320 NRLB 105, 109 (1995). I therefore credit Haynes and Swift's testimony where they differ from the Respondent's witnesses' testimony.

Analysis and Discussion

I. The 10(b) Claims

The Respondent's answer asserted the affirmative defense that the complaint allegations concerning Colon and Grant, and the allegations concerning the issuance of the two warnings to Haynes, set forth in the second amended charge, are time-barred by Section 10(b) of the Act. Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice

occurring more than six months prior to the filing of the charge. . . ."

The original charge, filed on May 21, 2009, alleged, as material here, that Haynes was unlawfully discharged because of his union activities. The first amended charge, filed on July 27, 2009, alleged, that (a) Haynes was unlawfully discharged (b) Donkor threatened a mass layoff of employees (c) an unknown manager threatened more onerous working conditions (d) Shaffer threatened unspecified reprisals and gave the impression that the Employer was surveiling employees' union activities and (e) Venti interrogated employees and solicited them to surveill other workers.

The allegedly untimely second amended charge, filed on October 20, 2009, realleged all the matters in the original and first amended charges, and further alleged that (a) in about early March 2009, Colon threatened employees that they would be discharged for supporting the Union (b) in about April 2009, Grant threatened employees with more onerous working conditions and told employees that support for the Union amounted to disloyalty towards the Employer and (c) on about April 23, 2009, issued disciplinary warnings to Haynes because of his union activities.

I first find that that part of the charge which alleged the unlawful warnings was timely filed. The warnings were issued on April 22 and 23, 2009, and the charge was filed on October 20. Inasmuch as the charge was filed less than 6 months after the warnings were issued, that part of the charge was timely filed. Accordingly, the Respondent's 10(b) defense is rejected as to that part of the charge which alleged the issuance of the warnings.

As set forth herein, I find, based on the credited testimony of Haynes, that Grant told him in February 2009, that working conditions could become worse if the Union comes in and that he would not be showing his gratitude if he voted for the Union. I further find that, based on Swift's credited testimony, in March 2009, Colon told him that he knew that Haynes was organizing for the Union and that he would have some problems, and that Grant told him [Colon] that as soon as the results of the election was announced, Haynes would be fired.

Inasmuch as the second amended charge was filed in October 2009, it would ordinarily be considered as untimely as it was filed more than 6 months after the alleged unlawful statements were made in February and March. However, in *Redd-I, Inc.*, 290 NLRB 1115 (1988), the Board held that allegations made in an untimely filed charge may be considered to be timely filed if they are legally and factually "closely related" to an otherwise timely filed charge.

In making this determination, the Board considers whether the otherwise untimely allegations are of the same class, involving the same legal theory and usually the same section of the Act as the timely filed allegations. It also analyzes whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge—meaning that the allegations must involve similar conduct, usually during the same time period with a similar object, for example, aimed at stopping a union organizing campaign. Finally, the Board considers whether the respondent would raise the same or similar defenses to both allegations—whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely charge.

The Board has held that a "sufficient factual relationship can be established by showing that the timely and untimely alleged employer actions are 'part of an overall employer plan to undermine the union activity'" and that if "allegations are demonstrably part of an employer's organized plan to resist union organization, they are closely related." The Board requires that the two sets of allegations "demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or as part of an overall plan to undermine union activity." *Carney Hospital*, 350 NLRB 627, 630 (2007).

The Board's "closely-related" requirement is clearly met here. First, the alleged unfair labor practices set forth in the second amended charge are of the same class and involve the same legal theory and the same section of the Act as the timely filed charges. Thus, the second amended charge alleges violations concerning threats of discharge and more onerous working conditions in violation of Section 8(a)(1) of the Act. Similarly, the original, first amended, and the timely filed part of the second amended charge allege similar conduct—two unlawful warnings, threats of mass layoff, more onerous working conditions, threats of unspecified reprisals, and interrogation.

In addition, the unfair labor practices set forth in the second amended charge as well as the earlier charges all relate to a compressed period of time, from February, when Haynes began organizing for the Union, through the third week in April when he was discharged. Accordingly, the allegations in the charges all relate to the Respondent's reaction to the Union's campaign and Haynes' prominent role therein, and its attempt to thwart that campaign. It is further clear that the Respondent would reasonably raise the same or similar defenses to the allegations in the second amended charge since they are of the same nature as those in the timely filed charges. I find and conclude, therefore, that the allegations in the second amended charge were closely related to the two prior timely filed charges and that therefore Section 10(b) does not bar the issuance of the complaint based on the allegations in the second amended charge. Redd-I and Carney, above.

II. THE VIOLATIONS OF SECTION 8(A)(1) OF THE ACT

The complaint alleges that the Respondent engaged in various violations of Section 8(a)(1) of the Act. The standard in determining whether employer conduct violates that section of the Act is based on whether statements made to employees reasonably tend to interfere with the free exercise of employee rights under the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

It is alleged that Donkor threatened employees with mass layoff if they chose to be represented by the Union. This refers to Haynes' credited testimony that Donkor told him that if the union comes in, the Employer's contract with the store "could be terminated" and that would put all the guards out of work,

adding that it would not be wise to vote for the union when the guards "could end up being without work."

I conclude that that this statement constitutes an unlawful threat that if the Union represented the workers the Employer's clients would terminate its contract with the Employer and the guards would lose their jobs. In connection with the phrase "if there was a strike we 'could' lose our jobs" it is well settled that a prediction of plant closure as a possibility rather than a certainty is violative of the Act. *Daikichi Corp.*, 335 NLRB 622, 624 (2001); *McDonald Land & Mining Co.,* 301 NLRB 463, 466 (1991). Indeed in *Gissel,* where the standards for evaluating the lawfulness of predictions of adverse consequences based on the Union's appearance were formulated, it was held that an employer's statement that a strike "could lead to the closing of the plant" violated Section 8(a)(1). *Gissel*, supra at 588. Indeed, past decisions have recognized as threats statements using "could" and statements using "would." *Intermet Stevensville*, 350 NLRB 1349, 1349 fn. 4 (2007), where a supervisor told an employee that "a lot of business depended on *Intermet* being a non-union shop and that if *Intermet* was to become unionized, we could lose business," and that "if we lost business, we could lose jobs." *Thayer Dairy Co.*, 233 NLRB 1383, 1388 (1977). "Our sincere belief is that if this Union were to get in here, it . . . could work to your serious harm." was a threat. *W. E. Carlson Corp.*, 346 NLRB 431 (2006).

The Respondent argues that these comments constitute only the manager's personal opinion of what might occur if the Union represented the guards. I do not agree. The Employer's reliance on *TNT Logistics North America, Inc.*, 345 NLRB 290 (2005), is misplaced. In that case, the respondent based its lawful prediction on the fact that it would lose its sole customer, Home Depot, if the union came in. In that case, the employer's prediction was based on objective facts, that Home Depot does not like and does not use unionized carriers, and the employer's contract with Home Depot was set to expire. Here, the Respondent did not cite any objective facts for its prediction that if the Union represented the guards, the store's contract with it could be terminated and the guards could lose their jobs. In this connection, the Respondent takes issue with the term "mass layoff." Donkor's threat was that all the guards could lose their jobs if the contract with Daffy's was cancelled. Inasmuch as seven guards were employed in the store, that would constitute a layoff of a substantial number of employees. The *Gissel* Court required that "a prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probably consequences beyond its control." 395 U.S. at 618. The burden of proof is on the employer to demonstrate that its prediction is based on objective fact. *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995). The Respondent has not done so.

I accordingly find that Donkor's statement constitutes an unlawful threat in violation of Section 8(a)(1) of the Act.

It is also alleged that an unknown agent threatened employees with more onerous working conditions if they chose to be represented by the Union. This refers to Haynes' credited testimony that, at a mandatory meeting attended by managers Kirby, Venti, and Charriez, an unidentified man stated that union dues could be increased at the union's discretion, and that if the union was selected, the workers' voices would be taken away and that they would no longer be able to request a wage increase or a transfer between site, but would have to ask the Union to make those requests.

First, Haynes' testimony that those comments were made was not denied by any of the three managers who attended the meeting. Kirby's conclusory denial that an unknown agent threatened employees with more onerous working conditions was not sufficient to credibly rebut the statements. The individual, although not identified, clearly spoke to the employees as the Respondent's agent. He spoke at a mandatory meeting attended by the Employer's managers who did not disavow his comments.

The Board has found that an employer violated the Act where it told its employees that it would no longer follow its current practice of giving personal and immediate consideration to employee requests for time off, shift preferences or changes, and that employees would have to go to the union to make such requests. *St. Vincent's Hospital*, 244 NLRB 84, 92 (1979). The statements made by the agent here were more pointed and specific than those made in *International Baking Co. & Earthgrains*, 348 NLRB 1133, 1135 (2006), cited by the Respondent. There, the supervisor's comment that the employee was making "decent money" and that the union would harm him was found to be a lawful expression of a personal opinion that the worker did not need the union and would not benefit from it. Here, in contrast, specific negative consequences concerning unionization were specified—that employees' voices would be taken away and its present policy of permitting workers to request a wage increase or transfer would be transferred to the union. No objective basis was given to support the statement that employees could no longer ask their supervisors for a raise or transfer. Such working conditions would not automatically be reserved for union action simply by the union's election as the employees'' representative.

There is some question as to whether the agent's statement that dues could be increased at the union's discretion is alleged as an unfair labor practice. The allegation is that the agent threatened employees with more onerous working conditions which clearly relates to the latter statement that employees would not be able to directly request a wage increase or transfer. The General Counsel's brief did not include argument that the comment about dues increases constituted a threat. I believe that any finding concerning that issue, if found to be a violation, would only be cumulative of the other findings made herein. I therefore will not discuss it.

Further, it is alleged that Venti interrogated employees about the union activities and sympathies of other workers, and solicited employees to engage in surveillance of the union activities and sympathies of other employees. Swift credibly testified that Venti asked him if he knew if Haynes was organizing outside work. When Swift replied that he was, Venti told him to watch him and report any information he had.

In determining whether questioning of employees coercively interferes with employee rights, the Board considers such factors as whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner,

and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18–19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177–1178 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). The fact that the questioner is a high level supervisor, as Venti was, supports a conclusion that the questioning was coercive. *Stoody*, above.

I find that Venti unlawfully interrogated Swift. Venti, a high official of the Employer, had no valid reason to ask if Haynes was organizing outside the job which occurred during the Union's organizing campaign. Swift was questioned in a conference room in the presence of two other company officials. I find that the interrogation was coercive and violated the Act. Similarly, by asking Swift to watch Haynes and report any information he learned, the Respondent violated Section 8(a)(1) of the Act. *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000). It is irrelevant that Venti did not follow up his questioning of Swift by asking Swift if he learned anything further about Haynes' union activities, or that Swift did not provide Venti with such information. The violation is established by Venti's request that Swift watch Haynes and report to him any information he learned.

It is alleged that Shaffer threatened employees with unspecified reprisals for their union activities, and created the impression among its employees that their union activities were under surveillance. This relates to Haynes' credited testimony that Shaffer told him that the Employer was aware that he had been campaigning and organizing for the union, and was "not happy about it," and that a union was not in the Employer's best interest.

First, Shaffer's comment that he was aware that Haynes was engaged in organizing for the Union clearly gave Haynes the impression that his union activities were under surveillance. The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, "under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007). The standard is an objective one, based on the rationale that "employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Industries,* 311 NLRB 257 (1993). Shaffer did not identify his source when he advised Haynes that he was aware of his union activities. *Stevens Creek Chrysler Jeep Dodge,* 353 NLRB 1294, 1296 (2009). His failure to do so is the "gravamen" of the violation. *North Hills Office Services*, 346 NLRB 1099, 1103 (2006). When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employer violates Section 8(a)(1). This is because employees are left to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring.

Further, Shaffer's remark that he was unhappy with Haynes' union activities which were not in the best interest of the company reasonably tended to interfere with Haynes' right to engage in activities in behalf of the Union, and was a threat that Haynes would be subject to unspecified reprisals. Shaffer's comment strongly implied that he would be worse off because of his involvement with the Union, and Haynes would reasonably have interpreted the remark as a threat that the Respondent would retaliate against him in some unspecified way if he continued his support of the Union. *SDK Jonesville Division LP*, 340 NLRB 101, 101 (2003).

It is alleged that Colon threatened employees that they would be discharged because of their support for the Union. Swift credibly testified that agent Colon told him that the Employer knew that Haynes was organizing outside the store and that he would have "some problems." That statement constitutes an unlawful threat. *SDK*, above. Colon added that Manager Grant said that Haynes would be fired as soon as the results of the election were known. This is a clear threat to Swift that Haynes would be fired because of his union activities. *Saint Jean Des Pres Restaurant*, 279 NLRB 109, 118 (1986), where an employer threatened to fire all its employees if the union won the election.

It is alleged that Grant threatened employees with more onerous working conditions if they selected the Union, and told employees that support for the Union amounted to disloyalty towards the Employer. This refers to Haynes' credited testimony that Grant told him that he should be grateful for being employed by the Respondent, and that his working conditions would be much worse if the Union was elected. She further told him that he would not be showing his gratitude toward the Employer if he voted for the Union. First, Grant's statement that working conditions would be worse with a union constitutes a threat that terms of employment would change if the Union was elected.

The statements, taken together, clearly sent a message to Haynes that he should change his attitude about the Union and that his vote for the Union would constitute disloyalty which would result in worse conditions of employment. *Reno Hilton*, 320 NLRB 197, 206 (1995). Further, the statement that he would be considered disloyal if he voted for the Union is an unlawful threat that his disloyalty would not serve him well in the future. Such a threat would reasonably tend to restrain Haynes in his willingness to engage in future union activity. An employer may not rebuke an employee by equating his pro-union sympathies to disloyalty to the employer. *Aladdin Gaming, LLC*, 345 NLRB 585, 617 (2005), where a supervisor told an employee that he was not showing gratitude by wearing a union pin.

III. THE VIOLATIONS OF SECTION 8(A)(3) OF THE ACT

A. Legal Principles

The question of whether the Respondent unlawfully issued two warnings for lateness to Haynes and discharged him is governed by *Wright Line*, 251 NLRB 1083 (1980). Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the employment actions taken. He must show union

activity by Haynes, employer knowledge of such activity, and union animus by the Respondent.

Once the General Counsel has made the requisite showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have discharged Haynes even in the absence of his union activity. If the General Counsel presents a strong prima facie showing of discrimination, the Respondent's burden is "substantial." *Vemco, Inc.*, 304 NLRB 911, 912 (1991).

To establish this affirmative defense "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 even in the absence of the protected activity." *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). "The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities." *Carpenter Technology Corp.*, 346 NLRB 776, 773 (2006).

Accordingly, the Respondent may present a good reason for its actions, but unless it can prove that it would have issued such discipline absent his union activities, the Respondent has not established its defense. "The policy and protection provided by the Act does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discipline is to retaliate for an employee's concerted activities. Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for taking the action in question; rather it "must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *North Carolina Prisoner Legal Services*, 351 NLRB 464, 469 fn. 17 (2007).

B. The General Counsel's Prima Facie Case

Haynes' union activities and the surrounding procedural steps taking place concerning the election occurred in a relatively compressed period of time. Haynes signed a card for the Union on January 26, 2009, and he immediately began organizing on its behalf. The Union filed a petition for representation 1 month later on February 27. Less than 1 month after the petition was filed, mail balloting took place which continued for 3 weeks, from March 31 to April 21. The ballots were counted on April 22, and Haynes was fired 1 day later, on April 23.

I credit Haynes' uncontradicted testimony that he visited stores and spoke to the Employer's guards about the benefits of union membership in February and March, which was both prior to and after the petition was filed. Although employee Swift stated that Haynes urged the workers to vote "yes or no," he characterized Haynes as adamantly pro union, and stated that he told the guards that unionization would be good for them.

Haynes voiced his opinion at a mandatory meeting in late February, rebutting a manager's denunciation of the Union as containing "criminals" by asserting that the Employer was itself criminal because it had not paid him his correct wages, had not granted him a promised raise, and stating that once the Union comes in such actions would cease. Haynes' complaints apparently had merit since the discrepancies in his pay were corrected immediately, and his raise was instantly granted. Neither Venti, Kirby, nor Charriez who were present at the meeting contradicted Haynes' version of the events.

It is apparent, that, at least at that time, Haynes had become persona non grata with the Employer. He was thereafter directed by dispatchers to attend two other mandatory meetings but upon attempting to enter those sessions he was told by Venti, and then by Charriez, the two managers present at the first meeting, that he need not attend. It is clear that Haynes was prevented from entering the meetings because it was believed that he would again make comments in favor of the Union. I reject Venti's testimony that Haynes was not banned from any meeting involving LRI. First, it is not certain that these were meetings conducted by LRI. Second, the evidence establishes that Haynes was barred from at least two meetings despite being directed to attend.

During the same month of February, Haynes was the object of unlawful statements made by a trio of Employer managers. He was told by agent Colon that it would not be wise for him to align himself with the Union and that he should not vote for it. Haynes refused Colon's request that he encourage other guards to do the same. At about the same time, Haynes admitted to Manager Donkor that he wanted the Union, and was the subject of a threat that the store could cancel its contract with the Employer if the Union was elected, with the result that all of the guards could be out of work. Grant told him that his rate of pay would be worse with union representation and voting for it would not be a display of gratitude toward the company.

Employee Swift credibly testified that in March, agent Colon advised that unionization would be bad and that the Employer was aware that Haynes was organizing employees and would have some problems, further stating that Manager Grant told him that Haynes would be fired when the ballots were counted. Swift further credibly stated that Employer official Venti asked him if Haynes was organizing and Swift said he was. Venti asked him to watch Haynes and report any information he had concerning that.

Finally, Manager Shaffer told Haynes on April 13, during the period of time when the ballots were being cast, that the Employer was aware that he had been campaigning and organizing for the union and that it was not happy about such activity. Indeed, Shaffer admitted seeing Haynes speak to a union agent in early April at his store, and reprimanding him for that activity.

It is clear that the above evidence abundantly shows that Haynes engaged in organizing activity in behalf of the Union, that he spoke in favor of the Union to employees and managers, and that the Respondent was aware of such activities.

The Respondent's knowledge of Haynes' union activities is clearly shown in the credited testimony of Haynes and Swift concerning the conversations they had with the Respondent's agent and managers. Further, Kirby's memo informing the Employer's managers and supervisors of their duties under the Act also instructed them to immediately report to the human resources department all conversations they had with employees concerning the Union. Accordingly, Kirby would have been informed, without delay, of the conversations that Colon and the managers had with Haynes and Swift, and would have become instantaneously aware of Haynes' union activities.

Animus toward the Union is also amply shown in the statements of Colon, Donkor, Grant, Venti, and Shaffer, all of which I have found to be unlawful. Thus, I have found that the Respondent threatened employees with mass layoff and more onerous working conditions if they chose to be represented by the Union, interrogated employees about the union activities and sympathies of other employees, solicited employees to engage in surveillance of the union activities and sympathies of other employees, threatened employees with unspecified reprisals for their union activities, created the impression among its employees that their union activities were under surveillance, threatened employees that they would be discharged because of their support for the union, and told employees that support for the Union amounted to disloyalty toward the Employer.

The timing of the delivery of the warnings on April 23, and the discharge the following day supports a finding that the disciplinary action taken against Haynes was motivated by his activities in behalf of the Union. First, Manager Shaffer told Haynes on April 13, only 10 days before his discharge, that the Respondent was aware of his activities on behalf of the Union and was not happy about it. Second, Swift's credited testimony that agent Colon informed him that Manager Grant advised that Haynes would be fired as soon as the ballots were counted strongly supports a finding of unlawful motivation. The two warnings were handed to Haynes on April 23, 1 day after the election ballots were counted and the Union was declared the winner. The following day, Haynes was fired. Clearly, given Haynes' dismal attendance record, a second warning and a final warning issued on the same day would certainly lead to a discharge, in short order, upon his next lateness. However, the Respondent did not have to wait for another lateness to fire Haynes since he was discharged the following day, allegedly for insubordination.

In addition, the warnings were issued to Haynes on April 23, only 10 days after Manager Shaffer told him that the Respondent was not happy that he was campaigning and organizing for the Union.

I accordingly find and conclude that the General Counsel has proven that the warnings administered on April 23 and Haynes' discharge the following day were motivated by his activities in behalf of the Union. *Wright Line*.

C. The Respondent's Defenses

1. The warnings

Once the General Counsel has established a prima facie showing that the actions taken against Haynes were motivated by his union activities, the burden shifts to the Respondent to prove that it would have taken those actions even in the absence of his union activities. *Wright Line*.

The first questions are why the warnings were issued for Haynes' latenesses of April 22 and 23, and why they were delivered to him at his post.

Regarding the necessity for the warnings, Kirby testified that the Respondent has no rule concerning the number of latenesses, the length of time of the lateness, or the interval between latenesses that will warrant the issuance of a warning. Indeed, the record is abundantly clear that Haynes was late on numerous occasions without receiving a warning.

The documentary record of Haynes' latenesses and the warnings issued to him shows that he was rarely issued warnings for lateness. Notwithstanding that he was late to work 54 days in 2007, 28 days in 2008, and 13 days in 2009, the only warnings he received prior to the final two warnings in April, 2009 were a first warning on June 2, 2005 for four latenesses, and a second warning 3 years later, for one lateness on April 5, 2008.

It should be noted that, notwithstanding that the Daffy's manager was described as having high standards and being very demanding, during Haynes' tenure there from March 31, 2008, until immediately prior to his discharge 1 year later, he was late on 35 days, 25 of them as a supervisor, with only one warning for a lateness on 1 day, April 5, 2008.

Further proof that tardiness was tolerated may be seen in the fact that Haynes' replacement, Perez, was late eight times in the 3 months following his succession of Haynes with no evidence that he was warned for such latenesses.

Scheduling Manager Lee stated that he must issue a write-up if there is a "pattern" of lateness or if the guard is "repeatedly or constantly late." The evidence demonstrates that there were 13 instances in 2007 to 2009 where Haynes was late, even excessively late, on 2 and even 3 consecutive days without having received a warning.[9] Accordingly, Haynes' pattern of lateness did not prompt a warning for 1 year prior to April 23, 2009, when the election results were announced.

The method of the issuance of the warnings was unusual. Oliver stated that he delivers warning notices in only a small percentage of cases, but no specific instance of such personal delivery of a warning was produced at trial. Indeed, the managers were advised, in writing, to make every effort to conduct the meeting as discretely and professionally as possible, and that a witness should be present whenever possible. Clearly, the reason for the administration of the discipline at headquarters was to ensure privacy and the presence of a witness.

Haynes and Swift could not recall any other instances of issuance of discipline at a store location. The prior issuance of discipline to Haynes was in the Employer's office. Here, in contrast, Oliver presented the discipline on a shop floor near other employees. Although he allegedly asked that they discuss the matter in private, he had already presented the warnings to Haynes and admittedly had attempted to discuss his lateness on the shop floor.

Although it is clear that the shop floor is not the preferred place to administer discipline, Kirby stated that written disciplinary letters are delivered to a worksite when there is an "immediate need for a change in conduct"—if the employee's actions must be "stopped immediately." There was no showing as to what urgency required the delivery of the warnings on April 23. Haynes' was habitually late, but the last warning he received was 1 year earlier. It is obvious that the timing of the issuance of the warnings was directly related to the union election results having been publicized the prior day. Grant's prediction to employee Swift that Haynes would be fired upon the announcement of the election outcome was thus fulfilled. The

[9] Although Haynes was late on April 5 and 6, 2008, he received a warning only for the April 5 lateness.

warning notices were thus the prelude to his discharge the following day.

The Respondent argues that the warning notices were initiated by Rorrie Lee in the scheduling department in Staten Island who had no knowledge of Haynes' union activities. Indeed, Lee testified that when he told the dispatcher to notify the human resources department so that they could take disciplinary action against Haynes, he was not aware that Haynes was involved in organizing for a union.

Inasmuch as the notices were signed by Kirby, and even according to Lee, it is the human resources department which disciplines the employee, it is clear that Kirby authorized and imposed the discipline. Kirby, as the senior director of human resources, was undoubtedly aware of Haynes' union activities. She was present at the mandatory meeting at which he stated that when the union represents the employees they would no longer receive discrepancies in their pay. Further, she directed her managers to inform her immediately of any conversations they had with employees concerning the Union. Accordingly, the discussions concerning the Union between Haynes, Swift, agent Colon, and Managers Donkor, Grant, Venti, and Shaffer, set forth above, must have been promptly reported to her.

The evidence demonstrates that although the Respondent issued written warnings to Haynes on occasion, the record abundantly shows that it tolerated Haynes' chronic tardiness for an extended period of time, even as a supervisor, during his 4-1/2 year tenure with the Employer. His last two latenesses involved nothing more than his latest latenesses. Although the Respondent argues that, as a supervisor, he should have been on time and even early to his post in order to attend to the duties incumbent upon a supervisor, these written warnings did not specify why these latenesses were more egregious than the others. He was late as usual and the Respondent had been willing to tolerate his tardiness until he became a union advocate, and until the election results were made known. At that point, the Respondent decided that his tardiness was no longer acceptable. *Made in France, Inc.*, 336 NLRB 937, 946–947 (2001).

On this record, although not condoning Haynes' excessive tardiness, and given Haynes' record of latenesses which has continued throughout his employment, I find that the two warnings issued for latenesses on April 22 and 23, 2009, would not have been issued in the absence of his union activities.

As set forth above, the Respondent's burden is to show that it would have issued the two warnings, not that it had a good reason to issue the warnings, or even that it could properly have issued the warnings, regardless of his union activities. As noted above, where the General Counsel has presented a strong prima facie showing of discrimination, the Respondent's burden is substantial.

Here, given the fact that the Respondent issued only two warnings to Haynes over the course of his employment prior to April 2009, despite his recurrent and consistent latenesses, I cannot find that it would have issued the two warnings at issue if he had not engaged in activities in behalf of the Union. I accordingly find that the Respondent has not proven that it would have issued the two warnings to Haynes for his latenesses on April 22 and 23, 2009, even in the absence of his union activities. *Wright Line*.

2. The discharge

Inasmuch as I find that the two warnings were unlawful, any disciplinary action growing out of those warnings was also unlawful. "It is well settled that, where a respondent disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful." *Publix Super Markets*, 347 NLRB 1434, 1441 (2006). Clearly, if the warnings were not issued, Oliver would not have visited the store to give them to Haynes and would not have become involved in a confrontation with him. In the absence of the confrontation, Haynes would not have allegedly become insubordinate either to him or in the meeting which was called by Kirby at which he was discharged. Accordingly, the discharge, based on Haynes' alleged insubordination to Oliver and Kirby, grew out of the unlawful warnings issued to Haynes the day before. Thus, the discharge was based, at least in part, on the unlawfully issued warnings. Nevertheless, I will discuss the discharge as an independent matter.

First, it must be noted that the Respondent's answer to the complaint asserts that Haynes was discharged "because of his chronic tardiness and insubordinate reaction to the Respondent's efforts to engage in progressive discipline." However, at hearing, the sole reason for the discharge, as testified by Kirby, was his insubordination and not his lateness. In finding a discharge to be unlawful, the Board has noted that where a respondent asserts one reason for discharge in its answer and then shifts from that reason to another at hearing, doubt is cast on the "true reason for its action." *Don Pizzolato, Inc.*, 249 NLRB 953, 957 (1980). It is well settled that shifting defenses is evidence of a discriminatory motive. *Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978). Accordingly, confidence in the Respondent's true reason for Haynes' discharge is undermined when it first asserts that he was fired for lateness and insubordination, and then declares that its sole reason for discharge was insubordination.

The Respondent contends that Haynes was discharged because of his insubordination to Oliver at their meeting, and his subsequent refusal to write a report containing his version of the confrontation with that manager.

As discussed above, the evidence supports a finding that Oliver's visit to the store to present the warning notices to Haynes was unusual. It was not the preferred method of imposing discipline on employees. Rather, the employee is called to the office where he is presented with the warning in a "professional, discrete" manner. The confrontation which resulted from the meeting was a product of the way the discipline was imposed. I credit Haynes' testimony that Oliver demanded that he sign the warning notices. Oliver testified that he asked Haynes to sign them, but his written report stated that he asked Haynes to sign them if he wanted to.

Haynes refused to sign, as he had done 1 year before without incident. Kirby stated that an employee need not sign the warning and his refusal is simply noted on the form by the supervisor. Further, no discipline is issued for such a failure. I doubt that Oliver told him, as set forth in his report, that he could sign the forms if he wanted to. It is more likely that Oliver, as testified by Haynes and Oliver himself, directed him to sign, and

Haynes, believing that he did not have to sign, refused. That refusal caused the discussion to escalate, leading to the meeting with Kirby the following day which ended with Haynes' termination. It may properly be found that Oliver's visit to the store to administer the two warnings was an effort to establish a reason for Haynes' discharge the following day.

Haynes' insubordination to Oliver, if Oliver's testimony is to be believed, is that Haynes refused to sign the warning notices, pantomimed tearing up the warnings, spoke to him in a loud voice, refused to explain his latenesses and spoke about irrelevant matters—the Employer's mistreatment of him and others, and the Union's victory in the election. First, Haynes was not required to sign the warnings, Haynes said that he raised his voice when Oliver did, and witness to the incident Berkley, did not corroborate Oliver's account of their meeting. Berkley did not state that he heard Haynes call Oliver a clown.

Haynes' testimony that at the meeting with Kirby she demanded that he sign the warning notices or be fired is credited. As set forth above, there is no such requirement. Even assuming that Kirby asked Haynes for his version of the confrontation with Oliver and Haynes refused, the evidence does not support a finding that Haynes would have been discharged for insubordination even in the absence of his union activities.

Thus, the two employees fired for insubordination prior to Haynes were employed a short time, only 3 and 9 months. Their infractions were far more serious than Haynes'. Carr threatened a coworker with violence, spoke inappropriately to a client, and abandoned her post. Filangeri used rude, obscene and/or abusive language to the store manager and threatened to sue the store.

Two guards were fired for insubordination after Haynes was terminated. One made obscene comments to the store manager, called him a clown and persisted in discussing the matter in front of store employees. The other abandoned her post and was disrespectful to an Employer manager, refusing to leave the office when asked. Thus, the Respondent has not proven that it has "similarly discharged other employees for like conduct." *Network Dynamics Cabling*, 351 NLRB 1423, 1429 (2007).

It is reasonable to infer that the alleged insubordination was seized on as a way of terminating a union activist—one whom Manager Grant had warned that the Employer intended to fire as soon as the ballots were counted. I accordingly find and conclude that the Respondent has not met its burden of proving that it would have discharged Haynes even in the absence of his union activities. *Wright Line*, above.

CONCLUSIONS OF LAW

1. By threatening employees with mass layoff if they chose to be represented by the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By threatening employees with more onerous working conditions if they chose to be represented by the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By interrogating employees about the union activities and sympathies of other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By soliciting employees to engage in surveillance of the union activities and sympathies of other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

5. By threatening employees with unspecified reprisals for their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

6. By creating the impression among its employees that their union activities were under surveillance, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

7. By threatening employees that they would be discharged because of their support for the union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

8. By telling employees that support for the union amounted to disloyalty towards the Respondent, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

9. By issuing disciplinary warnings on April 22 and 23, 2009, to its employee Franklyn Haynes, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

10. By discharging its employee Franklyn Haynes, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

THE REMEDY

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In recommending the reinstatement of Haynes, I note that the Respondent's officials testified that returning Haynes to work would undermine the Employer's authority to discipline its employees. However, the Board's authority to impose a meaningful remedy where an employee is unlawfully discharged requires that I order that he be reinstated.

In the complaint, the General Counsel seeks an Order requiring that the Respondent pay quarterly compounded interest on all monetary awards. Inasmuch as the Board has not adopted this remedy, I will not recommend that it be applied. Simple interest will be assessed. See, e.g., *Glen Rock Ham*, 352 NLRB 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Metro One Loss Prevention Services Group (Guard Division NY), New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with mass layoff if they chose to be represented by Allied International Union (Union).

(b) Threatening employees with more onerous working conditions if they chose to be represented by the Union.

(c) Interrogating employees about the union activities and sympathies of other employees.

(d) Soliciting employees to engage in surveillance of the union activities and sympathies of other employees.

(e) Threatening employees with unspecified reprisals for their union activities.

(f) Creating the impression among its employees that their union activities were under surveillance.

(g) Threatening employees that they would be discharged because of their support for the Union.

(h) Telling employees that support for the union amounted to disloyalty towards the Respondent.

(i) Issuing disciplinary warnings to its employee Franklyn Haynes because of his union activities.

(j) Discharging its employee Franklyn Haynes because of his union activities.

(k) 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 Franklyn Haynes full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful warnings of April 22 and 23, 2009 issued to Franklyn Haynes, and any reference to his unlawful discharge, and within 3 days thereafter notify Franklyn Haynes in writing that this has been done and that the April 22 and 23, 2009 warnings and discharge will not be used against him 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) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 2, 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 February 1, 2009.

(f) 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. April 21, 2010

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 threaten you with mass layoff if you choose to be represented by Allied International Union (Union).

WE WILL NOT threaten you with more onerous working conditions if you choose to be represented by the Union.

WE WILL NOT interrogate you about the union activities and sympathies of other employees.

[10] 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.

[11] 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."

WE WILL NOT solicit you to engage in surveillance of the union activities and sympathies of other employees.

WE WILL NOT threaten you with unspecified reprisals because of your union activities.

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

WE WILL NOT threaten you that you would be discharged because of your support for the Union.

WE WILL NOT tell you that support for the union amounts to disloyalty towards Metro One Loss Prevention Services Group.

WE WILL NOT issue disciplinary warnings to you because of your union activities.

WE WILL NOT discharge you because of your union activities.

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

WE WILL within 14 days from the date of the Board's Order, offer Franklyn Haynes full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Franklyn Haynes whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings of April 22 and 23, 2009 issued to Franklyn Haynes, and any reference to his unlawful discharge, and WE WILL within 3 days thereafter notify Franklyn Haynes in writing that this has been done and that the April 22 and 23, 2009 warnings and the discharge will not be used against him in any way.

METRO ONE LOSS PREVENTION SERVICES GROUP (GUARD DIVISION NY), INC.