

**Nos. 10-3511 & 10-3783**

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**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**v.**

**STARBUCKS CORPORATION**

**Respondent/Cross-Petitioner**

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**ON APPLICATION FOR ENFORCEMENT  
AND CROSS-PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board to enforce, and the cross-petition of Starbucks Corporation to review, the Board's Order in *Starbucks Corp.*, reported at 355 NLRB No.

135. (SA56, n.1.<sup>1</sup>) The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board filed its application to enforce the Board's Order on August 27, 2010, and Starbucks filed its petition for review on September 21, 2010. Each was timely as the Act places no time limitation on these filings.

This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in New York, within this Circuit. The Board's Order is a final order within the meaning of Section 10(e) and (f) of the Act.

### **RELEVANT STATUTES AND REGULATIONS**

Sections 7 and 8 of the Act (29 U.S.C. §§ 157 & 158) appear in the Special Appendix. (SA57-60.) Additional relevant statutory and regulatory provisions are contained in the Addendum at the end of this brief.

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<sup>1</sup> "JA" refers to the joint appendix. "SA" refers to the special appendix. "SuppA" refers to the supplemental appendix that the Board is moving to file with this brief. "Br." refers to Starbucks' opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the Board is entitled to summary enforcement of those portions of its Order remedying numerous Section 8(a)(3) and (1) violations that the administrative law judge found and the Board adopted, and to which Starbucks filed no exceptions.

2. Whether substantial evidence supports the Board's finding that Starbucks violated Section 8(a)(1) of the Act by implementing and enforcing a rule prohibiting employees from wearing more than one prounion button.

3. Whether substantial evidence supports the Board's finding that Starbucks violated Section 8(a)(3) and (1) of the Act by discharging Joseph Agins.

4. Whether substantial evidence supports the Board's finding that Starbucks violated Section 8(a)(3) and (1) of the Act by discharging Daniel Gross.

## **STATEMENT OF THE CASE**

On and after March 14, 2006, Local 660, Industrial Workers of the World ("the Union"), filed a number of unfair labor practice charges with the Board against Starbucks based on actions taken by Starbucks at several of its retail stores in New York City. After those charges were consolidated,

the Board's General Counsel issued a complaint alleging that Starbucks repeatedly violated the Act.

Following a hearing, an administrative law judge issued a decision on December 19, 2008. She concluded that Starbucks committed numerous violations of the Act by prohibiting employees from discussing the Union while off duty and from discussing terms and conditions of employment; prohibiting employees from posting union-related material on Starbucks' bulletin boards; restricting off-duty employees' access to the back room of a store; preventing a union supporter from picking up shifts at other stores; and disciplining another union supporter for confronting a member of management about the suspension of another employee. Starbucks did not file exceptions with the Board challenging these findings.

The administrative law judge also concluded that Starbucks violated the Act by prohibiting employees from wearing more than one prounion button, and by discharging Joseph Agins, and issuing disciplinary performance evaluations to, and ultimately discharging, Daniel Gross, for engaging in protected union activity. Starbucks filed exceptions with the Board to these findings. The Board, then consisting of two members, affirmed these findings and conclusions in a Decision and Order issued on

October 30, 2009. (SA1-55.)<sup>2</sup> Starbucks filed a petition for review of that Order with the Court of Appeals for the District of Columbia, and the Board filed a cross-application for enforcement of that Order.

On June 17, 2010, the Supreme Court issued *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (“*New Process*”), holding that the two-member Board did not have authority to issue decisions when there were no other sitting Board members. The D.C. Circuit then remanded this case to the Board for further processing by a properly-constituted Board. On August 26, 2010, a three-member panel of the Board issued the Order that is now before the Court. (SA56.) In its Decision, the Board “affirm[ed] the judge’s rulings, findings, and conclusions and . . . adopt[ed] the recommended Order to the extent and for the reasons stated in the decision reported at 354 NLRB No. 99.”

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<sup>2</sup> The Board (SA2, 56) disagreed with the administrative law judge and dismissed a complaint allegation that Starbucks’ discharge of Isis Saenz violated the Act.

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. Background

##### 1. Starbucks' organizational structure

Starbucks operates retail coffee stores throughout the United States, including a number of stores in New York City that are within Starbucks' New York Metro region. (SA6; JA264.) Each store is within a district comprising 8 to 9 stores, led by a district manager. (SA6; JA659.) The district manager reports to a regional director, who in turn reports to the vice president of the New York Metro Region. (SA6; JA264-66, 658-59.)

Starbucks stores are staffed by "Partners," including a store manager, one or more assistant store managers, as well as shift supervisors and baristas, whose responsibilities include preparing drinks for customers, processing payments, and stocking the store. (SA6; JA86.)

##### 2. The Union seeks to organize Starbucks' employees, and Starbucks responds

Beginning in 2004, the Union worked to organize Starbucks' employees. (SA6; JA448-51.) On May 17, 2004, barista Daniel Gross filed a petition with the Board on behalf of the Union, seeking to represent employees at a Starbucks store located on 36th Street and Madison Avenue, and issued a press release about the filing. (SA6, 8; JA98, 99, 448-50.) The

Union withdrew that petition several months later. (SA6; JA457-58.) It continued, however, to engage in various actions involving Starbucks, such as leafleting in front of stores, contacting members of Starbucks management, making statements to the media, launching a website, and engaging in demonstrations. (SA6; JA99, 455, 523.)

In an attempt to “thwart a potential union situation,” Starbucks collected and disseminated information, including weekly summaries referred to as “health checks,” about its employees’ union activities and the level of union support in stores located in the New York Metro region. (SA6; JA185-99, 638-40, 644-49.) It also kept track of employees identified as “IWW Supporters” and those identified as “pro-Starbucks” and trained managers on how to deal with these IWW supporters. (SA6-7; JA188, 198-201, 1849-51.)

**B. Employees at the Union Square East Store Announce Their Support for the Union, and Starbucks Responds by Prohibiting Employees from Posting Nonwork-Related Material on an Employee Bulletin Board**

On November 18, 2005, employees at Starbucks’ Union Square East store, including Daniel Gross and Tomer Malchi, accompanied by several employees from other stores, announced their support for the Union by passing out flyers in front of the store and presenting Store Manager Michael Quintero with a “list of demands.” (SA9; JA87, 300-03, 468-69.) They

asked to meet with management to discuss matters such as work hours and grievances, but were later told by Quintero that upper management would not do so. (SA9; JA87, 300-03, 320.)

The next day, November 19, Malchi posted a copy of the letter they had presented to Quintero, as well as a union flyer, on a bulletin board in the back room of the Union Square East store. (SA13; JA87, 88, 314-15.) Prior to that time, employees freely posted personal items on that same bulletin board, such as party invitations and announcements about poetry readings and musical performances. (SA13, 15; JA312-13, 363-64, 709.)

Later that day, Malchi noticed that, although some personal material remained on the bulletin board, the union material had been removed. (SA13; JA315-17.) Malchi reposted the material several more times that day, and each time it was removed. (SA13-14; JA316.) During his next shift, Malchi found that someone had removed all personal items from the bulletin board, including the union material, and replaced it with Starbucks-related material. (SA14; JA317-18.) In response to Malchi's inquiry, Quintero informed him that employees were no longer permitted to post anything on the bulletin board. (SA14; JA318.)

**C. Starbucks Prohibits Employees at the Union Square East Store from Entering the Back Room While Not on Duty**

Before the employees at the Union Square East store announced their support for the Union in November 2005, they regularly entered the back room of the store while not on duty to check their schedules, pick up their paychecks or tips, and wait for co-workers to get off work. (SA19; JA323-24, 366.) Soon after the announcement, Malchi was prevented from doing so by Assistant Store Manager Kristina Doran. (SA19; JA325.) Other employees were likewise advised that they would not be permitted in the back room if not scheduled to work. (SA19; JA367-68.) Starbucks continued to enforce this measure until March 2006, when it once again permitted employees to enter the back room. (SA19; JA327.)

**D. Starbucks Discharges Joseph Agins**

Joseph Agins, an employee since May 2004 at the 9th Street store, was an “open and vocal” union supporter. (SA25; JA97.) Agins participated in demonstrations, frequently distributed literature in front of various Starbucks stores, and expressed his support for the Union to his store manager. (SA25; JA97, 295, 320.) In an April 2005 email, Starbucks identified Agins as a likely union adherent. (SA25, n.41; SuppA19.)

On November 21, 2005, a group of employees, including Agins, Malchi, and Ayala, as well as several nonemployees, participated in a

demonstration at the 9th Street store to support employees who had been instructed to remove union buttons they wore while working. (SA26; JA307, 377, 581.) District Manager Will Smith had required employees at that store to either remove all union buttons or go home. (SA25-26; JA577-80.) On November 20, Smith told Montalbano to remove his union button or leave work. (SA29, 33; JA577-80.)

The group, none of whom was working, entered the store and took a seat; each was wearing union buttons and insignia. (SA26; JA307, 378-79, 581-82.) Montalbano, who was working, informed Assistant Store Manager Tanya James that he was also going to put on a union button. (SA26; JA582-83.) James went into the back room, and then came back out and told Montalbano that Smith had advised her by phone that, as long as Montalbano was working and not disrupting anything, he could continue to wear the button. (SA26, 30 n.50; JA380, 583.)

A short while later, Ifran Yablon entered the store. (SA26; JA308.) Yablon was an assistant store manager at another Starbucks store. (SA26; JA583.) Agins recognized Yablon as a regular customer and a Starbucks employee. (SA26; JA381, 427.) Also, during a Starbucks-sponsored bottled water promotion the previous summer, at which Agins and his father

distributed Union leaflets, Yablon had made derogatory remarks about Agins' father's age and support for the Union. (SA26, 30; JA383, 387-91.)

As an assistant store manager, Yablon would have known what the union button signified, but nonetheless he approached Agins, asked about the button, and then stated that employees did not need a union and that unions only worry about collecting dues, not defending workers. (SA26, 29-30; JA584, 687-88.) In response, Agins expressed his support for the Union. (SA26, 30, 32; JA382-83, 584.) This led to a conversation about the relative merits of the Union and Starbucks, which escalated into a brief argument during which they both made hand gestures and used profanity. (SA30; JA382-87, 430-31, 584-85.) During this argument Agins told Yablon that he did not want to fight him. (SA26; JA385-86.) Agins' companions soon intervened and had Agins join them at their table. (SA30; JA309-10, 385.) James instructed Yablon to "leave it alone," after which Yablon left the store. (SA26, 30, 32; JA689.) James then admonished Agins, who remained seated and listened to her. (SA30; JA385-86.) Agins and his companions remained in the store for about 10 more minutes. (SA30, 31; JA311.) James did not report this matter to anyone at Starbucks that night, nor did she contact the police. (SA31; JA690.)

Three weeks later, Starbucks discharged Agins for this incident. (SA28; JA129, 393.) On December 12, when Agins arrived at work, Store Manager Julian Warner told him not to clock in; when Agins asked why, Warner stated it was because of “what had occurred with the Yablon incident.” (SA28; JA393, SuppA35-36.) Agins was then told he was fired. (SA29; JA393.) Warner completed a Partner Action Notification to document the termination, noting the following as the explanation for the discharge: “Partner was insubordinate and threatened the store manager. Partner strongly support [sic] the IWW union.” (SA29; JA129.)

**E. Starbucks Implements and Enforces a Rule Prohibiting Employees from Talking About the Union at Work While Allowing Other Nonwork-Related Discussions**

On March 7, 2006, Starbucks entered into an informal settlement agreement with the Board resolving various unfair labor practice charges filed by the Union. (SA9; JA26.)<sup>3</sup> As part of that agreement, Starbucks agreed to revise its solicitation policy to read as follows:

*Distribution Notices/Soliciting*

Partners are prohibited from distributing or posting in any work areas any printed materials such as notices, posters or leaflets. Partners are further prohibited from soliciting other partners or nonpartners in stores or Company premises during working time or the working time of the partner being solicited. [SA9-10; JA26.]

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<sup>3</sup> As noted by the Board (SA9 n.13), that agreement did not preclude anyone from filing charges based on events that predated the agreement.

Starbucks interpreted this rule as a “blanket prohibition” against employees talking about the Union while working, regardless of the actual content or the length of the conversation, or whether it interfered with company operations. (SA18; SuppA29-30.) Starbucks permitted employees, however, to discuss other nonwork-related matters—such as movies, music, books, family, children, and traveling—while serving customers or performing other assigned tasks. (SA16; JA368-69, 718.)

While working on March 13, Malchi and employee Suley Ayala spoke with employee Aiesha Mumford, an employee who regularly worked at a different location, about the Union and gave her a union button. (SA16, 22; JA329-31.) And while working on April 3, 2006, Malchi spoke with employee Daniel Schwartz about the amount of money they were earning at Starbucks, their work conditions, and the Union, as well as sports and the possibility of meeting outside of work. (SA16, 22; JA331-32.)

On April 25, 2006, acting on instructions from District Manager Kim Vetrano, Quintero informed Malchi that he had violated Starbucks’ prohibition against solicitation by speaking with Schwartz about the Union while working, and instructed him to stop doing so. (SA16, 22; JA333-34, 718.) During that discussion, and in subsequent meetings with Quintero and members of upper management, Malchi learned he had been issued written

warnings for violating Starbucks' prohibition against distribution and solicitation by talking with Schwartz about the Union during work hours, giving Mumford a union button, and distributing flyers about a union party. (SA22-23; JA89-91, 335-43, 713.) During a May 3 meeting, Beckman advised him that if this continued he would be terminated. (SA16, 23; JA90, 336-38.)

**F. Starbucks Prohibits Malchi from Working Shifts at Other Locations**

On April 25, 2006, after Malchi informed Quintero, pursuant to company policy, that he planned on picking up a shift at another store, Quintero responded that he could not do so because he was on a final warning. (SA22, 24; JA334, 716.) Starbucks did not, however, have any policy prohibiting employees from working borrowed shifts at another store when they were on a final warning. (SA23; JA273.)

**G. Starbucks Prohibits Employees from Talking About Terms and Conditions of Employment**

In April 2006, Peter Montalbano and Laura DeAnda, who were employees and known union supporters, were called into the back room of the 9th Street store by District Managers Will Smith and Karen Schueler. (SA8, 16, 18; JA97, 599.) Smith alleged that Montalbano and DeAnda had spoken about the Union while working, that this constituted solicitation, and

that it must stop. (SA16, 18; JA599.) Montalbano stated that employees were entitled to talk about wages and working conditions provided those discussions did not interfere with work. (SA18; JA600.) Smith responded that wages are a private issue that should not be discussed. (SA18; JA600-01.)

#### **H. Starbucks Institutes the One Button Rule**

With Starbucks' encouragement, employees regularly wore numerous buttons and pins on their hats and aprons. (SA1, 11, 12, 13; JA92-96, 349-50.) These included Starbucks-issued M.U.G. pins (Moves of Uncommon Greatness) and Green Apron pins, which employees received as signs of recognition. (SA11, 12; JA211-18.) Along with these Starbucks buttons, several employees began wearing buttons in support of the Union. (SA1, 12; JA293.) There were two buttons at issue; one was slightly larger than the other, but both were approximately 1-inch in diameter and bore the letters "IWW" in white letters against a red background. (SA1, 12; JA293, SuppA6, 7.)

As part of the March 7 informal settlement with the Board, Starbucks agreed to end its policy that prohibited employees from wearing union buttons. (SA9-10; JA124.) The new policy stated the following:

## Pins

Partners are not permitted to wear buttons or pins that advocate a political, religious or personal issue. The only buttons or pins that will be permitted are those issued to the partner by Starbucks for special recognition or advertising a Starbucks sponsored event or promotion; and reasonably-sized and placed buttons or pins that identify a particular labor organization or a partner's support for that organization, except if they interfere with safety or threaten to harm customer relations or otherwise unreasonably interfere with Starbucks public image. [SA10; JA26.]

Starbucks interpreted this new policy as prohibiting employees from wearing more than one prounion button. (SA12; JA269, 786.)

Starbucks enforced this rule on a number of occasions. At various times it instructed employees Malchi, Montalbano, DeAnda and Charles Fostrum to remove all but one of the union buttons that each was wearing. (SA12 & n.16; JA353-54, 594-95, 607, 764-65.)

## **I. Starbucks Issues Disciplinary Performance Evaluations Against, and Ultimately Discharges, Daniel Gross**

### **1. Gross actively supports the Union**

Gross worked at Starbucks' 36th Street store from May 2003 until his discharge on August 5, 2006. (SA38; JA447.) Gross had an undisputed, extensive history of union activity. (SA8.) He filed the Union's May 2004 petition with the Board seeking to represent employees at the 36th Street store and issued a press release about the filing. (SA6, 8; JA98, 99, 448-50.) He participated in several demonstrations in June 2005 to protest the

discharge of a Union supporter. (SA8; JA288-89, 467, 563-68.) He was present when employees announced support for the Union in November 2005 at Starbucks' Union Square East store. (SA9, 39; JA469, 574-76.) And Gross was one of the main organizers of the "Black Friday" demonstration held on Friday, November 25, 2005, in front of the Union Square East store to protest Starbucks' refusal to meet with employees as well as to publicize the unfair labor practice charges that the Union filed with the Board. (SA9, 39; JA320-22, 473, 588.) The following day, Gross was quoted in a New York Times article about that demonstration, which prompted Starbucks' CEO, Jim McDonald, to send a written response to all employees, which was posted in stores. (SA39; JA474, SuppA1, 4.) Gross, on behalf of the Union, also generated various news releases about Starbucks. (SA39; JA463-64, 474, 498, SuppA8.)

## **2. Starbucks issues Gross disciplinary performance evaluations**

Starbucks gives its employees performance reviews approximately every 6 months. It rates employees in a number of areas along a scale of 3–Exceeds Expectations, 2–Meets Expectations, or 1–Needs Improvement. The scores are then averaged to arrive at an overall rating.

At Gross' first two performance reviews, in November 2003 and May 2004, he received overall ratings of 2.4 and 3.0 out of 3.0. (SA38; JA107-

10.) In every individual category, Starbucks gave him a score of either exceeds expectations or meets expectations. (SA38; JA107-10.)

At Gross' next performance review in May 2005, he received an overall rating of 2.0 out of 3.0. (SA38; JA113.) Although Starbucks found that he exceeded expectations in several categories, including customer service and drink preparation, it also found for the first time that he needed improvement in several categories. (SA38; JA113.)

**a. January 29, 2006 Performance Evaluation**

On January 29, 2006, District Manager Mark Anders and Store Manager James Cannon gave Gross his next performance review, which had an effective date of November 27, 2005, and an overall rating of "Needs Improvement." (SA40; JA100-02, 486.) Although Starbucks found that Gross met expectations in areas including customer service and beverage preparation, in no category did he exceed expectations and he needed improvement in nine. (SA40; JA100-02.) Starbucks stated that Gross did not display a positive attitude about Starbucks and failed to "adhere[] to Starbucks values, beliefs and principles during good and bad times." (SA42; JA100-02.) Starbucks did not provide Gross with examples supporting these comments. (SA42; JA100-02.)

Although Starbucks did not have a policy requiring employees to work a minimum number of shifts, Starbucks also asserted that Gross did not maintain adequate hours of availability, that he was rarely scheduled to work, and that when he was scheduled he frequently asked other partners to work his shifts for him. (SA39, 40; JA100-02, SuppA24.) During the review meeting, Gross reminded Cannon that several months ago they had discussed Gross giving away his shifts, and that although Gross had requested time off since then, which was granted, he had not given away any more scheduled shifts. (SA51; JA493-97, SuppA25.)

Anders then asked Gross to complete a new form indicating what hours he was available to work. (SA40; JA490.) Gross, who at the time was only available to work on Saturday and Sunday afternoons, asked if he was required to increase his availability in order to improve his performance review. (SA39, 51; JA490.) Anders said no. (SA51; JA490.)

#### **b. April 14, 2006 Performance Evaluation**

On April 14, 2006, Gross was called into a meeting with District Manager Paul Grzegorzcyk, Cannon, and new store manager Jose Lopez, who had learned from Cannon that Gross was a union spokesman and organizer. (SA42-43; JA222-224, 501-03.) Gross was presented with an unsigned performance review that, like the January performance review, had

an effective date of November 27, 2005.<sup>4</sup> (SA43; JA103-06.) The review was substantially similar to the review he received in late January, except Starbucks upgraded his score with respect to attendance from “Needs Improvement” to “Meets Expectations,” and noted “Dan, as agreed to during his last review, has worked all of his shifts as scheduled and has been on time and in dress code on all occasions.” (SA43, 51; JA103-06.) Gross again received an overall score of “Needs Improvement.” (SA43; JA103-06.)

**c. April 29, 2006 Performance Evaluation**

On April 29, 2006, Lopez met with Gross to give him an “Update on Performance” memo. (SA44; JA79-80, 621.) At that time, Lopez had only worked with Gross on three occasions. (SA44-45; JA622.) Lopez maintained a running log about store matters in a log book, in which he noted that Gross was “very positive,” displayed good customer service skills, sampled pastries, and offered to assist a coworker in a nonwork matter. (SA45; JA30, 615-18, SuppA22-23.) Yet in the memo, Lopez asserted that Gross was lacking in positive interactions with customers and

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<sup>4</sup> Starbucks later produced a similar version of the performance review given to Gross, but that later copy bore a manager’s signature, was dated April 3, 2006, and contained a fifth page with a section for “Additional Comments” that was omitted from the version provided Gross. (SA44; JA74-78, 103-06, 502-04.)

partners and had allegedly failed to participate in the sampling and promotion of products. (SA45; JA79-80.) Lopez did not identify any particular instances in which Gross' work was deficient. (SA45; JA79-80.)

**d. Lopez tells Gross to stop calling employees about the Union while off duty**

On May 12, 2006, Lopez learned that Gross had called several employees outside of work to talk about the Union. (SA46; JA254-56, 631.) The following day he informed Gross that two employees had complained about Gross calling them, and he instructed Gross not to call employees on the phone to talk about Starbucks. (SA46; JA519, 630.) Lopez further stated that Gross was not creating a good environment. (SA46; JA43, 630.) Gross asked Lopez what would happen if he were to continue to call employees to talk about Starbucks and Lopez stated that "we would be back here again." (SA46; JA519-20.)

**e. Starbucks issues Gross a written warning and a final disciplinary performance evaluation, and discharges him**

On August 5, Gross was summoned to a meeting with Lopez, Grzegorzcyk, and Partner Resources Manager Joyce Varino. (SA48; JA253, 526-27.) Lopez informed Gross that Starbucks was issuing him a corrective action based on an interaction he had with District Manager Allison Marx on

July 15, 2006, at a union demonstration protesting the decision to suspend a Starbucks' employee and union supporter. (SA48; JA511-15, 527-58.)

Gross was also given a new performance review, again with an overall rating of "Needs Improvement." (SA49; JA120-23.) Starbucks found that Gross met expectations in several areas, including preparing beverages and customer service. (SA52; JA120-23.) But it rated him as "Needs Improvement" in individual categories based in part on his interaction with Marx, his conversations with several employees about the Union outside of work, and his limited work availability. (SA49, 50, 52; JA120-23.)

Lopez then informed Gross that he was discharged. (SA50; JA531.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

Based on the foregoing facts, the Board agreed in part and disagreed in part with the administrative law judge's findings. Because Starbucks did not file exceptions to a number of the administrative law judge's findings, the Board adopted the judge's findings that Starbucks committed numerous violations of Section 8(a)(3) and (1) of the Act. (SA1 & n.3, 56)

With respect to the judge's findings that Starbucks excepted to, the Board agreed with the judge's findings that Starbucks committed several additional violations of the Act. First, the Board found that Starbucks violated Section 8(a)(1) of the Act by implementing and enforcing a policy

prohibiting employees from wearing more than one button in support of the Union. (SA1, 56.) Second, the Board found that that Starbucks violated Section 8(a)(3) and (1) by discharging employee Joseph Agins based on an argument he had with an off-duty supervisor while he was participating in a protected union demonstration. (SA1, 56.) Finally, the Board found that Starbucks violated Section 8(a)(3) and (1) of the Act by issuing disciplinary performance evaluations to, and ultimately discharging, Daniel Gross in retaliation for the prominent role he played in the Union's organizing efforts. (SA1, 56.)

To remedy these violations, the Board ordered Starbucks to rescind and stop giving effect to work rules found unlawful and remove from its files any discipline or performance evaluations found unlawful. (SA1, 53, 56.) Affirmatively, the Board's Order required Starbucks to reinstate Agins and Gross, make each whole, remove from its files any reference to their discharges, and post a remedial notice. (SA1, 53, 56.)

### **SUMMARY OF ARGUMENT**

Pursuant to a Board agreement settling previous unfair labor practice charges, Starbucks adopted a policy permitting employees to wear union buttons. Thereafter, however, Starbucks interpreted the policy as limiting each employee to wearing one union button. It is well established that such

restrictions are presumptively invalid under Section 8(a)(1) of the Act unless justified by “special circumstances.” Starbucks maintains that its public image constitutes such special circumstances, but the Board, based on substantial evidence, rejected this notion given that the union button was no more conspicuous than the panoply of other buttons that Starbucks encouraged its employees to display on their clothing. (SA1.)

In November 2005, Starbucks discharged union member Agins for engaging in protected union activity in violation of Section 8(a)(3) and (1) of the Act. During a peaceful union demonstration designed to show support for a union member who had been threatened with suspension for wearing a union button, a confrontational, off-duty, assistant store manager goaded Agins into an argument about his union button and the relative merits of union representation. Both men admittedly used profanity and made hand gestures in front of several customers, but the outburst was brief, did not involve physical violence, and was precipitated by the manager. Thus using the analytical framework set forth in *Atlantic Steel*, the Board reasonably concluded that Agins’ conduct was not so egregious as to cause him to lose the protections of the Act. (SA1.)

In 2006, Starbucks gave a series of disciplinary performance evaluations ultimately discharged union leader Gross, a persistent “thorn in

the side” of Starbucks, in violation of Section 8(a)(3) and (1). The Board engaged in a *Wright Line* analysis to determine Starbucks’ motive in taking these actions. It found that Starbucks was motivated by antiunion animus, and that several of its explanations were pretextual, and rejected Starbucks’ assertion that it would have discharged Gross absent his protected union activity. (SA1.)

### **STANDARD OF REVIEW**

The Board’s findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera*, 340 U.S. at 477. *Accord G & T*, 246 F.3d at 114. Thus, the Board’s reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*; as this Court has explained, “[w]here competing inferences exist, we defer to the conclusions of the Board.” *Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988). *See also Universal Camera*, 340 U.S. at 488; *G & T*, 246 F.3d at 114. Moreover, this Court has long had a policy of

deferring to the Board's adoption of administrative law judges' credibility determinations, and will only disturb such determinations in extremely limited circumstances. *See e.g., NLRB v. Columbia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976). In other words, this Court will reverse the Board based on a factual determination—such as a determination of employer motive—only if it is “left with the impression that no rational trier of fact could reach the conclusion drawn by the Board.” *G & T*, 246 F.3d at 114 (quoting *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996)).

This Court's review of the Board's legal conclusions is deferential: “This court reviews the Board's legal conclusions to ensure that they have a reasonable basis in law. In so doing, we afford the Board ‘a degree of legal leeway.’ ” *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir.2001) (quoting *NLRB v. Town & Country Elec.*, 516 U.S. 85, 89-90 (1995)). *See also Office & Prof'l Employees Int'l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir.1992) (“Congress charged the Board with the duty of interpreting the Act and delineating its scope.”). Therefore, the Court will only reverse the Board's legal determinations if they are arbitrary and capricious. *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008).

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS

Starbucks does not—nor could it—challenge the administrative law judge’s findings, adopted by the Board, that it violated the Act by engaging in a number of prohibited actions. (SA1 n.3.) Specifically, the Board held that Starbucks violated Section 8(a)(1) of the Act by:

- Prohibiting employees, including Gross, from discussing the Union while off duty;<sup>5</sup>
- Discriminatorily prohibiting employees at Starbucks’ Union Square East store from using a company bulletin board to post items related to the Union while allowing employees to post other nonwork material;<sup>6</sup>
- Discriminatorily prohibiting off-duty employees from entering the back room of the Union Square East store;<sup>7</sup>
- Prohibiting employees from talking about the Union while allowing other nonwork-related discussions;<sup>8</sup> and
- Prohibiting employees from talking about terms and conditions of employment.<sup>9</sup>

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<sup>5</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800-03 (1945).

<sup>6</sup> *Guard Publ’g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *Salmon Run Shopping Ctr. LLC v. NLRB*, 534 F.3d 108, 114 (2d Cir. 2008).

<sup>7</sup> *District Lodge 91, Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 814 F.2d 876, 880 (2d Cir. 1987).

<sup>8</sup> *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1006 (D.C. Cir. 2001).

<sup>9</sup> *Republic Aviation Corp.*, 324 U.S. at 803.

Further, the Board held that Starbucks violated Sections 8(a)(3) and (1) by:

- Disciplining employee Tomer Malchi pursuant to its unlawful rule prohibiting employees from talking about the Union while allowing other nonwork related discussions;<sup>10</sup>
- Discriminatorily preventing Malchi from working shifts at other Starbucks locations;<sup>11</sup> and
- Issuing a written warning to employee Daniel Gross on August 5, 2006.<sup>12</sup>

Starbucks failed to file exceptions with the Board challenging these findings. Therefore, it is precluded from seeking review of those determinations. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982); *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 479 (2d Cir. 2009). And, failing to contest these findings, Starbucks has waived any defense to these violations, entitling the Board to summary

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<sup>10</sup> *Road Sprinkler Fitters Local Union No. 669*, 681 F.2d 11, 21 (D.C. Cir. 1982); *ITT Industries, Inc. v. NLRB*, 251 F.3d 995, 1006 (D.C. Cir. 2001).

<sup>11</sup> *Road Sprinkler Fitters Local Union No. 669*, 681 F.2d at 21.

<sup>12</sup> *International Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB*, 440 F.2d 298 (D.C. Cir. 1970) (per curiam).

enforcement of the relevant portions of the Board's Order. *See, e.g., Torrington Extend-A-Care Employees Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994). Moreover, although these violations are uncontested, they do not disappear, but rather provide the background against which the Court considers the Board's remaining findings. *Id.*

## **II. STARBUCKS' RESTRICTION ON EMPLOYEES WEARING MORE THAN ONE UNION BUTTON VIOLATES SECTION 8(a)(1) OF THE ACT**

As part of an informal unfair labor practice settlement reached with the Board in 2006, Starbucks adopted a policy permitting employees to wear “reasonably-sized and placed buttons or pins that identify a particular labor organization or a partner's support for that organization . . . .” (SA10.) Prior to this agreement, in some stores employees were banned from wearing any union buttons, as can be seen in the context of the dispute leading to Agins' discharge. See Section III, below. Shortly after entering into that settlement agreement, however, Starbucks restricted each employee to wearing only one union button. Substantial evidence supports the Board's finding that, within the context of the facts of this case, this restriction violates the Act.

**A. Section 7 of the Act Protects the Right of Employees To Wear Union Buttons and Insignia While Working**

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” (SA57.) Determining whether union activity is protected within the meaning of Section 7 is a task that “implicates [the Board’s] expertise in labor relations” and is for “the Board to perform in the first instance . . . .” *NLRB v. City Disposal Sys.*, 465 U.S. 822, 829 (1984). This deference is appropriate given the breadth of cases that the Board confronts and the Board’s recognized expertise in labor relations. *Id.* at 829-30 & n.7 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)). An employee’s Section 7 rights are protected by Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” (SA57.)

Section 7 protects the right of employees to wear union buttons or other insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-03, n.7 (1945); *Guard Publ’g Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009). As this Court noted in *District Lodge 91*, 814 F.2d at 882, regardless of whether an employer institutes a partial or total ban on displaying union insignia, the Board “adhere[s] to the principle that

employers must show that some restriction is necessary.” *See also Sam’s Club*, 349 NLRB 1007, 1010 (2007); *Albis Plastics*, 335 NLRB 923, 924 (2001); *Mack’s Supermarkets, Inc.*, 288 NLRB 1082, 1098 (1988). To meet this burden, an employer must establish “that the restriction is necessary to protect ‘legitimate, recognized managerial interests,’ such as maintaining production, discipline, safety, or otherwise preventing disruption of company operations.” *International Bus. Machs. Corp. v. NLRB*, 31 F. App’x. 744, 746 (2d Cir. 2002) (quoting *District Lodge 91*, 814 F.2d at 880). Absent such a showing of “special circumstances,” any infringement upon the right to display union insignia violates Section 8(a)(1) of the Act. *Id.* at 745-46.

**B. Starbucks Violated Section 8(a)(1) By Prohibiting Its Employees from Wearing More than One Union Button**

In *Serv-Air Inc.*, 161 NLRB 382 (1966), *enforced*, 395 F.2d 557, 563 (10th Cir. 1968), the Board found that barring employees from wearing more than one union button violated Section 8(a)(1) of the Act because the employer could not show special circumstances warranting the restriction. Here, the Board’s settlement agreement permitted Starbucks to restrict the wearing of union buttons if they “interfere with safety or threaten to harm customer relations or otherwise unreasonably interfere with Starbucks public image.” (SA13.) But based on its careful evaluation of the specific facts of

this case, the Board reasonably concluded that Starbucks had not shown special circumstances to warrant restricting each employee to wearing only one union button.

Starbucks does not suggest that wearing more than one button adversely affects production, discipline, or safety, or otherwise disrupts company operations. Instead, it argues (Br. 55-56) that wearing more than one union button affects its public image and dilutes the value of its “Starbucks-issued” buttons. But the Board found that the union buttons at issue were “no more conspicuous than the panoply of other buttons employees displayed.” (SA1.) Because Starbucks encouraged employees to wear multiple buttons, the Board found that the customer is not able to tell which buttons are “company-sponsored pins meant to boost employee morale.” (SA13.) And based on photographs entered into evidence showing employees wearing buttons, the Board noted that “the image conveyed to the consumer [was] merely that of an employee wearing a variety of pins on their hats or aprons.” (SA13.) Starbucks therefore failed to show how permitting each employee to wear more than one union button would dilute the value of its company-sponsored buttons. (SA13.)

Moreover, to the extent that Starbucks' complains (JA56) that the union buttons affect its ability to control the public image it displays to customers, the fact remains that even under Starbucks' interpretation of its policy, employees were permitted to display one union button. Therefore, there is no basis for Starbucks to contend that the mere display of union buttons or other insignia in the presence of customers establishes special circumstances warranting a ban on that display. *See Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009). *Accord Lee v. NLRB*, 393 F.3d 491, 495 (4th Cir. 2005); *Meijer Inc.*, 318 NLRB 50 (1995), *enforced*, 130 F.3d 1209, 1216 (6th Cir. 1997)); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 287-88, 292 (1999).

The cases relied on by Starbucks (Br. 57-58) in which an employer's concern for its public image was found to constitute special circumstances, are easily distinguishable. For example, in *Midstate Tel. Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983), this Court found the employer could prohibit employees who constantly dealt with the public from wearing t-shirts that were emblazoned with the logo of the employer's parent company, which appeared to be cracked in three places, and displayed the words "I Survived the Midstate Strike of 1971-75-79." The Court concluded that the cracked logo could be interpreted as suggesting the company was crumbling, and

that the strike reference was an attempt to keep open the wounds from past strikes. *Id.* at 404. And in *NLRB v. Harrah's Club*, 337 F.2d 177 & n.1 (9th Cir. 1964), the court upheld a restriction against wearing union buttons where the employer prohibited employees from wearing jewelry or personal adornments of any kind, and the employer operated an upscale entertainment complex described as “on a par with similar services rendered by the finest theater-restaurants in the world.”

In contrast to cases such as these, which involve either the display of an offensive message or a work environment where all such adornments are lawfully prohibited, here the buttons at issue are small and inconspicuous, and are worn by employees amongst a “panoply of other buttons.” (SA1.) To be clear, as the Board explained (SA1, 12), there were only two union buttons at issue here. Each bore the letters “IWW” in white against a red background and while one was slightly larger than the other, both were approximately 1-inch in diameter. (SA1 12.) Nevertheless, Starbucks insists incorrectly (Br. 57) that the Board “authorize[ed]” the display of “Union Thug pins and other such employee-scripted messages.” The Board made clear that if employees wore buttons containing an offensive message or that created an untidy appearance or a safety hazard, that would presumably violate Starbucks’ Board-sanctioned button policy. (SA13.)

Finally, Starbucks attempts to downplay (Br. 57-58) the employees' interest in showing support for the Union by wearing union buttons. But the record is clear that, although the Union had withdrawn its election petition, its members were in the throes of a protected effort to recruit new members and improve their working conditions, and that they wore the union buttons to further those efforts. *See NLRB v. Floridan Hotel of Tampa, Inc.*, 318 F.2d 545, 547 (1963) (enforcing Board's finding of violation where small, neat, and inconspicuous buttons was worn as part of campaign to increase membership, and employer failed to show that button detracted from dignity of hotel or caused any diminution of business). This case is distinguishable from those cited by Starbucks (Br. 57-58), in which no active organizing employees or attempts to improve terms and conditions of employment were taking place.

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT STARBUCKS VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT WHEN IT DISCHARGED JOSEPH AGINS FOR CONDUCT THAT OCCURRED DURING PROTECTED UNION ACTIVITY**

The record fully supports the Board's findings (SA29-32) that Agins' participation in the November 21 demonstration supporting the right of employees to wear union buttons constituted protected Section 7 activity, that Starbucks discharged him based on an argument that he was goaded into

by an off-duty Starbucks' manager during the course of that protected activity, and that his conduct was not so egregious as to remove him from the Act's protection.

**A. An Employer Violates the Act by Discharging an Employee for Engaging in Protected Union Activity**

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” (SA57.) Furthermore, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” (SA57.) Thus, an employer violates Section 8(a)(3) and (1) of the Act by disciplining employees for participating in union activity that Section 7 protects.

Even if an employee is engaged in protected union activity, the employee, during the course of that activity may act in such an abusive manner that he loses the protection of the Act. *NLRB v. City Disposal Sys.*, 465 U.S. at 837; *accord NLRB v. Caval Tool Div.*, 262 F.3d 184, 191 (2d Cir. 2001). When confronted with such a situation, the Board analyzes the employee's conduct using the analytical framework set forth by the Board in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), discussed in detail below. In

doing so, there is a general recognition that when an employee is engaged in protected activity some leeway is necessary “since passions may run high and impulsive behavior is common.” *Caval Tool Div.*, 262 F.3d at 192 (quoting *Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 517 (2d Cir. 1980)).

**B. Starbucks Discharged Agins Based on His Conduct During Protected Union Activity at the 9th Street Store**

On November 21, off-duty employee Joseph Agins, along with other union supporters, went to the 9th Street store wearing union buttons and other insignia to show support for Peter Montalbano and other employees who had recently been ordered to either remove the union button they were wearing or face suspension for the remainder of their shifts. Starbucks acknowledges (Br. 28-29), as found by the Board (SA29), that this show of support was protected union activity.

While they were in the store, an off-duty manager from a different store, Ifran Yablon, who the Board found (SA29) “would have known what the button signified,” approached Agins and confronted him about his union button and goaded him into an argument by asserting that employees did not need a union and that unions are more concerned with collecting dues than protecting their members. Yablon’s affront prompted Agins to express his support for the Union. This discussion, and the brief argument that ensued,

concerned the very subject about which the group was demonstrating—the right to wear union buttons in support of the IWW. There was thus more than a “sufficient nexus” between the argument and the union-button demonstration to support the Board’s finding (SA29-30) that Agins’ was engaged in protected union activity. *Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988); *see also Caval Tool Div.*, 262 F.3d at 188.

The Board reasonably rejected the argument (SA30-31), which Starbucks rehashes now (Br. 27), that Agins was not discharged for this incident, but rather for engaging in a “pattern of misconduct.” First, the evidence establishes that Starbucks discharged Agins based on his involvement in this incident. This was made most stark by the Partner Action Notification that Store Manager Warner completed to document Agins’ discharge, on which he offered the following explanation: “Partner was insubordinate and threatened the store manager. Partner strongly support [sic] the IWW union.” (SA29; JA129.) And when he arrived at work on the day of his discharge, Warner instructed him not to clock in, and by way of explanation referred to the incident with Yablon. (SA28.)

Second, not only was Agins not discharged for a pattern of misconduct, but there is no support for the notion that he had a history of conduct issues. Indeed, the Board found (SA31) that, by suggesting

otherwise, Starbucks engaged in an exaggerated, “posthoc characterization” of Agins’ conduct that “call[ed] into question the veracity of Respondent’s assertions relating to Agins’ alleged misconduct.” (SA31.) For example, Starbucks failed to present any performance reviews or other evidence suggesting that Agins’ performance was ever deemed deficient. (SA31.) And in May 2005 Partner Resource Manager Traci Wilk noted in an email to District Manager Smith that there was no history of problems with Agins, and Smith did not reply to the contrary. (SA31.)

Likewise, the Board found no support for Starbucks’ assertion that Agins was on a final warning for a May 2005 incident in which he became upset after Assistant Store Manager James delayed in helping him assist customers. The Board did not ignore that this previous incident took place, as Starbucks now suggests (Br. 40), but rather discredited the assertions that Agins had received a final written warning for it. (SA28 n.44, 34.) Moreover, no mention was made of that incident when Starbucks discharged Agins on December 12, 2005, or on the Partner Action Notification that documented his discharge.

Starbucks also mistakenly argues (Br. 20, 28) that once James permitted Montalbano to don a union button after the group entered the store on November 21, the group’s actions were no longer protected. Although

the group was motivated to act that evening based on Starbucks' recent practice of prohibiting employees from wearing any union buttons, the action itself—displaying buttons to show their affiliation with and support for the Union—would have been protected even absent the precipitating conduct.

**C. Agins Did Not Engage in Conduct so Egregious as To Lose the Protection of the Act**

In determining whether an employee's conduct is sufficiently egregious to forfeit Section 7 protection, the Board balances two policy concerns under the Act: allowing employees some latitude for impulsive conduct in the course of protected activity and respecting employers' need to maintain order in the workplace. *See DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005). This Court has explained that “[t]he responsibility for applying this balancing test, depending as it does so heavily on the facts in a particular case, rests with the Board, whose decision, if supported by substantial evidence, will not be disturbed unless it is arbitrary or illogical.” *American Tel. & Tel. Co. v. NLRB*, 521 F.2d 1159, 1161 (2d Cir. 1975); *accord NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 379 (5th Cir. 2007); *Earle Indus., Inc. v. NLRB*, 75 F.3d 400, 405 (8th Cir. 1996).

To reach the appropriate balance of interests, the Board considers four factors: (1) the place of the discussion; (2) the subject matter of the

discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an unfair labor practice by the employer. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). An animating principle that guides this determination is the Board's explanation that "[t]he protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). As demonstrated below, ample evidence supports the Board's determination (SA33) that Agins did not forfeit the Act's protection, so Starbucks' discharge of him violated of Section 8(a)(3) and (1) of the Act.

### **1. The place of the discussion weighs against protection**

Because the argument between Agins and Yablon took place in a public area of the 9th Street store, the Board found that the first *Atlantic Steel* factor—the place of the discussion—weighed against protection. In so finding, however, the Board noted (SA32) that Agins was off duty at the time, that his comments were not directed at his superiors, and that this was not the first or last time a heated conversation involving profane language

likely occurred there. Moreover, it was a manager from another Starbucks store, not Agins, who precipitated this incident in a public area of the store.

## **2. The subject matter of the November 21 discussion favors protection**

When an employee's outburst occurs during protected activity, the subject matter of the discussion weighs heavily in favor of protection. *Felix Indus., Inc.*, 339 NLRB 195, 196 (2003), *enforced mem.*, 2004 WL 1498151 (D.C. Cir. 2004). As discussed above (pp. 37-40), Agins and his companions were engaged in protected union activity by asserting their right show their support for and affiliation with the Union by wearing Union buttons. In response, Yablon precipitated an argument by asking Agins about his union button, which sparked a broader, albeit brief, argument about the relative merits of the Union.

Starbucks attempts to divide this incident into two parts, arguing (Br. 34) that after Agins and Yablon discussed his union button, the discussion escalated into an argument about an incident the previous summer involving Agins' father. But the Board found that the references to that previous incident "took place in the overall context of a demonstration in support of

employees' Section 7 rights, and was initiated by Yablon's apparent reaction to this concerted, protected conduct." (SA32.)<sup>13</sup>

Starbucks also argues that Agins' conduct weighs against protection because he directed his profanity at his supervisor. This argument is misplaced because the use of profanity affects the analysis of the third factor—the nature of the outburst—not its subject matter. *See Verizon Wireless*, 349 NLRB 640 (2007) (finding second factor favored protection because while employee used profanity, he did so while exercising his Section 7 rights); *Beverly Health & Rehab. Serv, Inc.*, 346 NLRB 1319 (2006) (same). It is also incorrect. Agins did not direct the profanity at his supervisor—Tanya James—but merely used profanity in her presence. In the cases cited by Starbucks, by contrast, the profanity was leveled against the employees' supervisors. *See Piper Realty Co.*, 313 NLRB 1289, 1290 (1994) (employee told supervisor that the supervisor had a “f\*\*\*ing problem”) and *DaimlerChrysler*, 344 NLRB at 1329-30 (employee called

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<sup>13</sup> In *Felix Indus. v. NLRB*, 251 F.3d 1051, 1054 (D.C. Cir. 2001) the District of Columbia Circuit dismissed an employer's similar attempt to “bifurcate” a disputed discussion and “parse” a discharged employee's words in holding that “the obscenities were intertwined with [the] protected activity—as they are in every case governed by *Atlantic Steel*.” *See also DaimlerChrysler*, 344 NLRB at 1329 (fact that profane outburst occurred while employee was investigating grievance weighed in favor of protection despite fact that it was a reaction to supervisor's remark about scheduling a meeting and not about the merits of the underlying grievance).

supervisor an “a\*\*hole”); *see also Trus Joist Macmillan*, 341 NLRB 369, 371 (2004) (finding nature of the outburst favored loss of protection where employee launched a planned, vituperative personal attack against a manager, with foul language and obscene gestures).

Likewise, Starbucks incorrectly argues (Br. 34) that this factor should weigh against protection because this incident occurred in the presence of customers. This fact is relevant in assessing the first *Atlantic Steel* factor—the location of the incident; by raising it here, Starbucks is improperly collapsing the location with the subject matter of the discussion.

### **3. The nature of Agins’ outburst favors protection**

In deciding whether the nature of the employee’s conduct crossed the line between protected and unprotected conduct, the Board examines such facts as whether the employee used profanity, whether the employee’s conduct was premeditated or spontaneous, whether the employee directed his ire at his superiors, whether the conduct was brief or sustained, and whether the conduct was accompanied by a threat of physical harm.

Here, substantial evidence supports the Board’s findings, which were largely based on the administrative law judge’s credibility determinations, that Agins was goaded by Yablon into a brief, albeit profane, argument, and that this factor on the whole militates toward Agins retaining the protection

of the Act. (SA32-33.) Agins' conduct stands in contrast to the types of egregious behavior that has led the Board and courts to reach different conclusions in other cases. In *Media General Operations, Inc. v. NLRB*, 560 F.3d 181, 188 (4th Cir. 2009), the vice president of the company sent a series of letters to employees blaming the union for delays in negotiating a new contract. An employee, upon learning that another letter had been sent, which he had not read, initiated a discussion with two supervisors in which he leveled a profane attack against the vice president. *Id.* at 186. Because the employee's "opprobrious ad hominem attack" was not made in the heat of negotiations, but instead was temporally removed from and concerned only with the employer's lawful letters, the Fourth Circuit found that the employee forfeited the Act's protection. *Id.* at 189. And in *Verizon Wireless*, 349 NLRB 640, 643 (2007), the Board found that an employee lost the Act's protections by initiating two aggressive discussions with coworkers in which he used insubordinate and offensive language while discussing several supervisors.<sup>14</sup>

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<sup>14</sup> For other cases demonstrating the type of opprobrious conduct that has resulted in a loss of protection, see *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005) (profanity "used repeatedly in a loud ad hominem attack on a supervisor that other workers overheard"); *Trus Joist Macmillan*, 341 NLRB 369, 371 (2004) (employee's anger "did not give him license to launch a planned, vituperative personal attack, with foul language and obscene gestures" against supervisor); *Aluminum Co. of America*, 338

The Board acknowledged (SA32) that after Yablon goaded Agins into this argument, Agins used profanity and was disruptive. But Yablon also used profanity. And after Agins' companions encouraged him to take a seat, he did so and listened to what James had to say, and was permitted to remain in the store until he chose to leave about 10 minutes later.

To be certain, this was not the first time that a Starbucks employee other than Agins or Yablon used offensive language, despite Starbucks' claim (Br. 31) that offensive language is "alien" in its stores. (SA32.) The evidence established that even in instances where employees engaged in behavior far worse than Agins' conduct, by using racial or ethnic slurs and in some instances engaging in physical violence, Starbucks did not always discharge those employees. (SA32 n.55.) And Starbucks has not disclosed whether Yablon was discharged for his role in this incident, which like Agins involved the use of profanity and hand gestures in the presence of store customers. (SA30 n.49.) Indeed, Starbucks, without explanation, failed to call Yablon to testify, leading the administrative law judge (SA31-

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NLRB 20, 22 (2002) ("Repeated, sustained, ad hominem profanity cannot be excused as an emotional outburst provoked by any opposition from the Respondent's officials to his grievance activity."); and *Honda of America Mfg., Inc.*, 334 NLRB 746, 748 (2001) ("[P]lacing of the [sexually] offensive language in [successive] newsletters that were available to employees and management throughout the plant can be dismissed as impulsive behavior.").

32) to draw the inference that his testimony would have been adverse to Starbucks.

The picture painted by Starbucks of this incident veers sharply from the Board's well-supported findings, and should be rejected. Agins did not engage in a "unilateral[]" (Br. 20, 29) act of physically threatening or intimidating behavior. (Br. 35.) It cannot be disputed that Yablon precipitated this incident while Agins made it clear that he was there to participate in a peaceful button action, not to fight. (SA26; JA385.) And while both men made hand gestures towards one another and used profanity, Agins never invited Yablon to fight, but rather responded to Yablon's persistent goading. (SA26, 32; JA430-31.) Moreover, the administrative law judge discredited "significant portions" of James' testimony about Agins' "purported misconduct," finding it "overblown" and "inherently improbable." (SA30, 31.) This finding was buttressed by the negative inference drawn by the administrative law judge based on Starbucks' failure to produce James' initial incident report, and by the various written statements, produced in the weeks between the incident and Agins' discharge, which the judge discredited. (SA31.) Finally, it is of no moment that Agins' companions led him back to where they were seating yet "[n]o one had to physically intercede with Yablon." (Br. 35 n.4.) Yablon was

alone, and had Agins' companions attempted to restrain Yablon, that could only have escalated the matter. And while James did not physically restrain Yablon, she did instruct him to "leave it alone." (SA27, 30, 32 n.54.)

In sum, while Agins used several profane words during this brief incident, as found by the Board (SA31, 32), it was neither as extreme or prolonged as Starbucks maintains, and it lacked the aggravating factors—including premeditation, threats or acts of physical violence, and ad hominem attacks—that have led to a loss of protection in the past. The Board therefore reasonably concluded (SA32-33) that this factor militates in favor of protection.

**4. The absence of a legally proscribed unfair labor practice does not weigh against protection**

Under the fourth and final *Atlantic Steel* factor, the Board examines whether the conduct in question was provoked by an employer's unfair labor practice. If so, this factor weighs in favor of protection. But the absence of an unfair labor practice does not necessarily mean that this factor weights against protection. Even where an employer's conduct does not rise to the level of an unfair labor practice, where the employee's conduct was precipitated by the hostile conduct of a supervisor, the Board has at times found that this factor favors protection. *See Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007); *Overnite Transp. Co.*, 343 NLRB 1431,

1437-38 (2004). On the other hand, where an employee initiates outbursts in response to “temporally removed,” lawful, written communications, this factor weighs against protection. *See Media Gen. Operations, Inc.* 560 F.3d at 188; *see also Verizon Wireless*, 349 NLRB at 642-43.

Strictly speaking, as acknowledged by the Board (SA33), Agins’ conduct was not provoked by an unfair labor practice, although it was provoked by the goading of a Starbucks manager. Nonetheless, taking a balanced approach, the Board reasonably found (SA33) that this factor did not weigh against protection based on several facts. Only three days before this incident, the Board’s General Counsel issued a complaint alleging that Starbucks committed an unfair labor practice by prohibiting employees from wearing union buttons at work. Moreover, the previous day Starbucks engaged in such conduct again by instructing Montalbano to remove a union button or go home. Although the parties ultimately resolved those complaint allegations through a settlement agreement that contained a non-admission clause, Agins and his companions had a reasonable belief that that an unfair labor practice had occurred at the time Yablon confronted Agins about his union button. These surrounding circumstances arguably place this case on par with *Network Dynamics Cabling* and *Overnight Transportation*. Nevertheless, the Board did not go as far as to find that this factor weighed

in favor of protection, but rather that it did not weigh against protection.

(SA33.) And in any event, the Board found that even if this factor weighed slightly against protection, this would not alter the ultimate conclusion that Agins did not engage in conduct so egregious as to forfeit the protections of the Act. (SA33.)

### **5. The balance of the *Atlantic Steel* factors favors protection**

In conclusion, the Board reasonably determined that the balance of the four *Atlantic Steel* factors favors protection. Although the location of the incident weighs against Agins retaining protection, the button action that brought Agins and his group to the store, as well as the argument with Yablon, concerned protected activity—the right of employees to wear buttons in support of the union—and thus the subject matter weighs in favor of protection. Regarding the nature of the incident, Agins, like Yablon, used profanity during this relatively brief argument that Yablon initiated, but after considering the entirety of the circumstances, and discrediting much of Starbucks’ evidence about the incident, the Board found that this factor militates towards Agins retaining the Act’s protection. Finally, although Agins’ conduct was not directly provoked by an unfair labor practice, it came on the heels of charges filed with the Board over Starbucks’ prohibition against union buttons, and Yablon’s statements, while not

unlawful, were confrontational. Therefore, this factor does not weigh against Agins retaining protection. And even if this fourth factor, based on these accompanying mitigating circumstance, were found to slightly weigh against protection, the Board found that on balance, Agins did not forfeit the protections of the Act.

Because the Board engaged in a thorough, well-reasoned analysis of these four fact-intensive factors, and struck a balance that is neither arbitrary nor illogical, it should not be disturbed by this Court. *American Tel. & Tel. Co. v. NLRB*, 521 F.2d 1159, 1161 (2d Cir. 1975).

**D. Starbucks's Arguments About the Judge's *Wright Line* Analysis Have No Bearing on This Case**

Surprisingly, Starbucks devotes considerable energy (Br. 40-43) challenging the administrative law judge's *Wright Line* analysis of its motive for discharging Agins. *See Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). This was entirely unnecessary, for having found that Agins' discharge violated the Act based on the administrative law judge's *Atlantic Steel* analysis, the Board found it unnecessary to address her *Wright Line* analysis. (SA56n.3.) In any event, should the Court find fault with the Board's *Atlantic Steel* analysis, the proper course would be to remand the case so the Board may then analyze Agins' discharge under *Wright Line*.

**IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT STARBUCKS' DECISION TO DISCHARGE DANIEL GROSS WAS MOTIVATED BY ANTIUNION ANIMUS AND STARBUCKS FAILED TO ESTABLISH THAT IT WOULD HAVE DONE SO ABSENT HIS UNION ACTIVITY, THUS VIOLATING SECTION 8(a)(3) AND (1) OF THE ACT**

**A. An Employer Violates the Act by Issuing Disciplinary Performance Evaluations and Discharging Employees in Retaliation for Their Union Activity**

An employer violates Section 8(a)(3) and (1) of the Act by taking adverse action against an employee because of the employee's union activity. The critical inquiry in such cases is whether the employer's actions were motivated by antiunion animus. *See NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957 (2d Cir. 1988). If substantial evidence supports the Board's finding that union activity was a "motivating factor" in the employer's decision, the Board's conclusion that the action was unlawful must be affirmed unless the record, considered as a whole, compels acceptance of the employer's defense that the same action would have been taken even in the absence of union activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395, 397-403 (1983); *accord Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 278 (1994). If the Board reasonably concludes that the employer's non-discriminatory justification for its action is pretextual, the defense fails. *S.E. Nichols, Inc.*, 862 F.2d at 957; *Wright Line, a Div. of Wright Line, Inc.*,

251 NLRB 1083, 1084 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

It is settled that the Board may infer motive from circumstantial evidence. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988). Among the factors supporting an inference of unlawful motivation are the employer's knowledge of the employee's union activity, the employer's hostility to the union and the employer's union activity, and the implausibility of its asserted reason for the adverse action. *See Abbey's Transp. Servs.*, 837 F.2d at 579-82; *NLRB v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292, 295 (2d Cir. 1972).

**B. Starbucks Has Failed to Contest the Board's Finding that Gross' Four Disciplinary Performance Evaluations Were Unlawful**

The Board found (SA1-2, 56), that Starbucks violated Section 8(a)(3) and (1) of the Act by issuing Gross the four disciplinary performance evaluations—dated January 29, April 14, April 29, and August 5, 2006—that led to his discharge. Starbucks has failed to challenge these findings in its brief. Accordingly, the Board is entitled to summary enforcement of these violations.

Federal Rule of Appellate Procedure Rule 28(a)(9)(A) provides that the argument portion of an appellant's opening brief “must contain” the

“appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.” Starbucks has not come close to meeting this requirement. Nowhere does Starbucks, for instance, challenge the Board’s findings (SA42, 52) that Starbucks would not have issued the January 29 or August 5 evaluations in the absence of Gross’ union activity, or the Board’s findings (SA44, 45) that the April 14 and April 29 evaluations were pretextual. Instead, it has only referenced these violations in its statement of issues (Br. 2), and in a passing, conclusory footnote to its argument that Gross’ discharge violated the Act. More is required to comply with Rule 28(a). *See Institute for Info., Inc. v. Gordon & Breach, Science Publishers, Inc.*, 931 F.2d 1002, 1011 (3d Cir. 1991) (“to assure consideration of an issue by the court, the appellant must both raise it in the ‘Statement of the Issues’ and pursue it in the ‘Argument’ portion of the brief”) (quoting 16C Wright & Miller, *Federal Practice and Procedure* § 3975, at 421-22 (1st ed. 1977)<sup>15</sup>); *see also Dunkin' Donuts Mid-Atl. Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004).

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<sup>15</sup> This section currently appears at 16AA Wright & Miller, *Federal Practice and Procedure* § 3974.1, at 240-43 (4th ed. 2008).

By failing to argue that the Board erred in concluding that Starbucks violated the Act by issuing Gross each of these four performance evaluations, Starbucks has abandoned any such challenge, thus warranting summary enforcement of these violations.

**C. Starbucks Was Motivated by Antiunion Animus When It Discharged Gross**

Substantial evidence supports the Board's findings (SA1-2, 56), that Starbucks was unlawfully motivated when it discharged Gross. As an initial matter, it is undisputed that Gross was an active Union leader and that Starbucks was aware of his involvement in the Union. In the 2 months leading up to the first negative disciplinary performance evaluation that Gross had received during his 3-year employment, Gross was prominently involved in the Union's "highly publicized" activity. (SA51.) This included participating in the November 2005 Black Friday demonstration, which generated an article in the New York Times quoting Gross and to which Starbucks' president responded in an email posted in stores. (SA39.) Gross also issued several press releases during that time on behalf of the Union against Starbucks' union position. (SA39.)

In addition, at the time it discharged Gross in August 2006, Starbucks had manifested both a deep-seated, institutional animus against the Union, as well as its animus directed at Gross as a union leader. As discussed above

(pp. 27-29), Starbucks does not challenge the Board’s findings that it committed numerous unfair labor practices—include prohibiting employees from discussing the Union while off duty, from posting union-related items to a bulletin board while permitting other nonwork material, and from talking about terms and conditions of employment—which betrayed its hostility toward the Union. And with respect to Gross individually, Starbucks does not challenge the Board’s finding that on August 5, 2006, the very day it discharged him, it also unlawfully disciplined him based on his involvement in the July 15 protected union demonstration in violation of Section 8(a)(3) and (1) of the Act. Nor does Starbucks contest the finding that Store Manager Lopez had instructed Gross not to talk with other employees about the Union while off duty, in violation of Section 8(a)(1) of the Act. These violations indisputably show that Starbucks had unlawful antiunion animus and that the animus ran personally against Gross. *See Abbey’s Transp. Servs., Inc.* 837 F.2d at 580.

The Board also inferred that animus motivated Gross’ discharge based on the content of the disciplinary performance evaluations. Starbucks stated, in both the January 29 and April 14 evaluations, that Gross met expectations in areas including “acting with a ‘customer comes first’ attitude,” “adhering to all recipe and presentation standards,” “[f]ollow[ing] Starbucks

operational polices and procedures,” as well as the “critical area” of “Composure—remains calm, maintains perspective and responds in a professional manner when faced with tough situations.” (SA40, 42.) Nonetheless, it asserted that Gross had a poor attitude and failed to “[a]dhere[] to Starbucks values, beliefs and principles during both good and bad times.” (SA40, 42.) The Board reasonably concluded that these “nonspecific, unexplained” assertions constituted “veiled reference[s]” to Gross’ union activities, and were thus evidence of antiunion animus. (SA42.) This finding is consistent with the many prior cases in which the Board, with court approval, has found that a company’s complaints about an employee’s “bad attitude” can be a euphemism for employee participation in protected activities, particularly when used in reference to union leaders. *James Julian Inc. of Delaware*, 325 NLRB 1109, 1109, 1111 (1998); *see also Dayton Typographical Serv., Inc. v. NLRB*, 778 F.2d 1188, 1193 (6th Cir. 1985).<sup>16</sup>

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<sup>16</sup> *Accord SCA Tissue N. America LLC v. NLRB*, 371 F.3d 983, 990 (7th Cir. 2004); *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 944 (4th Cir. 1995); *D & D Distribution Co. v. NLRB*, 801 F.2d 636, 641 (3d Cir. 1986); *DeQueen General Hosp. v. NLRB*, 744 F.2d 612, 617-618 (8th Cir. 1984); *see also Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 811-14 (2d Cir. 1980); *Retail Store Employees Union Local 880 v. NLRB*, 419 F.2d 330, 331-32 (D.C. Cir. 1969).

Similarly, in the April 29 evaluation, Store Manager Lopez, who had only worked with Gross on three occasions, documented perceived inadequacies of Gross' performance that did not comport with observations he recorded in his running log book. For example, although Lopez stated in the evaluation that Gross lacked positive interactions with customers and partners, and had allegedly failed to participate in the sampling and promotion of products, in his log book Lopez had recorded that Gross had acted in a friendly manner toward Lopez, seemed "positive," displayed good customer service skills, sampled pastries, and offered to assist a coworker in a nonwork matter. (SA45.) This discrepancy also contributed to the Board's finding (SA45) that this review constituted evidence of Starbucks' unlawful motive with regard to its future actions against Gross. And the Board reasonably found (SA51) that Lopez continued to exhibit animus against Gross when he unlawfully instructed Gross not to contact employees outside of work about the union, as discussed above.

Finally, in Starbucks' final performance evaluation of Gross, which it relied on in "significant measure" to support his discharge (SA52), it unlawfully relied on Gross' protected activity as support for its conclusion that his performance was unsatisfactory. (SA52.) Specifically, Starbucks twice referred to Gross' July 15 protected conduct, and also downgraded

him based on its assertion that that two employees were not comfortable working with him, which the Board found (SA52) was related to Gross' protected attempts to contact them outside of work to discuss the Union. This led the Board to reasonably find (SA52) that this final performance evaluation provided direct evidence of Starbucks' unlawful motive.

Ample evidence thus supports the Board's finding (SA51) that Gross' protected union activity was a motivating factor in his discharge. Therefore, the burden shifts to Starbucks to establish that it would have discharged Gross absent his union activity.

**D. Starbucks Would Not Have Discharged Gross Absent His Protected Activity**

Starbucks attempts to rebut this "strong" showing of unlawful motivation (SA52) by arguing that it discharged Gross based on poor performance, limited work availability, and his discussions with other employees about their job duties. But these arguments are no more convincing than they were before the Board, which rejected each in a thorough analysis. As such, this Court should defer to those findings. *See S.E. Nichols*, 862 F.2d at 956.

Turning to its first defense, Starbucks seeks to prove Gross was a poor performer by relying on selected portions of the four disciplinary performance evaluations that the Board found were issued unlawfully.

Because those evaluations were tainted by antiunion animus, Starbucks cannot, as a matter of law, rely on them to establish a legitimate reason for discharging Gross. *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 32 (D.C. Cir. 1998) (explaining employer cannot establish legitimate basis for discharge under second part of *Wright Line* by relying on incident that the Board found was tainted by an illicit motive). And upon finding that those evaluations were unlawful, the Board explained in its remedial order (SA5) that those evaluations cannot “be used against [Gross] in any way.”

Moreover, the Board specifically found (SA44-45) that Starbucks’ reliance on the April 14 and 29 performance evaluations was pretextual. Starbucks claimed that the April 14 evaluation was intended to “set [Gross] up for success,” but this assertion was belied by Starbucks’ failure to provide Gross with a page of narrative comments containing feedback, including the suggestion that he expand his availability. Likewise, in the April 29 evaluation, Store Manager Lopez documented his perceived inadequacies of Gross’ performance which stood in stark contrast to positive observations of Gross that Lopez recorded in his running log book.

With respect to Gross’ performance in general, taking a balanced approach to its analysis, the Board (SA51) acknowledged that he appeared “disengaged from the Starbucks employee culture.” Nevertheless, it found—

and Starbucks does not seriously dispute—that his performance in areas including customer service, drink preparation, and composure was adequate and that Starbucks did not point to any incident in which he engaged in any misconduct or was insubordinate. (SA51.)

Starbucks nonetheless argues (Br. 50) that the Board cannot require it to continue Gross’ employment merely because his performance was adequate. But this is not what the Board did. Under the *Wright Line* analysis, the question was not whether Starbucks *could* have discharged Gross based on his performance, but rather *would* it have done so. And for the reasons discussed, the Board reasonably found that Starbucks would not have discharged him absent its animus. The Board’s decision is therefore entirely consistent with the cases cited by Starbucks, including this Circuit’s, in which courts have found that an employee’s performance that is satisfactory, but no more, does not amount to substantial evidence supporting an unlawful discharge finding. *See NLRB v. Charles Batchelder Co.*, 646 F.2d 33 (2d Cir. 1981); *Vulcan Basement Waterproofing, Inc. v. NLRB*, 219 F.3d 677 (7th Cir. 2000).

Starbucks also continues to insist that it would have discharged Gross based on his limited work availability, which it now variously characterizes as “absenteeism” and “poor attendance.” (Br. 47, 48.) But the Board found

(SA51) that this too was pretextual. The Board acknowledged (SA51) that Gross worked fewer hours than other employees between May 2005 and his August 5, 2006 discharge, but credited Gross' testimony that, during the meeting over the January 29 evaluation, District Manager Anders told him he did not need to expand his availability in order to obtain a positive evaluation. Moreover, although Starbucks had routinely approved Gross' requests for time off, and although Gross had previously given away shifts consistent with company policy, he had stopped doing so after discussing the matter with Store Manager Cannon the previous fall. (SA51, 52.) And the Company failed to present any probative evidence that Gross' lack of hours compromised his ability to make drinks or serve customers. (SA51.)

The mere fact that Gross worked limited hours sets this case apart from those relied on by Starbucks (Br. 47) in which the Board found that an employee's failure to report to work supported discipline or discharge. *See Be-Lo Stores*, 318 NLRB 1, 24 (1995), *enforced*, 126 F.3d 268, 289 (4th Cir. 1997) (finding discharge warranted by absenteeism after employee failed to show up to work for two days and left early another day); *International Guards Union of America v. NLRB*, 789 F.2d 1465, 1466 (10th Cir. 1986) (finding discharge warranted after security guard refused to work overtime where employer had informed employees in writing that refusal to do so

may have serious consequences, including termination). Unlike the employees in those cases, Gross never failed to work when scheduled.

The Board (SA52) also reasonably rejected the argument that Gross' discharge was supported by two conversations he had with coworkers about work assignments and wages. On one occasion, he merely asked Assistant Store Manager Scott whether she should be cleaning the floors. He was not, as Starbucks would suggest, instructing her, his superior, not to do so. On the other occasion, Gross informed a coworker of his opinion that cleaning was not part of their job description. Starbucks exaggerates the Board's findings with respect to this comment, suggesting (Br. 49) that the Board found "that this aspect of Gross' behavior" was unprotected. In fact, the Board merely clarified (SA56 n.3) that—to the extent that this isolated comment could be interpreted, as Starbucks maintains (Br. 44), as an attempt to persuade her not to do her job—that would not be protected under the Act.

Finally, the Company argues (Br. 53) that the Board ignored "substantial and undisputed evidence" that it treated Gross consistently with other employees. But the Company falls far short of providing evidence sufficient to compare their employment with that of Gross. The Company (Br. 53) first compares Gross to Lena Brown, but cites to evidence that only establishes that the Company believed she was "falling through the cracks"

(JA27); that Assistant Store Manager James “did a horrible job ensuring” that Brown was adequately trained (JA32); that Brown did not seem to take feedback very well (JA32); that she was issued a corrective action for calling out from work based on apparently insufficient personal reasons (JA47); and that Lopez terminated her for reasons unknown (JA740-41.) The Company then attempts (Br. 53) to draw a comparison between Gross and Vasti Martinez, who was terminated on or around March 25, 2005. (JA174.) But the Company never explained why Martinez was terminated. Instead, it merely referred to a performance evaluation she received several months before her discharge in which Starbucks indicated that she did not follow cash-handling policies and did not show “integrity or honesty.” (JA174-77.) These are hardly adequate comparators to support an argument that Gross was treated in a consistent manner.

Weighing all of this evidence, as is its primary responsibility, the Board found that “[o]n whole” the Company would not have discharged Gross absent his protected conduct, and as such, violated Section 8(a)(3) and (1) of the Act by discharging him.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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April 2011

## **ADDENDUM**

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### **Statutes**

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

\* \* \*

(e) The Board shall have power to petition . . . for the enforcement of such order . . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

\* \* \*

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 10-3511,
	*	10-3783
v.	*	
	*	Board Case No.
STARBUCKS CORPORATION	*	2-CA-37548
	*	
Respondent/Cross-Petitioner	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,746 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

**COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS**

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the respondent/cross-petitioner. The Board counsel further certifies that the CD-ROM has been scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.1.9.9000 (04/10/2011 rev. 2). According to that program, the CD-ROM is free of viruses.

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Dated at Washington, DC  
this 15th day of April, 2011

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I further certify that the foregoing document was served on all parties, or their counsel of record, through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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this 15th day of April, 2011