Siren Retail Corp. d/b/a Starbucks *and* Workers United Affiliated With Service Employees International Union. Case 19–CA–290905

November 8, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, PROUTY, AND WILCOX

On January 31, 2023, Administrative Law Judge John T. Giannopoulos issued the attached decision. Siren Retail Corp. d/b/a Starbucks (the Respondent), the General Counsel, and Workers United (the Charging Party) each filed exceptions and a supporting brief. The Respondent filed answering briefs in response to the General Counsel and the Charging Party, and the Charging Party filed an answering brief in response to the Respondent. The Respondent and the Charging Party each filed a reply brief.

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

The issues in this case primarily arise out of various statements that the Respondent's managers made to employees during mandatory meetings that the Respondent convened to discuss unionization following the Charging Party's filing of a petition for a representation election.[3] We affirm the judge's findings, for the reasons he states, that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by threatening employees that unionization would cause them to lose the current benefit of Term Limited Assignments and would cause the Respondent to prioritize giving benefits to employees at its nonunionized stores over giving benefits to employees at its unionized stores.[4] We also affirm the judge's finding that the Respondent violated Section 8(a)(1) by implying that collective bargaining could not redress the employees' current inability to receive tips from customers' credit card payments. Such statements, which suggest that a union cannot help employees get better compensation for their work, unlawfully threaten employees that unionization would be futile. See, e.g., *Bucyrus Foodland North & Bucyrus Foodland South*, 247 NLRB 284, 286 (1980), enfd. in rel. part sub nom. *NLRB v. Frederick's Foodland, Inc.*, 655 F.2d 88 (6th Cir. 1981).[5] We further affirm the judge's findings that the social media posts of one of the Respondent's supervisors that threatened that unionization would cause the loss of certain employee benefits were attributable to the Respondent and violated Section 8(a)(1).[6]

We also adopt the judge's finding that the Respondent did not violate Section 8(a)(1) based on its managers' statements concerning the impact unionization would have on the employees' ability to address issues individually with the Respondent. However, in reviewing the judge's finding, we have decided to prospectively overrule *Tri-Cast, Inc.*, 274 NLRB 377 (1985)—which the judge relied on—and adopt, for future cases only, a test consistent with the Board's pre-*Tri-Cast* approach. As discussed in greater detail in Section I, below, in *Tri-Cast* and its progeny, the Board erred in deeming categorically lawful nearly any employer statement to employees touching on the impact that unionization would have on the relationship between individual employees and their employer. As we will explain, the purposes of the Act are better served if the content and context of such statements

[1] The Respondent asserts that Members Prouty and Wilcox should recuse themselves, claiming that their "past, present, and perceived relationships with the Service Employees International Union (SEIU), SEIU Local Unions, and their affiliates, including Charging Party Workers United" create a conflict of interest. Members Prouty and Wilcox have determined, in consultation with the Board's Designated Agency Ethics Official, that there is no basis to recuse themselves from the adjudication of this case.

[2] We have amended the judge's conclusions of law consistent with our findings and have modified the judge's recommended Order consistent with those legal conclusions. We have substituted a new notice to conform to the Order as modified.

[3] The General Counsel requests that we overrule *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), which addresses the lawfulness of such employer-mandated campaign meetings. We decline to do so at this time and, thus, affirm the judge's dismissal of the allegation that the Respondent unlawfully held mandatory or effectively mandatory captive-audience meetings.

[4] Sec. 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Sec. 7 of the Act]." 29 U.S.C. § 158(a)(1). Sec. 7 provides, in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . . " Id. § 157.

[5] We find it unnecessary to pass on whether the Respondent also unlawfully threatened the futility of unionization by its statements concerning the duration of collective bargaining, including that it takes "on average a year to eighteen months" for parties to reach an agreement. Any such finding would be cumulative and would not affect the remedy.

[6] In affirming the judge's finding that the supervisor's posts were attributable to the Respondent, we do not rely on *Big Ridge, Inc.*, 358 NLRB 1006, 1020 (2012), affd. 361 NLRB 1372 (2014), enfd. 808 F.3d 705 (7th Cir. 2015), because no exceptions were taken in that case to the judge's relevant findings. Instead, we rely upon *Jimmy John's*, 361 NLRB 283, 290 (2014), enfd. in rel. part 861 F.3d 812 (8th Cir. 2017) (en banc), and *Wake Electric Membership Corp.*, 338 NLRB 298, 299–300 (2002).

are analyzed on a case-by-case basis, applying the principles reflected in the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), which also involved an employer's prediction of adverse consequences from unionization. Thus, to be deemed lawful, employer predictions about the negative impacts of unionization on employees' ability to address issues individually with their employer "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Gissel*, 395 U.S. at 618.

Finally, and contrary to the judge, we find in Section II, below, that the Respondent violated Section 8(a)(1) by its managers' statements concerning the employees' union membership and strike obligations if a majority of them chose to unionize.

I.

At one of the Respondent's mandatory meetings that it had convened to address unionization, a manager told the employees:

> If you want a union to represent you—uh—you want to give your right to speak to leadership through a union, you're going to check off "yes" for the election. If you want to maintain a direct relationship with leadership, you'll check off "no."

She also said:

> [A] representation of a union is the rules of employment will then be grounded in a contract. And if it's not in that contract, it's not a conversation in my opinion that's going to happen with leadership. We'll be bound by the contract. So the union will be bound. And Starbucks will be bound. So I want to be clear on that. That a third party comes in and speaks for you. And everything will be grounded, from my experience and my opinion through the lens of that contract.

In *Tri-Cast*, decided in 1985, the Board reversed precedent to hold that an employer's campaign statements like these are lawful. The *Tri-Cast* holding has since been applied broadly as a categorical rule to immunize nearly all employer statements concerning the relationship between individual employees and their employer. In view of *Tri-Cast* and its progeny, the judge in this case found the statements at issue lawful. The General Counsel asks that we overrule *Tri-Cast* and find unlawful campaign statements of this sort that threaten employees with the loss of an existing benefit, i.e., an established practice of permitting employees to address issues individually with their employer. In turn, she urges the Board to find that the Respondent's statements in this case violated Section 8(a)(1). The Respondent disagrees, arguing that *Tri-Cast* and its progeny are well reasoned. For the reasons explained below, we overrule the categorical rule established in *Tri-Cast* and the cases that have applied it. We replace it with the case-specific approach the Board used in the years immediately preceding *Tri-Cast* and which the Board generally uses when analyzing whether allegedly threatening statements violate Section 8(a)(1) of the Act.[7] However, in view of employers' longstanding reliance on *Tri-Cast*'s categorical rule, we will apply the newly reinstated approach only prospectively.

A. Legal Background

We start with the text of the statute. Section 9(a) of the Act grants a union chosen by the majority of a unit of employees the authority to serve as the employees' "exclusive representative[]" for the purposes of collective bargaining.[8] But Section 9(a) also contains a proviso qualifying that exclusive representation. The proviso states that:

> [A]ny *individual* employee or a *group of employees* shall have the *right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative*, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (emphasis added in part). The proviso assures that, even when they are represented by a union, individual employees or groups of employees are permitted to

[7] Our decision to replace *Tri-Cast*'s categorical rule with the case-specific approach that immediately preceded it applies to both representation and unfair labor practice cases. In representation cases, the Board generally assesses whether conduct during a representation campaign is objectionable because it interferes with employee free choice and thereby warrants setting aside a representation election. In unfair labor practice cases, the Board generally assesses whether the conduct of an employer or a union—including in the context of a representation campaign—violates the Act and thereby warrants a remedial order. In representation cases (or consolidated representation and unfair labor practice cases), the Board has long recognized that conduct that is or could be separately deemed an unfair labor practice almost always constitutes objectionable conduct that may warrant setting aside the election. See *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962) ("Conduct violative of Sec[.] 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election."); see also *Lucky Cab Co.*, 360 NLRB 271, 277 (2014).

[8] In full, this first part of Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.]" 29 U.S.C. § 159(a).

"present grievances" directly to their employer without going through the union, and employers retain the corresponding ability to address such grievances directly with those individuals or groups. Id.

The version of Section 9(a) in effect prior to the enactment of the Taft-Hartley Act of 1947 provided that individual employees could "present" their grievances to their employer, 29 U.S.C. § 159(a) (1935), but the Board had interpreted this language narrowly to mean that, while employees could communicate their grievances to their employer, they had to go through their union to resolve them, *Hughes Tool Co.*, 56 NLRB 981, 982–983 (1944), enfd. 147 F.2d 69 (5th Cir. 1945). The Taft-Hartley Act "amended Section 9(a) . . . to specifically authorize employers to settle grievances presented by individual employees or groups of employees, so long as the settlement is not inconsistent with any collective bargaining contract in effect." H.R. Rep. No. 80–510, at 46 (1947) (Conf. Rep.), reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 550. As the Supreme Court has explained, "[t]he intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61 fn. 12 (1975).

In the 1960s and early 1970s, the Board was inconsistent in its treatment of employer statements concerning the impact of unionization on employees' ability to address issues individually with their employer. In some cases, the Board found—often with the approval of the federal courts of appeals—that statements were unlawful threats where employees were told that, if they chose a union, they would lose the benefit of their existing ability to address issues individually with their employer.[9] But in other cases, the Board found that substantially similar statements were lawful predictions that unionization would require employees to go through their chosen unions to address individual issues.[10]

By the late 1970s and early 1980s, however, the Board began—with the approval of the Fourth, Sixth, Seventh, Eighth, and Ninth Circuits—to consistently find unlawful employer statements that effectively threatened employees with the loss of their Section 9(a) ability to address issues individually with their employer.[11] In those cases, the Board recognized that "an employer may explain that with union representation the union will be a participant in employer-employee relations generally," but also recognized that "an employer cannot threaten to retaliate against its employees' selection of a union representative by cutting off the employees' Section 9(a) right to deal directly with management." *Greensboro News Co.*, 257 NLRB at 701.

At the same time as it was consistently remedying employer threats to abridge employees' ability to raise individualized grievances under the proviso to Section 9(a), the Board decided *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), a representation case that addressed factual misrepresentations made during a union campaign. There, the Board concluded that it would "no longer probe into the truth or falsity of the parties' campaign statements" and, accordingly, would "not set

[9] See, e.g., *Saticoy Meat Packing Co.*, 182 NLRB 713, 713–715 (1970); *Henry I. Siegel Co.*, 172 NLRB 825, 825, 829, 837-838 (1968), enfd. 417 F.2d 1206 (6th Cir. 1969), cert. denied 398 U.S. 959 (1970); *Block-Southland Sportswear, Inc.*, 170 NLRB 936, 936, 949–950 (1968), enfd. 420 F.2d 1296 (D.C. Cir. 1969); *Winn-Dixie Stores*, 166 NLRB 227, 227, 234 (1967); *Graber Mfg. Co.*, 158 NLRB 244, 244, 246–247, 249 (1966), enfd. 382 F.2d 990 (7th Cir. 1967).

[10] See, e.g., *Gertz*, 197 NLRB 718, 718, 723 (1972); *Bostitch Div. of Textron, Inc.*, 176 NLRB 377, 377, 379 (1969); *K.O. Steel Casting, Inc.*, 172 NLRB 1837, 1837 (1968); *National Bookbinding Co.*, 171 NLRB 219, 219–220 (1968); *Westmont Engineering Co.*, 170 NLRB 13, 13 (1968); *Skirvin Hotel & Skirvin Tower*, 142 NLRB 761, 763 (1963).

[11] See, e.g., *Mead Nursing Home, Inc.*, 265 NLRB 1115, 1115-1116 (1982) (employer statement deemed objectionable campaign conduct); *Economy Fire & Casualty Co.*, 264 NLRB 16, 20 (1982) (employer statement deemed unfair labor practice); *Gould, Inc.*, 260 NLRB 54, 54 fn. 3 (1982) (employer statement deemed unfair labor practice); *Greensboro News Co.*, 257 NLRB 701 (1981) (employer statement deemed objectionable campaign conduct); *Associated Roofing & Sheet Metal Co.*, 255 NLRB 1349, 1350 (1981) (employer statement deemed objectionable campaign conduct); *Limestone Apparel Corp.*, 255 NLRB 722, 728 (1981) (employer statement deemed unfair labor practice), enfd. 705 F.2d 799 (6th Cir. 1982) (mem.); *Joe & Dodie's Tavern*, 254 NLRB 401, 401, 411 (1981) (employer statement deemed unfair labor practice), enfd. sub nom. *NLRB v. Dick Seidler Enterprises*, 666 F.2d 383 (9th Cir. 1982); *Ducane Heating Corp.*, 254 NLRB 112, 112 fn. 2 (1981) (employer statement deemed unfair labor practice), enfd. in part 665 F.2d 1039 (4th Cir. 1981) (mem.); *G.F. Business Equipment, Inc.*, 252 NLRB 866, 871 (1980) (employer statement deemed objectionable campaign conduct and unfair labor practice), enfd. 673 F.2d 1314 (4th Cir. 1982) (mem.); *Armstrong Cork Co.*, 250 NLRB 1282, 1282 (1980) (employer statement deemed objectionable campaign conduct); *LOF Glass, Inc.*, 249 NLRB 428, 428–429 (1980) (employer statement deemed objectionable campaign conduct); *Colony Printing & Labeling*, 249 NLRB 223, 224-225 (1980) (employer statement deemed unfair labor practice), enfd. 651 F.2d 502 (7th Cir. 1981); *Sacramento Clinical Laboratory, Inc.*, 242 NLRB 944, 944–945 (1979) (employer statement deemed unfair labor practice), enf. denied in rel. part 623 F.2d 110 (9th Cir. 1980); *Tipton Electric Co.*, 242 NLRB 202, 202, 205–206 (1979) (employer statement deemed unfair labor practice), enfd. 621 F.2d 890 (8th Cir. 1980); *Robbins & Myers, Inc.*, 241 NLRB 102, 103–104 (1979) (employer statement deemed objectionable campaign conduct), enfd. 653 F.2d 237 (6th Cir. 1980), cert. denied 451 U.S. 938 (1981); *C & J Manufacturing Co.*, 238 NLRB 1388, 1391–1392 (1978) (employer statement deemed objectionable campaign conduct and unfair labor practice); *Han-Dee Pak, Inc.*, 232 NLRB 454, 458–459 (1977) (employer statement deemed objectionable campaign conduct and unfair labor practice).

elections aside on the basis of misleading campaign statements." *Midland*, 263 NLRB at 133. But the Board also made clear that it would still "continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice." Id.

The Board subsequently confirmed that the rule from *Midland* "applied to misleading campaign statements generally," such that "there [was] no basis for treating misrepresentations of law differently" than misrepresentations of fact. *Furr's Inc.*, 265 NLRB 1300, 1300 fn. 10 (1982). But *Midland* and its extension to misrepresentations of law in *Furr's* were not initially understood as upsetting the consistent approach that had emerged for assessing employer campaign statements concerning unionization's impact on employees' ability to address issues individually with their employer. The Board in those cases had not held that employer statements of this sort violated the law merely because they misrepresented the right of employees to individually present grievances under Section 9(a)'s proviso. Rather, the Board had held that these statements violated the law because the employer's purported misrepresentation was for all intents and purposes a threat: that the employer would deprive employees of an existing beneficial practice if they chose to unionize, when, in fact, the law would *not* permit that action. See, e.g., *Greensboro News Co.*, 257 NLRB at 701 fn. 5 ("Because we find that the statement constitutes a threat, we find it unnecessary to pass on the . . . finding that the statement constitutes a misrepresentation."); *Associated Roofing & Sheet Metal Co.*, 255 NLRB at 1350 (same); *Ducane Heating Corp.*, 254 NLRB at 112 fn. 2 (same).

Indeed, on the same day that the Board confirmed in *Furr's* that the *Midland* rule applied to misrepresentations of law, the Board still found that an employer engaged in objectionable conduct by sending a letter to employees stating that "[i]f a union is certified, you will have to deal through Union representatives and may not be permitted to go directly to [the employer] about particular problems that you may have." *Mead Nursing Home, Inc.*, 265 NLRB at 1115–1116. The Board was able to reconcile this finding with *Midland* and *Furr's* because the employer's statement in *Mead Nursing Home*, regardless of whether it was a misrepresentation of the law, "constitute[d] a retaliatory threat to terminate unilaterally an existing benefit of employees to deal directly with the Employer if the Union were selected." Id. at 1116 (internal footnotes omitted); see also *Fiber Industries*, 267 NLRB 840, 841 (1983) (assessing post-*Midland* whether, based on its content and broader context, an employer's campaign statement that "in a unionized plant individuals cannot come directly to supervisors to solve job related problems or to receive action or needed improvements" was an "objectionable threat to eliminate a benefit granted employees").

Moreover, just two weeks *after* the Board decided *Midland*, it issued its decision in *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982). At issue in *Eagle Comtronics* was an employer's statement to its employees that, in the case of an economic strike, strikers "could be replaced with applications on file." Id. at 515. The Board found that the statement was lawful because it "truthfully inform[ed] employees that they are subject to permanent replacement in the event of an economic strike," even if it failed to "fully detail[] the protections" enumerated for economic strikers in *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969). Id. at 515–516.[12] But, critically, the Board acknowledged that an employer's statement on job status after an economic strike must "not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*." Id. at 516. In other words, an employer's statement on job status after an economic strike must be "consistent with the law" in order to "[]not be characterized as restraining or coercing employees in the exercise of their rights under the Act." Id. Accordingly, while *Eagle Comtronics* permits employers to make statements about striker replacements without fully detailing the protections provided by law, it also provides that an employer may not make statements that are inconsistent with the law, which effectively threaten to deprive employees of their existing rights as a consequence of striking.

In the years since *Midland* and *Eagle Comtronics* were decided in 1982, the Board has regularly and uncontroversially applied *Eagle Comtronics* many times, often finding employers' legally inaccurate strike-related statements to unlawfully threaten employees based on their content and context.[13] This precedent confirms that *Midland* did not

[12] In *Laidlaw*, the Board held that "economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." 171 NLRB at 1369–1370.

[13] See, e.g., *Care One at Madison Avenue*, 361 NLRB 1462, 1462, 1471–1473 (2014) (unfair labor practice where employer's statement asked employees whether they wanted to "give outsiders the power to jeopardize your job by putting you out on strike?"), enfd. 832 F.3d 351 (D.C. Cir. 2016); *Gelita USA Inc.*, 352 NLRB 406, 406–407 (2008) (unfair labor practice where employer stated to employees that "economic strikers would have no job protection if replaced"), adopted by 356 NLRB 467 (2011); *Wild Oats Markets, Inc.*, 344 NLRB 717, 718, 740 (2005) (unfair labor practice where employer stated to employees that

demand a fundamental change to the Board's approach of proscribing employers' coercive campaign statements that implicate employees' protections under the Act.

Even so, in *Tri-Cast* and its progeny—all decided after *Eagle Comtronics*—the Board took a different approach when addressing statements concerning employees' ability to address issues individually with their employer after unionization. The *Tri-Cast* Board considered whether an employer's campaign statement to employees was objectionable election misconduct that warranted setting aside a representation election. 274 NLRB at 377. The statement was as follows: "We have been able to work on an informal and person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing." Id. The Board reversed the Regional Director's determination that this statement was objectionable because it threatened to curtail employees' ability to address issues individually with their employer, which, as noted, is a practice explicitly authorized by Section 9(a)'s proviso.

The *Tri-Cast* Board made the general observations that "[t]here is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before" and that Section 9(a) "contemplates a change in the manner in which employer and employee deal with each other." Id. It further observed that "[t]his is especially so" when "a collective-bargaining agreement is negotiated" and that when an employer tells its employees about such changes during an election campaign it "cannot be characterized as an objectionable retaliatory threat to deprive employees of their rights, but rather is nothing more or less than permissible campaign conduct." Id. It also called it a "'fact of industrial life' that when a union represents employees they will deal with the employer indirectly, through a shop steward." Id. (quoting *NLRB v. Sacramento Clinical Laboratory*, 623 F.2d 110, 112 (9th Cir. 1980)).

Although the employer's statement definitively told employees that, as a consequence of unionization, the employer would "not be able to handle personal requests as we have been doing," the *Tri-Cast* Board characterized that specific statement as "simply explicat[ing] one of the changes which occur between employers and employees when a statutory representative is selected." Id. To the extent that the employer inaccurately stated that unionization would legally require it to discontinue a beneficial practice explicitly authorized by Section 9(a)'s proviso, the *Tri-Cast* Board deemed that unproblematic, because the Board in *Midland* had held that it would "no longer probe into the truth or falsity of the parties' campaign statements." Id. at 378 (quoting *Midland*, 263 NLRB at 133).

In finding the employer's statement not objectionable, the *Tri-Cast* Board specifically reversed three prior decisions that had deemed similar statements objectionable. Id. at 377 & fn. 5 (overruling *Greensboro News Co.*, 257 NLRB 701 (1981); *Armstrong Cork Co.*, 250 NLRB 1282 (1980); *LOF Glass, Inc.*, 249 NLRB 428 (1980)). As noted, those expressly overruled cases—and many others that the Board in *Tri-Cast* did not cite, see supra fn. 11—found that statements like the one at issue in *Tri-Cast* "could reasonably be construed as a threat to deprive employees of their right" under Section 9(a) to address issues individually with their employer. *Greensboro News Co.*, 257 NLRB at 701. The Board in those cases had made the same general observation that the *Tri-Cast* Board did, noting that "an employer may explain that with union representation the union will be a participant in employer-employee relations generally." Id. But in these pre-*Tri-Cast* cases, the Board did *not* view an employer's *specific* statement that employees would no longer be able to address individual grievances with the employer after unionization as a lawful *general* statement. Instead, as noted, the Board

"when unions go on strike, wages can be lost and many have lost their jobs because striking workers are replaced"); *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 542 (2003) (unfair labor practice where employer stated to employees that "if you value your job and your continued future at [the employer] you must come to work regardless of a strike!"); *Rankin & Rankin, Inc.*, 330 NLRB 1026, 1026 (2000) (unfair labor practice where employer stated to employees that "if the union demanded higher wages and the company disagreed, the union could call a strike and the employees could be replaced by new employees who would be hired for less money"); *Mediplex of Danbury*, 314 NLRB 470, 470–471 (1994) (unfair labor practice where employer stated to employees that employees at another facility who had recently unionized went on strike, were terminated, and the facility reopened with permanent replacement employees); *Baddour, Inc.*, 303 NLRB 275, 275 (1991) (objectionable campaign conduct and unfair labor practice where employer stated to employees that "union strikers can lose their jobs" and "you could end up losing your job by being replaced with a new permanent worker"); *Texas Super Foods*, 303 NLRB 209, 209, 219 (1991) (objectionable campaign conduct and unfair labor practice where employer stated to employees that if they struck they would lose their jobs); *Fern Terrace Lodge*, 297 NLRB 8, 8–9 (1989) (unfair labor practice where an employer stated to employees that "[a]n employer has the legal right to permanently replace the striking employees, and the replaced striker is not automatically entitled to his job back just because the strike ends"); *Larson Tool & Stamping Co.*, 296 NLRB 895, 895–896 (1989) (objectionable campaign conduct where employer stated to employees that during an economic strike "you could LOSE YOUR JOB TO A PERMANENT REPLACEMENT"); *Gino Morena Enterprises*, 287 NLRB 1327, 1327–1328 (1988) (unfair labor practice where employer stated to employees that "it would be futile to engage in a strike and that they would not only be out of a job but would probably lose their jobs if they struck").

held that "an employer cannot threaten to retaliate against its employees' selection of a union representative by cutting off the employees' Section 9(a) right to deal directly with management." Id.

Following the categorical rule of *Tri-Cast* and its progeny, and notwithstanding the clear statutory protections of Section 9(a), the Board, in both representation cases and unfair labor practice cases, has since repeatedly found lawful employer statements that unionization would eliminate employees' ability to address workplace issues individually with their employer—notwithstanding that some of these statements could be understood to threaten employees with a loss of an established benefit, when viewed from the perspective of a reasonable employee.[14] There have been criticisms of this approach over the years, including Member Block's concurring opinion in *Dish Network Corp.*, 358 NLRB 174 (2012).[15] Member Block encouraged "reexamining *Tri-Cast* in an appropriate future case" in view of her conclusion that *Tri-Cast* is "at odds with the Board's overall treatment of employer predictions about the outcome of unionization." 358 NLRB at 176–177. Specifically, she pointed out that under the Supreme Court's decision in *Gissel*, such predictions "'must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.'" Id. at 175–176 (quoting *Gissel*, 395 U.S. at 618). Member Block also noted that *Eagle Comtronics*, unlike *Tri-Cast*, was implicitly consistent with *Gissel* in that it allows employers to make statements about striker replacements but also requires employers' statements to be objectively based—i.e., it "provides an important qualification [that] the employer may not threaten to deprive employees of existing rights as a consequence for striking." Id. at 176. In Member Block's view, "the *Tri-Cast* Board erred in not applying a similar qualification" and, consequently, "*Tri-Cast* ha[d] proven to be a blunt instrument, applied in such a broad fashion that almost any statement involving employees' ability to pursue grievances individually is permissible." Id.

B. Analysis

The Board's administrative process is one of "constant . . . trial and error" informed by our "[c]umulative experience" administering labor-management relations. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (quoting *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 349 (1953)). Consistent with that process, informed by our experience and our careful consideration of this issue, we overrule *Tri-Cast*. Even if it constitutes a permissible construction of the Act, *Tri-Cast* was poorly reasoned when it was decided, and its later application has categorically immunized employer campaign statements that, based on their content and context, could reasonably be understood to threaten employees with the loss of an established workplace benefit. As a consequence, *Tri-*

[14] See, e.g., *Tesla, Inc.*, 370 NLRB No. 101, slip op. at 7 (2021) (employer's "statement that if the employees selected the Union as their representative, only the Union would have a voice and not the employees did not violate the Act"), enf. denied on other grounds 86 F.4th 640 (5th Cir. 2023); *Holy Cross Health d/b/a Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 1 fn. 3 (2020) (employer's "statements that union representation might limit direct access to management … are not threats"); *Stern Produce Co.*, 368 NLRB No. 31, slip op. at 4 (2019) (dismissing unfair labor practice allegation that employer unlawfully told employees "that if they chose the Union to represent them, they would no longer have direct dealings with the Respondent's owner and would have to wait until the Union negotiated with him"); *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at 1 fn. 2 (2018) (dismissing unfair labor practice allegation that employer unlawfully "told employees that signing union authorization cards or electing the union would negatively impact their ability to individually represent themselves"), enf. denied on other grounds 932 F.3d 465 (6th Cir. 2019); *Office Depot*, 330 NLRB 640, 642 (2000) (dismissing unfair labor practice allegation that employer unlawfully told employees that they "wouldn't be able to communicate with management in the same way that [they] are right now because there would be a representative from the union that would be the middle person"); *Ben Venue Laboratories*, 317 NLRB 900, 900 (1995) (dismissing unfair labor practice allegation that employer unlawfully told its employees that its "'open-door policy' would no longer exist if employees voted to unionize"), enfd. 121 F.3d 709 (6th Cir. 1997) (mem.); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989) (dismissing unfair labor practice allegation that employer unlawfully "threaten[ed] employees with the loss of their right to bring grievances to the attention of management if they became unionized"), enfd. 938 F.2d 815 (7th Cir. 1991); *Hyatt Regency Memphis*, 296 NLRB 259, 259 fn. 3 (1989) (dismissing unfair labor practice allegation that employer unlawfully "threatened employees with the loss of the privilege of going directly to supervision with employee problems"), enfd. 939 F.2d 361 (6th Cir. 1991); *SMI Steel*, 286 NLRB 274, 274 (1987) (dismissing unfair labor practice allegation that employer unlawfully told its employees that its "'open-door policy' would no longer exist if the employees voted to unionize"); *Koons Ford of Annapolis*, 282 NLRB 506, 506 (1986) (dismissing unfair labor practice allegation that employer unlawfully told its employees that "if the Union got in he would not be able to talk directly to the employees as he had been doing but would have to go to the Union"), enfd. 833 F.2d 310 (4th Cir. 1987) (mem.), cert. denied 485 U.S. 1021 (1988); *FGI Fibers*, 280 NLRB 473, 473 (1986) (overruling election objection based on employer "tell[ing] its employees about changes in its open door policy which will result from their selection of a bargaining agent"); *Port Plastics*, 279 NLRB 362, 362 (1986) (dismissing unfair labor practice allegation that employer unlawfully told employees "that he had been able to speak on a one-on-one basis to employees, but would no longer be able to do so if the Union came into the warehouse"); *Michael's Markets*, 274 NLRB 826, 826–827 (1985) (dismissing unfair labor practice allegation and overruling election objection based on employer telling employees, "There is no room for discussion because once [the union] is voted in, the union does the talking and the employees do the listening. At least right now if an employee has a difference of opinion with you, he can discuss it with you on a one-to-one basis. With the union, this opportunity is totally eliminated.").

[15] Although the recess appointment of Member Block was invalid, *NLRB v. Noel Canning*, 573 U.S. 513, 519 (2014), we find her concurring opinion persuasive on this issue.

Cast inhibits, rather than promotes, employees' freedom to exercise the organizational rights guaranteed by Section 7 of the Act. The case-specific approach that we return to today is more carefully calibrated to ensure that employer campaign statements are nonthreatening. That approach is also more consistent with the Supreme Court's decision in *Gissel* and better protects employees' Section 7 rights without infringing on employers' speech protected under Section 8(c) of the Act, which only shields statements that "contain[] no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

As a preliminary matter, we take no issue with the general observations that the *Tri-Cast* Board made. Generally speaking, "[t]here is no threat, either explicit or implicit," in an employer statement that *merely* says to employees that "when they select a union to represent them, the relationship that existed between the employees and the employer *will not be as before*." *Tri-Cast*, 274 NLRB at 377 (emphasis added). In light of the Act's collective-bargaining provisions, this is an objectively true statement, of course. Most obviously, and as Section 9(a) sets out, after employees choose a union, the union will be their exclusive representative for purposes of collective bargaining, and bargaining may culminate in a collective-bargaining agreement that defines terms and conditions of employment. Accordingly, we do not disagree that Section 9(a), to this extent, "contemplates a change in the manner in which employer and employee deal with each other." Id.

We fundamentally disagree, however, that the specific employer campaign statement at issue in *Tri-Cast was* such a statement, and we further disagree that, as a categorical matter, *all* employer statements on the general subject of employees' ability to address issues individually with the employer after unionization are always lawful. The specific statement at issue in *Tri-Cast* was, in most relevant part, that "[i]f the union comes in" the employer "will not be able to handle personal requests as we [i.e., the employer] have been doing." Id. The *Tri-Cast* Board offered no compelling rationale as to *why* this specific statement (or others like it) was not contrary to the guarantee of the Section 9(a) proviso and did not threaten employees that, as a consequence of unionization, they would lose an existing benefit. Instead, *Tri-Cast* made the conclusory assertion that this statement "simply explicates one of the changes which occur between employers and employees when a statutory representative is selected" and the equally conclusory assertion that it "cannot be characterized as an objectionable retaliatory threat to deprive employees of their rights, but rather is nothing more or less than permissible campaign conduct." Id. What is particularly confounding about these assertions is that the specific statement at issue in *Tri-Cast* (and others like it) does *not* explicate "one of the changes" that comes from unionization under the Act. To the contrary, Section 9(a)'s proviso ensures precisely the opposite: that an employer being "able to handle personal requests"—as the employer's statement colloquially put it in *Tri-Cast*—is precisely one of the things that does *not* inevitably change upon unionization.

Because the *Tri-Cast* Board described the statement at issue so generally, it failed to address, much less refute, the rationale of the consistent line of cases in the preceding years explaining that employer statements concerning the impact of unionization on the employer-employee relationship can be unlawfully coercive if they amount to a threat to eliminate a beneficial practice. Instead, the *Tri-Cast* Board cited the three decisions relied upon in the underlying Regional Director's report—without noting the many others (including those enforced by reviewing courts), see supra fn. 11—and, without further elaboration, overruled those three cases. Id. at 377 fn. 5 (expressly overruling *Greensboro News Co.*, 257 NLRB 701 (1981); *Armstrong Cork Co.*, 250 NLRB 1282 (1980); *LOF Glass, Inc.*, 249 NLRB 428 (1980)). Those cases acknowledged, consistent with *Tri-Cast*'s general observations, that "an employer may explain that with union representation the union will be a participant in employer-employee relations generally." *Greensboro News Co.*, 257 NLRB at 701. But, instead of treating all statements touching on the employer-employee relationship as if they were the same, the pre-*Tri-Cast* cases looked at the specific content and context of the particular statement at issue to assess whether it "was an improper threat by the Employer to terminate the existing beneficial situation." Id.[16] In other words, prior to *Tri-Cast*, the Board asked whether a statement concerning unionization's impact on the employer-employee relationship threatened the loss of a beneficial practice and, if so, properly deemed such a statement an unlawful threat that interfered with employees' free exercise of their organizational rights. The *Tri-*

[16] See also, e.g., *Armstrong Cork Co.*, 250 NLRB at 1282 ("We find that the above-quoted portion of the Employer's letter constitutes a threat to employees that selection of the union would result in the loss of an existing benefit; namely the right under the Sec[.] 9(a) proviso . . . . "); *LOF Glass, Inc.*, 249 NLRB at 428–429 ("The Employer argues that its statement was intended to inform employees that under [a collective-bargaining agreement] its 'open door' policy could no longer exist . . . . [T]he statement remains a serious misrepresentation of the employees' right under Sec[.] 9(a) of the Act to present their own grievances and have them adjusted without reference to any contractual procedures as long as the substance of the adjustment is not inconsistent with the contract. That employees frequently made use of the Employer's 'open door' policy makes its reputed loss something that they well could consider a significant reason to reject union representation.") (internal footnote and citations omitted).

Cast Board failed to persuasively explain why this approach should be rejected.

Although the *Tri-Cast* Board cited *Midland* in an attempt to buttress its reasoning, its treatment of *Midland* was misleadingly superficial. Relying on *Midland*'s holding that the Board would "no longer probe into the truth or falsity of the parties' campaign statements," the *Tri-Cast* Board said its own analysis would thus not change even if the employer's statement were understood "to have misrepresented employee rights." 274 NLRB at 378. However, as noted above, the Board in *Midland* made clear that it would continue to prohibit "campaign conduct, such as threats, promises, or the like, which interferes with employee free choice." 263 NLRB at 133. Thus, even if a misrepresentation is not per se unlawful, a statement that incorporates a misrepresentation may still constitute an unlawful threat. And that was precisely the rationale of the cases that, without any reasoned explanation, *Tri-Cast* overruled. See, e.g., *Greensboro News Co.*, 257 NLRB at 701 fn. 5 ("Because we find that the statement constitutes a threat, we find it unnecessary to pass on the . . . finding that the statement constitutes a misrepresentation."). In short, contrary to the apparent suggestion of *Tri-Cast*, *Midland* does not somehow require the preposterous outcome that the Board immunize employer threats simply because they are premised on a misrepresentation of the Act and its effects on employees.

The *Tri-Cast* Board also cited *Eagle Comtronics* following its conclusory assertion that the statement at issue was "nothing more or less than permissible campaign conduct." 274 NLRB at 377 & fn. 5. But that citation is inapposite because the reasoning of *Eagle Comtronics* actually supports the rationale of the cases that *Tri-Cast* overruled. Specifically, in *Eagle Comtronics*, the Board reasoned that if an employer's statements concerning employees' job status after a strike are not "consistent with the law," then they may "be characterized as restraining or coercing employees in the exercise of their rights under the Act." *Eagle Comtronics*, 263 NLRB at 516. In other words, *Eagle Comtronics* confirms the general proposition—wrongly rejected by *Tri-Cast*—that a statement that misrepresents the law can still be unlawful if, depending on its content and context, it threatens interference with employees' Section 7 rights.

Perhaps most fundamentally, *Tri-Cast*, unlike *Eagle Comtronics*, is at odds with the law's general treatment of employer predictions about the potential adverse impacts of unionization. In *Gissel*, the Supreme Court described it as "obvious" that any balancing of an employer's speech rights and employees' Section 7 rights "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." 395 U.S. at 617. Accordingly, the Supreme Court instructed that if an employer "make[s] a prediction as to the precise effects he believes unionization will have on his company," then "the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control." Id. at 618. Thus, "[i]f there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a *threat of retaliation based on misrepresentation and coercion*." Id. (emphasis added).

Under this generally applicable framework, when an employer makes a statement explicitly or implicitly based on what the Act allows or requires, the statement must be measured against what the Act actually allows or requires. A statement that inaccurately conveys what the Act allows or requires is not "carefully phrased on the basis of objective fact" and, as such, may be "a threat of retaliation based on misrepresentation and coercion" depending on its content and context. Id. Employer statements that broadly predict that unionization will necessarily foreclose employees' ability to address issues individually with their employer are not reasonable predictions about the legal consequences of unionization that follow from the Act. Put somewhat differently, the Act does not compel employers to end all direct interaction with individual employees over workplace issues if employees choose union representation. Section 9(a) explicitly provides otherwise. Thus, when an employer's statement, based on its content and context, contradicts Section 9(a) by asserting that an existing practice of permitting individual employees to address their issues with management must end if employees choose union representation, that statement amounts to an unlawful threat of retaliation that an employer may end existing practices "solely on his own initiative." Id.

As noted, experience under *Tri-Cast* shows that it has been broadly applied to immunize employer statements that, when subjected to normal Section 8(a)(1) scrutiny under *Gissel*, could have a reasonable tendency to coerce employees. See supra fn. 14. There is no compelling reason to accept this result. To the contrary, *Gissel* makes clear that employers must carefully phrase their predictions about the consequences of unionization on the basis of objective facts. Despite not expressly citing *Gissel*, the Board in *Eagle Comtronics* implicitly followed its instructions in the context of employer statements about strikers' job status rights. As a consequence, *Eagle Comtronics* has

been a useful and uncontroversial tool for distinguishing employer statements on that topic that are not unlawfully threatening[17] from those that are.[18] By bringing scrutiny of employer statements concerning the employer-employee relationship into compliance with *Gissel*'s instructions, we will henceforth have a similarly sensible tool for those types of statements too. Accordingly, we adopt an approach for assessing the lawfulness of employer statements concerning the impact of unionization on the relationship between individual employees and their employer that is grounded in *Gissel*, informed by *Eagle Comtronics*, and consistent with the pre-*Tri-Cast* approach.[19]

Adopting this approach promotes the policy of the Act in a manner that *Tri-Cast* does not. The Act declares it "to be the policy of the United States" to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151. *Tri-Cast*'s approach—to effectively give employers carte blanche to misrepresent their obligations under the Act in order to deter employees from exercising their right to organize—is anathema to this policy. The generally applicable threat analysis that we reinstate—which, consistent with the Supreme Court's decision in *Gissel*, reasonably requires employers to ground their predictions concerning the consequences of unionization in objective fact—better protects employee self-organization and thereby advances the Act's goal of encouraging collective bargaining.

Under the approach we reinstate today, statements concerning the consequences of unionization on the relationship between individual employees and their employer, including the ability of employees to address issues individually with their employer, are to be treated the same as all other employer statements concerning the consequences of unionization. Consequently, employers retain robust protection under Section 8(c) to express their views to employees about unionization. However, to be protected under Section 8(c), all such employer predictions must be grounded in objective fact. That familiar requirement is rooted in Supreme Court precedent and fair to employers. As the Supreme Court has recognized:

> [A]n employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in brinkmanship when it becomes all too easy to overstep and tumble over the brink. At the least he can avoid coercive speech *simply by avoiding conscious overstatements he has reason to believe will mislead his employees*.

Gissel, 395 U.S. at 620 (cleaned up; emphasis added).

C. Prospective Application

The Board's usual practice is to apply new policies and standards retroactively to all pending cases, including the case in which the new rule is announced, unless doing so would amount to a manifest injustice. *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005). To determine whether retroactive application amounts to a manifest injustice, we consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. Id. Here, on balance and in the circumstances of this particular case, prospective application only is warranted.

First, we recognize the reliance interest of the parties on preexisting law. In 1985, the *Tri-Cast* Board announced what was almost immediately understood as a broad categorical rule covering a wide swath of employer campaign statements. Accordingly, for nearly 40 years, *Tri-Cast*'s broad rule has been in effect. Employers thus reasonably came to rely on the fact that predictions specifically about unionization's consequences for the employer-employee relationship were lawful, however anomalous that may have been under the standard that governed their other predictions. Accordingly, there are relatively strong employer reliance interests weighing against retroactive application.

On the other hand, employees have a strong interest in the Board applying the reinstated pre-*Tri-Cast* approach that follows *Gissel*'s instructions and that more effectively accomplishes the Act's purposes. As noted, *Tri-Cast* is contrary to the Act's express policies, whereas the *Gissel*-compliant approach we reinstate effectively promotes those policies. Retroactive application would thus help accomplish the Act's purposes.

Third, and last, we would find some injustice in applying the reinstated pre-*Tri-Cast* approach in this case because the Respondent would likely be judged to have committed an unfair labor practice based on speech that was clearly lawful at the time of utterance.

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[17] See, e.g., *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 184–186 (2007); *Novi American*, 309 NLRB 544, 545-546 (1992); *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988).

[18] See supra fn. 13.

[19] To the extent that a statement assessed under this standard is deemed to violate Sec. 8(a)(1), we note that such a violation, depending on the circumstances, usually is also sufficient to set aside an election. *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at 26 fn. 142 (2023) (citing *Lucky Cab Co.*, 360 NLRB at 277); *Clark Equipment Co.*, 278 NLRB 498, 505 (1986); *Dal-Tex Optical Co.*, 137 NLRB at 1786–1787.

After carefully considering the particular circumstances of this case, we conclude that, on balance, it would amount to a manifest injustice to apply the new standard in this case, and prospective application is the more appropriate course. Although the issue is close, we think that future application of the standard we reinstate today will sufficiently promote the policies of the Act while giving appropriate weight to the reasonable reliance employers have previously placed on *Tri-Cast*'s categorical rule and avoiding unjust results.

D. Response to the Dissent

We respectfully disagree with the arguments raised by our dissenting colleague and explain below the following errors in his analysis.

First, the dissent contends that because *Tri-Cast* was a representation case and this is an unfair labor practice case, the Board has no authority to address *Tri-Cast* and our overruling of *Tri-Cast* and its progeny is somehow mere "dicta" without precedential effect. This contention is unfounded. In the nearly 40 years since *Tri-Cast* was decided, the Board has never hesitated to apply *Tri-Cast*'s categorical rule across both representation and unfair labor practice cases, indistinguishably. We have collected more than a dozen cases to prove the point. See supra fn. 14. Indeed, less than 2 weeks after it decided *Tri-Cast*, the very same Board applied *Tri-Cast*'s rule in a consolidated representation and unfair labor practice case to jointly resolve both an election objection and an unfair labor practice allegation. *Michael's Markets*, 274 NLRB at 826–827. Even our dissenting colleague—when he was in the majority just a few years ago—applied *Tri-Cast*'s rule to decide unfair labor practice allegations. See, e.g., *Holy Cross Health d/b/a Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 1 fn. 3; *Stern Produce Co.*, 368 NLRB No. 31, slip op. at 4.[20] *Tri-Cast* provides a categorical rule for assessing whether an employer's statement amounts to a *threat*, regardless of whether the alleged threat is scrutinized as potential objectionable campaign conduct or as an alleged unfair labor practice. *Michael's Markets*, cited above, clearly demonstrates as much. So does *Ben Venue Laboratories*, 317 NLRB at 900. In that consolidated representation and unfair labor practice case, the Board also assessed whether an employer's statement constituted both objectionable campaign conduct and an unfair labor practice. After citing *Tri-Cast* and a handful of cases citing that decision, the Board explained that it had assessed the employer's statement "in light of th[o]se cases," had "conclude[d] that it did not constitute an unlawful threat," and "[a]ccordingly . . . dismiss[ed] the complaint allegation and overrule[d] the election objection relating to this conduct." Id. Insofar as *Tri-Cast* has been applied repeatedly in unfair labor practice cases, including by the judge in this case, it obviously can be overruled in this unfair labor practice case.

Second, our dissenting colleague offers another supposed reason why today's decision is mere dicta: because we overrule *Tri-Cast* prospectively and accordingly have found the Respondent's statements here to be lawful under *Tri-Cast*. Contrary to our colleague's implication, the Board is not required to adopt new legal rules retroactively in order for them to be valid. As our dissenting colleague knows, in cases where the Board overrules precedent, it almost invariably examines, pursuant to the same long-established criteria we have considered in this case, see *SNE Enterprises*, 344 NLRB at 673 (citing, inter alia, *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)), whether the overruling will have retroactive or prospective effect. Accepting the dissent's premise would require us to reject the analysis that the Board has consistently and uncontroversially brought to bear in precedent-shifting cases. See, e.g., *Piedmont Gardens*, 362 NLRB 1135, 1140–1151 (2015) (overruling precedent prospectively only over two vigorous dissents, neither of which suggested the Board could not change precedent prospectively), enfd. sub nom. *American Baptist Homes of the West v. NLRB*, 858 F.3d 612 (D.C. Cir. 2017). Our dissenting colleague does not explain how, under his understanding of the law, the agency could *ever* overturn precedent but decide that the equities merited doing so only on a prospective basis.[21]

[20] Notably, the analytical framework from *Eagle Comtronics*, on which we rely to overrule *Tri-Cast*, is also indistinguishably applied to assess both election objections and alleged unfair labor practices. See, e.g., *Texas Super Foods*, 303 NLRB at 209, 219; see also *Larson Tool & Stamping Co.*, 296 NLRB at 895–896.

[21] Our dissenting colleague relatedly and alternatively faults us for not hypothetically applying the new standard to the facts of the case to find that "the statements at issue in this case *would* be found unlawful" (emphasis added). Making such hypothetical determinations is not and never has been a required practice when the Board opts to use adjudication to change its standards. See, e.g., *Piedmont Gardens*, 362 NLRB at 1140; see also *General Motors LLC*, 369 NLRB No. 127, slip op. at 10–11 (2020) (overruling precedent but remanding to the judge for application in the first instance). Our dissenting colleague says that he is "not aware of any case establishing that it was appropriate to change the law prospectively *without actually applying the law to the present case*" (emphasis in original), but *Piedmont Gardens* is just such a case. As noted above, in enforcing the Board's decision, the District of Columbia Circuit gave no indication that the Board could not change its precedent on a prospective-only basis. See *American Baptist Homes*, 858 F.3d at 614-616. Moreover, contrary to the dissent's suggestion, we find that applying the new standard here would constitute a "manifest injustice," which is why we are adopting it prospectively.

Our dissenting colleague is also similarly mistaken in his reliance on the Sixth Circuit's recent decision in *NLRB v. McLaren Macomb*, Nos. 23-1335/1403, 2024 WL 4240545 (6th Cir. Sept. 19, 2024) (unpublished per curiam). There, the Board found a Sec. 8(a)(1) violation under prior precedent and "[a]lternatively" also found a Section 8(a)(1) violation

Third, the dissent advances yet another baseless claim that today's decision is dicta: because the standard we reintroduce will be applied to "*other* unidentified statements" not currently before the Board (emphasis in original). Of course our standard will be applied to assess other future statements not presently before the Board. To say so is just to acknowledge that we are adopting a general standard that necessarily will apply to specific cases going forward. Those cases will turn on the new general standard being applied to their specific facts. Our colleague does not explain how the Board could ever set a standard through adjudication that was not "dicta," as he understands it. Under our colleague's reasoning, *Tri-Cast* itself would be "dicta." When the *Tri-Cast* standard was announced, it was clearly intended to be applied to "other unidentified statements" not then before the Board. Two weeks later, the Board was applying the *Tri-Cast* standard in *Michael's Markets* to a statement similar to—but hardly identical with—the statement at issue in *Tri-Cast*. Such is the nature of precedent and analogical reasoning.

Fourth, the dissent contends that we "have failed to provide any reasoned explanation for why it was necessary, in the instant case, to revisit [*Tri-Cast*]." There is no basis for that claim. Here, the judge squarely relied on *Tri-Cast* to resolve the relevant issue. The General Counsel argued on exceptions that the Board should overrule *Tri-Cast*; the Respondent offered counter-arguments. In reaching our decision, we have explained, at some length, why overruling *Tri-Cast* is consistent with Supreme Court precedent (*Gissel*), our own precedent (most notably, *Eagle Comtronics*), and the policy of the Act (Section 1). In revisiting *Tri*-Cast, we address the issue squarely presented to the Board. Our dissenting colleague is free to disagree with our decision, to be sure, but we have hardly reached out to decide an issue not presented or failed to explain the basis for our decision.[22]

Finally, we respond to the dissent's view on the merits. At bottom, our dissenting colleague disagrees with us as a matter of policy as to the proper framework for assessing the coercive tendency that a certain type of employer statement could have on employees' free exercise of their Section 7 rights. He is entitled to his contrary view, but we are not persuaded by it.

Our dissenting colleague contends that we have characterized a number of Board decisions as being "wrongly decided under *Tri-Cast*," and he proceeds to offer his preferred analysis of the employer statements from some of those cases. Here, however, we need not decide how prior cases would have come out under the standard we adopt today, which rejects the categorical rule of *Tri-Cast*, for the reasons carefully explained. Had our new standard been in place when the prior cases were decided, each case would have turned on its particular facts, not on the general subject matter of the employer's statement. It may be that some, or even most, of the prior cases would have been decided differently under today's standard, while in others the result would have been the same. That fact is immaterial. Today's decision is based on the demonstrable flaws of the *Tri-Cast* standard, not on our disagreement with the result in any individual prior case.

In turn, we reject the dissent's remarkable assertion that "it is fair to say that," under *Tri-Cast*, "the Board has generally distinguished objectively fact-based predictions about the changed employee-employer relationship from unlawful threats." Our dissenting colleague fails to cite a single case from the last 40 years in which, under *Tri-Cast*, an employer's statement was found to be a threat. The absence of such cases confirms that *Tri-Cast* has been applied categorically, immunizing a broad swath of potentially coercive statements. By contrast, *Eagle Comtronics*—on which, as noted, we rely in replacing *Tri-Cast*—reflects a preferable approach, focused on the facts of a particular case, and so allows for noncoercive statements to continue to be deemed lawful while requiring those that are coercive to be found unlawful. See supra fns. 13 & 17.

The dissent also misunderstands our position on the proviso to Section 9(a) of the Act. Recall that the proviso says in key part that "any individual employee or a group of employees *shall have the right* at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative." 29 U.S.C. § 159(a) (emphasis added).

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after having overruled that precedent and returned to earlier law. Id. at *6–7. The court found the former rationale sufficient for enforcement and so did "not address" the Board's other rationale that had relied on the reversal of precedent. Id. at *8. Contrary to the dissent's implication, nothing in the Sixth Circuit's decision suggests that the Board did anything improper by changing precedent even if doing so did not change the underlying finding of a Sec. 8(a)(1) violation.

[22] The judge correctly determined that *Tri-Cast* was dispositive here, as the parties' briefing confirms. Thus, the dissent is simply wrong to contend that we could decide this case "without reaching" *Tri-Cast*.

The dissent's assertion that overruling *Tri-Cast* makes "no difference" in this case is nothing more than a reflection of the fact that we have chosen—based on a careful consideration of the relevant factors—not to apply our decision retroactively. Had we applied the standard adopted today to the facts presented, the result in this case could have very well been different.

In view of the judge's decision and the parties' briefing, the dissent is also wrong in arguing that the parties did not have "notice" that the Board would consider revising the law. We note that it is curious that our dissenting colleague would raise this argument, as he was part of the Board majority in multiple prior cases that did, indeed, reach out to decide issues that were not outcome-determinative and did so without any notice to, or briefing by, the parties involved. See, e.g., *Hy-Brand Industrial Contractors,* 365 NLRB 1554, 1588–1589 (2017) (dissenting opinion); *Boeing Co.*, 365 NLRB 1494, 1522–1526 (2017) (dissenting opinion). Inexplicably, he would now find such a practice illegitimate.

To begin, our dissenting colleague asserts that our position is that the Section 9(a) proviso "establishes a substantive right for represented employees to have their grievances heard by their employer." Of course, because the proviso itself expressly refers to "the right . . . to present grievances," our colleague's quarrel might seem to be with Congress, not us. But our position is not that the Section 9(a) proviso grants employees a right as Section 7 does. Rather, the proviso reflects the clear intent of Congress to ensure that when employees choose union representation, they will not automatically lose the ability to present grievances to the employer without the union's intervention. Thus, to repeat what we said earlier: Section 9(a) makes clear that after employees choose representation, an employer may maintain, under specified circumstances, its pre-unionization practice of addressing employees' grievances individually without engaging in unlawful direct dealing in violation of Section 8(a)(5). *Emporium Capwell Co.*, 420 U.S. at 61 fn. 12. The Act does not *require* an employer to adopt such a practice, but it *permits* such a practice. When such a practice exists, the proviso to Section 9(a) ensures that the practice can continue after unionization. When an employer tells employees otherwise—when it tells employees that it will be required to abandon the practice if they choose union representation—then the employer is unlawfully threatening employees with the loss of a benefit.[23]

Next, the dissent mistakenly asserts that, under today's decision, we "requir[e]" an employer "to tell its employees of their rights under the Act" to avoid making an unlawful threat. However, the standard adopted today ensures that an employer may not threaten employees with the loss of a beneficial practice if they choose union representation. As explained, determining whether a statement amounts to such a threat will depend on its content and context. An employer need not explain to employees how the Section 9(a) proviso operates—just as under *Eagle Comtronics,* supra, an employer "may address the subject of striker replacement without fully detailing the protections enumerated in [Board case law] so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in [Board case law]." 263 NLRB at 516. Consistent with the Supreme Court's *Gissel* decision, however, the employer's statement must be based on objective fact—and a statement (for example) that the Act requires the employer to eliminate any practice of individual grievance resolution if employees choose union representation is *not* based on objective fact, because the Section 9(a) proviso expressly says otherwise. To repeat the observation of the *Gissel* Court, in this area, as in others, an employer "can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees." 395 U.S. at 620.

For all these reasons, we cannot agree with our dissenting colleague's position here.

II.

We now turn to the remaining issue in this case. At one of the mandatory meetings that the Respondent convened to address its employees about unionization, an employee inquired about "walkouts" to pressure the Respondent to comply with the terms of a contract or to bargain a contract modification. A manager facilitating the meeting

[23] Our dissenting colleague's analysis of Sec. 9(a) misses this point, while misunderstanding our position here.

We address the situation where an employer makes a statement that could reasonably be understood by employees as a threat to end a beneficial practice of addressing employees' grievances individually, if the employees choose union representation. For example, an employer might state that it will end its existing open-door policy if employees organize. Sec. 9(a), as we have explained, does not *require* employers to end such a practice once a union represents employees. Indeed, as noted above, the proviso to Sec. 9(a) protects employees' right to present concerns individually to their employer. Thus, Sec. 9(a) cannot provide an objective factual basis for the employer's statement about the consequences of unionization. Instead, as discussed extensively above, such a statement is an impermissible threat of the loss of a benefit. See *Gissel*, 395 U.S. at 618.

We do not find that Sec. 9(a) requires an employer to maintain its prior practice, regardless of the union's position, only that it is possible for the practice to continue after unionization. Our colleague is mistaken, then, when he seems to ascribe to us the view that Sec. 9(a) "provide[s] the . . . benefit" at issue. It is the employer, rather, that has provided a benefit to employees, and Sec. 9(a) that makes it possible for the employer to continue the benefit. Employer statements to the contrary are inconsistent with Sec. 9(a) and its proviso, and no part of Sec. 9(a) immunizes the threatened loss of an existing benefit.

Instead of genuinely addressing our position, our colleague essentially argues that the Sec. 9(a) proviso is a nullity and is somehow inconsistent with other statutory provisions. Thus, he insists that "it is not true that the proviso gives the employer a green light to resolve grievances of its represented employees 'without the intervention' of their exclusive bargaining representative." First, the Sec. 9(a) proviso literally says otherwise, stating that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, *without the intervention of the bargaining representative*," if certain conditions are met. 29 U.S.C. § 159(a) (emphasis added). Second, and even more fundamentally, employer statements of the kind we address in today's decision often sweep more broadly and threaten the loss of channels of communication for "present[ing] grievances" that will not result in the "adjustment" of grievances within the meaning of either the first or second proviso to Sec. 9(a). Id. Even on our colleague's interpretation, nothing in Sec. 9(a) provides any basis for immunizing such statements.

We adhere to the Supreme Court's understanding of Sec. 9(a) in *Emporium Capwell*, supra, that Congress intended the proviso to insulate employers from direct-dealing allegations under Sec. 8(a)(5). Necessarily, then, we reject our colleague's apparent view that the proviso is meaningless. The canon against surplusage in statutory interpretation rules out that position. See generally *Pulsifer v. U.S.*, 601 U.S. 124, 143 (2024).

responded by saying "for that all union partners would have to strike"; a second manager added "there is no opt-out in the State of Washington. Everyone will be union, if you go union, and the contract is ratified"; and the first continued "the strike would be a simple majority as well." The judge found that these statements were lawful because they were not coercive even if they misstated the law.[24] We disagree.

Consistent with *Midland*, 263 NLRB at 133, and with the Supreme Court's decision in *Gissel*, we do not deem these statements unlawful simply because they misrepresented the law—which they did. See *Machinists Local Lodge 1414 (Neufeld Porsche-Audi, Inc.)*, 270 NLRB 1330, 1333 (1984) ("[Section 7] encompasses not only the right to refrain from strikes, but also the right to resign union membership."). Rather these misrepresentations are unlawful because they lacked an objective basis in the Act and had a reasonable tendency to coerce economically dependent employees to refrain from choosing union representation.

Employees hearing these statements could reasonably conclude (1) that if a simple majority of their coworkers voted to unionize, they would be required to join the union (making them subject to union discipline and the financial obligations of membership), and (2) that if a simple majority of the employees voted to strike, they would be required to take part in the strike. These false statements—having no support in the Act at all—would thus tend to discourage employees from voting for the union, if they desired representation, but did not wish to become union members or to join a strike. Because joining a strike would mean foregoing wages and other benefits, moreover, these statements amount to a threat of economic harm: if there were a strike, employees would have to participate and, as a consequence, forfeit pay and other benefits. We thus disagree with the judge's analysis that these statements were not coercive because they were made in response to a "narrow hypothetical" concerning a strike to create pressure for a contract modification. We thus conclude that these statements violated Section 8(a)(1) of the Act.[25]

AMENDED CONCLUSIONS OF LAW

1. Siren Retail Corp. d/b/a Starbucks, the Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Workers United, affiliated with the Service Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening employees that existing benefits will be reduced if they select union representation.

4. The Respondent violated Section 8(a)(1) of the Act by threatening employees that they will lose existing benefits if they select union representation.

5. The Respondent violated Section 8(a)(1) of the Act by threatening employees that it would be futile for them to select union representation.

6. The Respondent violated Section 8(a)(1) of the Act by threatening employees that, if they select union representation, the company will prioritize non-union stores and union-represented stores will not receive added benefits.

7. The Respondent violated Section 8(a)(1) of the Act by threatening employees about their union membership and strike obligations if they select union representation.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The Respondent, Siren Retail Corp. d/b/a Starbucks, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that existing benefits will be reduced if they select union representation.

(b) Threatening employees that they will lose existing benefits if they select union representation.

(c) Threatening employees that selecting union representation would be futile.

(d) Threatening employees that, if they select union representation, the company will prioritize non-union stores and union-represented stores will not receive added benefits.

(e) Threatening employees that, if they select union representation, they would have to be union members and that, if there were a strike, they would have to participate in the strike.

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

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

[24] Specifically, the judge relied on the managers' refraining from the even more clearly coercive pronouncements that "a strike would be an inevitable result of unionizing" or "that the employer, by its own action, would impose dire consequences upon employees" and on the fact that the managers' statements came in response to an employee's "narrow hypothetical."

[25] Accordingly, we decline the Charging Party's request to revisit *Midland*.

(a) Direct its supervisor Elijah De La Vega to delete the February 14, 2022 Facebook posts—"if union vote is passed, TLA opportunities would be on the table. As they wouldn't be considered a part of the theoretical union. Since they are two different entities, we can't share partners anymore for legality reasons" and "Nothing will be guaranteed and everything will be on the table. Some might lose their free ASU others their healthcare. And much else. Even negotiating higher wages wouldn't be guaranteed."—and take appropriate steps to ensure De La Vega complies with this directive.

(b) Post at its Seattle, Washington facility copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 14, 2022.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 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. November 8, 2024

Lauren McFerran, Chairman

David M. Prouty, Member

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, concurring in part and dissenting in part.

At issue in this unfair labor practice case is a determination whether certain statements made by the Respondent in reaction to the employees' union organizing activities violate Section 8(a)(1) of the Act. For the reasons explained below, I agree with my colleagues' findings that some of the Respondent's statements violated Section 8(a)(1) of the Act, and I disagree with their findings that certain other statements were unlawful. Of particular importance, however, is the fact that my colleagues and I all adopt the judge's finding that the managers' statements concerning the effect that unionization would have on the employees' ability to address issues individually with the Respondent did not constitute unlawful threats under Section 8(a)(1) of the Act.

Yet, even though we all agree with regard to the dismissal of that complaint allegation, my colleagues have nevertheless written a lengthy decision explaining why they are overruling "*Tri-Cast* and its progeny" and, further, why they believe that this case presents them with the opportunity to do so. As I will explain, however, their reasoning is based in abstraction and fails to engage with the actual facts and law presented in this case.

To begin, although my colleagues assert that they are overruling *Tri-Cast, Inc.*, 274 NLRB 311 (1985), in this case, they are not. The only issue presented in *Tri-Cast,* which was a representation case, was whether or not a certain statement rose to the level of *objectionable conduct* sufficient to warrant setting aside the results of a representation election. The case currently before the Board, however, does not present the question of whether or not the statements at issue constituted objectionable conduct. Rather, the case before us presents the issue of whether those

[26] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

statements constitute an *unfair labor practice* under Section 8(a)(1).

It is settled law pursuant to *Pergament United Sales*, 296 NRB 333 (1989), that the Board cannot reach an issue not alleged in the complaint unless two factors are satisfied: the issue is closely connected to the subject matter of the complaint and the issue has been fully litigated. See, e.g., *Dalton Schools d/b/a The Dalton School*, 364 NLRB 132, 133 (2016) (declining to reach the issue of whether the respondent engaged in an unlawful interrogation because the issue failed to satisfy the *Pergament* test). There is no question that, if my colleagues were to attempt to find that the statement at issue did, or did not, constitute objectionable conduct, they would not be able to do so because that issue would not satisfy the requirements of *Pergament*. Indeed, I am not aware of any case in which the Board has addressed whether or not conduct rose to the level of objectionable conduct where, as here, *no election had been held*.[1]

It is not clear to me on what basis my colleagues believe that, even though they do not have the ability under *Pergament* to make any finding regarding objectionable conduct in the instant case, they have the ability to overrule *Tri-Cast* and thus effectively find that the conduct at issue in this case would now constitute objectionable conduct.[2] To my knowledge, the Board has never held that it has the ability to make law, let alone overrule precedent, based on an issue that is inarguably not before it.[3] Nor am I aware of any case in which the Board has overruled law pertaining to representation cases through the vehicle of an unfair labor practice case, or vice versa.

My colleagues cannot challenge the validity of these points. Rather, they attempt to justify using this unfair labor practice case to overrule law pertaining to representation cases, which involve an entirely different section of the Act, by asserting that "[i]n representation cases . . . conduct that is or could be separately deemed an unfair labor practice almost always constitutes objectionable conduct that may warrant setting aside the election." Similarly, they contend that "[i]n the nearly 40 years since *Tri-Cast* was decided, the Board has never hesitated to apply *Tri-Cast*'s categorical rule across both representation and unfair labor practice cases." Even assuming that those statements are true, my colleagues have skipped a logical step. My colleagues refuse to concede, as they must, that the Board does not use the same analysis for determining whether a statement constitutes an unlawful threat and thereby violates Section 8(a)(1) of the Act and for determining whether a statement constitutes objectionable conduct in determining whether to uphold election results. Accordingly, just because violations of Section 8(a)(1) often strongly support a determination that objectionable conduct has occurred, that does not turn the instant unfair labor practice case into a representation case presenting the issue of whether certain statements constitute *objectionable conduct*. And because that issue is inarguably not before us, my colleagues cannot use this case to change the law pertaining to what constitutes objectionable conduct.

Still unpersuaded, my colleagues assert that they "have collected more than a dozen cases to prove the point." But, to the extent that they are citing unfair labor practice cases

[1] Because the issue of whether or not the Respondent engaged in objectionable conduct is not before us, if the judge applied the holding in *Tri-Cast* as binding precedent, that was clear error. The fact that the Board has applied the *rationale* in *Tri-Cast* to unfair labor practice cases in the past does not establish that *Tri-Cast* itself needs to be overruled to decide an alleged violation in an unfair labor practice case. Contrary to the suggestion of the majority, the judge's error in that regard does not place the question of whether or not *Tri-Cast* needs to be overruled before the Board.

In fact, this is not the first time my colleagues, or the Board, have erroneously conflated these two separate areas of the law. In *Cemex Construction Materials Pacific, Inc.*, 372 NLRB No. 130, slip op. at 6 (2023), my colleagues cited both *Tri-Cast* and *Midland Life Insurance*, 263 NLRB 127 (1982), another post-election representation case, as grounds for reversing the judge's finding that statements made to drivers violated Sec. 8(a)(1) of the Act. But my colleagues also cited *New Process Co.*, 290 NLRB 704, 707 (1988), enfd. 872 F.2d 413 (3d Cir. 1989) (unpublished), a combined unfair labor practice and representation case, in which the Board appears to have made the same error, reversing the judge's finding that a statement violated Sec. 8(a)(1) on the basis of *Tri-Cast*, finding "that holding is dispositive of the alleged violation here." 290 NLRB at 707.

[2] Which is a particularly odd result given that my colleagues are not finding that the statements at issue in this case even violated Section 8(a)(1), which is inarguably a lower bar.

[3] Nor would courts likely enforce a decision by the Board on an issue not presented in the case before it. *Cf. Berman v. Dept. of the Interior*, 447 F.App'x 186, 192 (Fed. Cir. 2011) (remanding Merit System Protection Board decision giving preclusive effect to a later-reversed jury verdict on a 18 U.S.C. § 209(a) allegation because, inter alia, "the merits of a Section 209(a) violation were not before the Board").

I also note that my colleagues' attempt to reach the issue of objectionable conduct in this unfair labor practice case--if successful--would completely overhaul the Board's practice of deciding cases. If my colleagues are correct, then nothing would stop the Board from using a case only alleging a single unlawful Sec. 8(a)(1) threat to overturn *Wright Line*, the long-standing precedent for determining whether an employer's adverse action against an employee violates Sec. 8(a)(3) and (1) of the Act. Like the determination of objectionable conduct, the determination of an unlawful adverse action under *Wright Line* is not the same analysis as that used for determining a Sec. 8(a)(1) violation. However, it cannot be denied that, often, the Board's finding of an unlawful threat under Sec. 8(a)(1) is the determinative factor in finding that the General Counsel has met her initial *Wright Line* burden and that that determination controls the Sec. 8(a)(3) and (1) analysis, so long as the respondent cannot rebut it. Similarly here, although the finding of an unlawful Sec. 8(a)(1) threat may very well end up being the determinative factor in finding that a future employer engaged in objectionable pre-election conduct, the Board in that future case must still undertake an objectionable conduct analysis.

that have applied the *rationale* in *Tri-Cast*, those cases do not establish that the decision whether or not to overrule *Tri-Cast* is before us.[4] Instead, what *is arguably* before the Board is whether the Board should continue to apply the *Tri-Cast* rationale in determining whether or not statements constitute unlawful threats under Section 8(a)(1).[5]

Finally, I note an additional reason why my colleagues are not overruling *Tri-Cast*: the Board's holding in *Tri-Cast* had two separate bases. Specifically, the Board found that the statement at issue "[could] not be characterized as an *objectionable* retaliatory threat"[6] and that "the Regional Director's finding of an *objectionable* misrepresentation cannot stand" in light of *Midland National Life Insurance Co.*, 263 NLRB 127 (1982) (emphasis added). The decision in *Midland* flowed directly from the Supreme Court's decision in *NLRB v. A.J. Tower, Co.*, in which the Supreme Court held that, in establishing "the proceedings necessary to insure the free and fair choice of bargaining representatives by employee," the Board was required to weigh multiple factors. *Midland*, 263 NLRB at 131 (citing *NLRB v. A.J. Tower, Co.*, 329 U.S. 324, 330 (1946)). As the Board stated:

> [T]he Board must weigh and accommodate not only the principle of majority rule, but several other conflicting factors, such as preserving the secrecy of the ballot, insuring the certainty and finality of election results, and minimizing unwarranted and dilatory claims by those opposed to the election results.

Id. (citing *A.J. Tower*, 329 U.S. at 331). Because such a wide range of interests were at stake, the Board rejected prior cases that had required that the Board undertake an inquiry into the truth or falsity of election campaign misstatements. Rather, it concluded that the proper standard was that, in determining whether misstatements constituted objectionable conduct, the Board should not rely on the "*substance* of the representation" but rather on whether the representation was made in a "deceptive *manner.*" Id. at 131. The Board concluded that, because employees would be capable of evaluating statements made in the context of a campaign, this standard would promote "definite [election] results [that] are both predictable and speedy," reduce "[t]he incentive for protracted litigation" over election results, and reduce "the possibility of disagreement between the Board and the courts."[7] Id. at 131–132. For these reasons, the Board concluded that "we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements." Id. at 133.[8] Thus, the Board expressly decided *Tri-Cast* in light of the high standard applicable for finding conduct objectionable under *Midland*. The instant case, by contrast, has nothing to do with the Board's *Midland* precedent.

In addition to the fact that the factors to be weighed in determining objectionable conduct are entirely absent in determinations whether statements violate Section 8(a)(1), there is another obvious reason why the Board would create a lower standard for Section 8(a)(1) violations. The ramifications for finding violations in the two contexts are very different. The remedy imposed by the Board for objectionable conduct involving coercive statements results in overruling employees' choice whether or not to be represented as expressed through a secret ballot election. In the case of Section 8(a)(1) violations, in contrast, the remedies ordered are far more limited, ultimately centering on a cease-and-desist order and a notification to employees of the violation, including a statement that such conduct will not happen again.[9] Consistent with this difference,

[4] In a future appropriate case raising the issue of whether certain statements are objectionable, my colleagues would be free to overrule *Tri-Cast*. They just can't do so in this case because the issue is not before us.

[5] My colleagues find it significant that two majority decisions in which I participated "applied *Tri-Cast*'s rule to decide unfair labor practice allegations," citing *Holy Cross Health d/b/a Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 1 n.3 (2020), and *Stern Produce Co.*, 368 NLRB No. 31, slip op. at 4 (2019). But there is nothing remarkable about that. I am not disputing the fact that the Board has a practice of applying the principle set forth in *Tri-Cast* to unfair labor practice cases. But that does not establish that the holding in *Tri-Cast*--that certain conduct was not objectionable--was before the Board in those cases. Indeed, it would have been as inappropriate to overrule *Tri-Cast* in those prior cases in which I participated as it is in the instant case. I further note that nothing in *Holy Cross* or *Stern Produce* suggests that any party argued to the Board that it should stop applying the *Tri-Cast* reasoning to unfair labor practice allegations.

[6] I will refer to this basis of the Board's holding in *Tri-Cast* as the "absence of threat" analysis.

[7] The Board also noted that it believed "that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." Id. at 131 (internal quotation marks omitted).

[8] It may well be that my colleagues disagree with the Board's decision in *Tri-Cast* to rely on *Midland* in finding that the conduct at issue was election propaganda and, therefore, did not constitute objectionable conduct. However, there is no argument whatsoever for the Board reaching that issue here, unless my colleagues are taking the position that the Board may use any case to overrule any precedent, whether or not the issue is remotely before the Board. If that is indeed my colleagues' position, they appear to be giving future Boards *carte blanche* to overrule any precedent, at any time. In addition, they must answer the question why, if the issue is not before us, the Board is free to ignore the rulemaking provisions mandated in the Administrative Procedure Act.

[9] The contrast in the two questions is also demonstrated in the recent representation case *Coway USA, Inc.*, 372 NLRB No. 145 (2024). In that case, the question presented was whether the union engaged in objectionable conduct by threatening or informing employees that voting against the union would be futile. Specifically, the union president informed employees "that, if the employees voted against representation, he would 'hire lawyers and file a lawsuit' and that the Union would eventually prevail." Id., slip op. at 1 n.1. Two of my colleagues found that the statement at issue in *Coway* did not constitute objectionable conduct, in part,

the Board in *Midland* cited the Supreme Court for its understanding that it was acceptable to allow parties to make misrepresentations to employees based on the principle that "a Board rule governing a representation proceeding need not be an 'absolute guarantee' that the election will, without exception, reflect the choice of a majority of the voting employees." *Midland*, 263 NLRB at 131 (citing *A.J. Tower*, 329 U.S. at 332, 333).

In a future appropriate case, three members of the Board may choose to overrule the holding in *Tri-Cast* that the statement at issue in that case did not constitute objectionable conduct. Or, in the absence of a case presenting the issue, three Board members could engage in rulemaking to make that change to the law. What the majority of the Board may not do, however, is reverse long-standing Board precedent that involves an entirely different area of the law than what is before the Board in the instant case.[10]

THE RESPONDENT'S ALLEGED SECTION 8(a)(1) VIOLATIONS

Allegations Where I Join My Colleagues in Finding Violations

I agree with my colleagues' conclusion that the Respondent violated Section 8(a)(1) by threatening employees when their managers made certain statements about the effects of unionization in meetings on March 11 and 22, 2022, and in postings on Facebook. Specifically, I join my colleagues in finding that the Respondent unlawfully threatened employees that unionization would cause them to lose the current benefit of Term Limited Assignments (TLAs), but only to the extent that a manager stated that TLAs would be "off the table." By that statement, employees would reasonably understand that the Respondent would refuse to bargain over a mandatory bargaining subject concerning temporary work assignments.[11]

I also agree that the Respondent violated Section 8(a)(1) when its manager told employees that the Respondent would "prioritize, frankly, ununionized stores over unionized stores" if employees voted to unionize, particularly after telling them that "for unionized stores to get a super great deal, it's going to be hounding, I think, for Starbucks to move all those billions of dollars that go to partners over to their legal department that's constantly negotiating contracts." I further agree that the Respondent, by one of its manager's Facebook posts, unlawfully threatened that unionization would cause the loss of certain employee benefits, but only to the extent that the manager stated, "we can't share partners anymore for legality reasons." Additionally, I join my colleagues in affirming the judge's dismissal of the allegation that the Respondent unlawfully held mandatory or "effectively mandatory" captive-audience meetings to discourage union activity.[12]

Finally, I join my colleagues in finding that the Respondent did not violate Section 8(a)(1) when its manager told employees, in pertinent part, that a "yes" vote would give their "right to speak to leadership [to] a union" and "[t]hat a third party comes in and speaks for" them upon selection of a union. Despite our unanimous decision on this issue, my colleagues have found it necessary to speculate at length, in *dicta*, whether different statements not presently before the Board should be found to violate the Act. As will be discussed below, such speculation has no precedential value because it has no bearing on the issues presently before the Board.

Allegations Where I Do Not Join My Colleagues in Finding Violations

I disagree with my colleagues that the Respondent otherwise violated Section 8(a)(1) as alleged. Unlike my colleagues, I would affirm the judge's finding, for the reasons he stated, that the Respondent did not violate Section 8(a)(1) when its manager responded to an employee question about walkouts by saying that all union partners would have to strike and that there is no opting out in the State of Washington.

Further, contrary to my colleagues' conclusion, I would *reverse* the judge's finding that the Respondent's store operations manager unlawfully gave employees the impression that selecting the Union would be futile because it

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because "the statement [was] a permissible forecast of the Union's legal options following a hypothetical unsuccessful election. To the extent that it may have misrepresented the extent to which the Union's 'lawsuit' might be successful, the Board does not 'probe into the truth or falsity of the parties' campaign statements.' *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982)." Id. If *Coway* had been an unfair labor practice case, by contrast, my colleagues would presumably not have applied *Midland* and, instead, would have considered whether a reasonable employee would feel coerced by a union president threatening to file a lawsuit and not accept the results of the election should the employees vote not to be represented. Certainly, it is hard to imagine a scenario in which an employer making the exact same statements would not be found to violate Sec. 8(a)(1).

[10] I further note that I will explain that, to the extent that my colleagues are attempting to overrule Board precedent involving Sec. 8(a)(1) violations without addressing how the change in law would affect the case presently before us, their *dicta* clearly qualifies as arbitrary and capricious and is therefore barred by the Administrative Procedure Act.

[11] See generally *Southern California Edison Co.*, 284 NLRB 1205, 1210 (1987) (finding that "temporary work assignment practice" is a mandatory subject of bargaining "within the category of wages, hours, and terms and conditions of employment"), enfd. 852 F.2d 572 (9th Cir. 1988).

[12] Like my colleagues, I decline the General Counsel's request to overrule *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), which addresses the lawfulness of employer-mandated campaign meetings, but I note that the majority's decision to prospectively overrule *Tri-Cast* in this case undermines *Babcock* by severely restricting lawful employer statements about the effects of unionization and by blurring the clear guidance that the Agency is obligated to provide and, for decades, has provided.

would not result in a change in credit-card processing technology, which employees believed reduced their potential tips. In this respect, the manager told employees:

> [If] credit card tips … could just be switched on—that would be amazing. That server, that code, doesn't exist yet. And, um, contract negotiations isn't going to create the code. We use registers that are used in every other Starbucks. What updates on ours will impact every other Starbucks. When we talk about like mobile—you know when you go to [the credit-card processing technology] like Square, or whatnot, like that front end, credit card, those registers flip, so that a customer can make a personal choice as to how much to tip. Our equipment doesn't do that. And negotiations is going to have a hard time in us getting brand new equipment in here, plus server code. It's just honest.

To begin, the statements that my colleagues view as threats are not alleged to have been false or inaccurate. Furthermore, contrary to my colleagues' suggestions, nothing in the statement suggested that the Union could not "help employees get better compensation for their work." The Respondent did not suggest that it would refuse to bargain about tips, nor did it suggest that it was unwilling to bargain over higher wages to compensate for the unavailable technology.

Finally, and perhaps most significantly, because the selection of banking or credit card-processing technology is not a mandatory subject of bargaining, nothing in this statement can be construed as a threat that the Respondent would unlawfully refuse to bargain.[13] Because it is not a statement of futility to refuse to bargain over a permissive subject of bargaining, if employees had an expectation that such bargaining was required, they were wrong.

In addition to dismissing the allegation(s) that the statements above were unlawful, I would also dismiss the allegation that the Respondent's manager unlawfully threatened that bargaining would be futile by stating that negotiations at the Respondent's Buffalo, New York store had been ongoing for 12 to 18 months without a contract. My colleagues do not dispute that this statement accurately characterized the status of bargaining at the Buffalo store. Unlike my colleagues, I conclude that because these factual statements did not threaten action by the Respondent nor imply that the length of negotiations was attributable to any one party's intransigence, the General Counsel did not establish a violation of Section 8(a)(1).[14]

INSOFAR AS MY COLLEAGUES' DECISION CONTAINS SPECULATION THAT IS NOT RELEVANT TO DECIDING THE CASE BEFORE US, SUCH SPECULATION IS NOT BINDING PRECEDENT

As mentioned above, my colleagues and I unanimously decided, based on a shared rationale, that the statements *at issue in this case* addressing the potential changes to the relationship between the employees and the Respondent do not violate the Act. That, of course, should be the end of the matter. Instead, my colleagues seek to address an entirely different question, neither pled in the complaint nor at issue in the case before us: whether to change the standard used to determine whether *other* unidentified statements, but not the statements currently before the Board, would violate Section 8(a)(1). Insofar as my colleagues' language purporting to overrule *Tri-Cast* is entirely irrelevant to their determination whether the language before us violates the Act, it is not only *dicta* but it is clearly contrary to the provisions of the Administrative Procedure Act given that, to decide the instant case, the question whether other statements not before us are unlawful is entirely irrelevant.

Indeed, as Chairman McFerran recognized in an earlier case, the Board's scope to change the law through its quasi-judicial process is not unlimited. As part of the dissent in *Hy-Brand Industrial Contractors,* then-Member McFerran found that the Board there "fail[ed] to engage in the reasoned decisionmaking required of administrative agencies by the Administrative Procedure Act" when it engages in overreach. Id., 365 NLRB 1554, 1588 (2017) (Members Pearce and McFerran, dissenting) (overruled on procedural grounds, 366 NLRB No. 26 (2018)). In *Hy-Brand*, the dissent concluded that the following aspects of that case demonstrated the majority decision's failure to comply with the Administrative Procedure Act. First, the case could be "easily decided without reaching the [] issue . . . ." That is undeniably true here. Second, the change in the joint-employer standard there "ma[d]e no difference" with regard to determining whether the respondent was a joint employer. Again, undeniably true here. Third, the dissent criticized the majority for "breaking with

[13] The cases cited by the judge to find this violation do not establish that the choice of technology is itself a mandatory subject of bargaining. Contrary to my colleagues' finding, the Respondent has no obligation to bargain about capital investments such as purchasing new technology, which, as the Supreme Court has made clear, would infringe its right to manage its business. See generally *Fibreboard Corp. v. NLRB,* 379 U.S. 203, 213 (1964) (reasoning that company's decision to contract out maintenance work was a mandatory subject of bargaining because, inter alia, "[n]o capital investment was contemplated" and, therefore, requiring bargaining "about the matter would not significantly abridge [the employer's] freedom to manage the business"). Again, nothing the Respondent said precluded bargaining over increased wages or other tipping options to make up for the Respondent's technological limitations.

[14] See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (distinguishing lawful, objectively fact-based statements from unlawful threats).

established practice" by failing "to give notice that it was considering a change in the law" and failing "to provide interested persons with an opportunity to file briefs on the issue." That is true here as well.[15]

Based on these factors, the dissent in *Hy-Brand* concluded that the decision there was "arbitrary" and could not be reconciled with the requirements of the Administrative Procedure Act. See id. at 1589, 1598 fn. 55. But if then-Member McFerran found that to be true in *Hy-Brand*, I cannot discern any reasoned basis for deciding that the majority's attempt to overrule the absence of threat analysis here does not also violate the Administrative Procedure Act. In particular, I note that the precedent at issue in *Hy-Brand* had been in place for two years. The analysis that my colleagues seek to overrule here, by contrast, has been in place for approximately 40 years. Nevertheless, my colleagues have failed to provide any reasoned explanation for why it was necessary, in the instant case, to revisit that analysis. Which is not surprising, because none exists.[16]

Of course, the current majority has not been afraid to overreach the bounds of the case before them to reverse other precedent similarly at odds with then-Member McFerran's criticism of *Hy-Brand*. See, e.g., *American Federation of Children*, 372 NLRB No. 137, slip op. at 14 (2023) (reaching broader question not necessary to decide the case as an "alternate holding"); *Miller Plastic Products, Inc.,* 372 NLRB No. 134, slip op. at 3 fn. 10 (2023) (same).[17] In those cases, at least, my colleagues attempted to defend their position as an "alternate holding." That justification, however, is not available to my colleagues today. There is nothing in their prejudgment that they will find certain statements not currently before us violate Section 8(a)(1) *that is necessary or relevant to deciding the case presently before us*. Accordingly, my colleagues' comments suggesting such prejudgment are clearly nothing more than *dicta* and are without precedential value.[18]

My colleagues refuse to accept this fact, asserting that I do "not explain how, under [my] understanding of the law, the agency could *ever* overturn precedent but decide that the equities merited doing so only on a prospective basis." Allow me to explain. As my colleagues conceded, the Board decides to apply a change in law prospectively because applying the new policies and standards retroactively would "amount to a manifest injustice." In other words, the Board decides not to find a violation based on the new law because it would be unfair to the parties. But that is not the case here. My colleagues are not finding that applying the new standard here would constitute a manifest injustice because, if the new standard applied, the Respondent's statement would then be unlawful. Instead, they are deciding to apply the change in law prospectively because, in their view, "the Respondent would *likely* be judged to have committed an unfair labor practice based on speech that was clearly lawful at the time of utterance."[19] I am not aware of any case establishing that it was appropriate to change the law prospectively *without actually applying the law to the present case* and determining that such application would create a manifest

[15] The *Hy-Brand* dissent also noted two additional facts: no party had asked the Board to reconsider the joint-employer standard, and the D.C. Circuit was considering a case involving the joint-employer standard. Nothing in *Hy-Brand*, however, indicates that, absent those two facts, the dissent would have concluded that *Hy-Brand* was a proper vehicle for reconsidering the joint-employer standard. Indeed, the fact that no court is currently considering the issue undermines my colleagues' suggestion that they have a reasoned basis for attempting to use this case, which does not present the issue, to jettison the long-standing "absence of threat" analysis. The fact is that no court is currently considering the issue because no court, or Board, decision has questioned the "absence of threat" analysis for the 40 years that it has been in place.

[16] The General Counsel's error in requesting that the Board overrule *Tri-Cast* in an unfair labor practice case does not mean that the relevant issue in that case—whether an employer has engaged in objectionable conduct—is properly before the Board.

[17] Notably, in *NLRB v. McLaren Macomb*, the Sixth Circuit recently found, as the dissent had asserted in the Board case, that it was entirely unnecessary to reach the question of whether the law pertaining to severance agreements should be changed in order to decide the case. Rather, the court found that because the "the Board held that even under [the prior precedent]," the respondent's conduct violated the Act, the case could be decided under that prior precedent. And, indeed, the court applied the prior precedent that had allegedly been overruled by the Board in that case in deciding the case. *NLRB v. McLaren Macomb*, Nos. 23-1335/1403, 2024 WL 4240545 at 7 (6th Cir. Sept. 19, 2024) (unpublished per curiam).

[18] My colleagues have also attempted to rely on language from Supreme Court cases to support their assertions that the Board must be allowed to formulate rules through its quasi-judicial function. See, e.g., *Miller Plastic Products,* 372 NLRB No. 134, slip op. at 3 fn.10. None of the cases relied upon by my colleagues, however, support the proposition that the Board may use its quasi-judicial function to formulate rules that are not properly presented in the case before it. *See Beth Israel v. NLRB*, 437 U.S. 483, 501 (1978) (affirming Board decision where it was supported by substantial evidence on the record as a whole); *NLRB v. Bell Aerospace*, 416 NLRB 267 (1974) (affirming Board decision that was supported by the record facts).

[19] Similarly, my colleagues reject my contention that their language overruling *Tri-Cast* is *dicta* irrelevant to the case before us, stating that my position is "nothing more than a reflection of the fact that we have chosen--based on a careful consideration of the relevant factors--not to apply our decision retroactively." But of course, that is not the basis for my assertion that their attempt to overrule *Tri-Cast* is non-precedential *dicta*. Rather, I believe that they have not overruled *Tri-Cast* because they have not shown that overruling *Tri-Cast* would have had any effect on the case before us, let alone resulted in a "manifestly unjust" outcome. Stating that "the result in this case could have very well been different" is not enough to establish that the proposed change in law was actually relevant to the case before us.

injustice.[20] Accordingly, because my colleagues are not finding that their proposed change in law would affect the outcome of this case, that proposed change in law is *dicta*.[21]

My colleagues also assert that my fundamental criticism with their holding today is that I "disagree with [them] as a matter of policy as to the proper framework for assessing the coercive tendency that a certain type of employer statement could have on employees' free exercise of their Section 7 rights." Although it is true that I disagree with their current standard for evaluating whether statements are coercive, that is not my fundamental criticism of their decision. Rather, to be clear, my fundamental disagreement is two-fold. First, my colleagues are attempting to overrule a representation case, which presents the question of whether conduct is objectionable, through an unfair labor practice case that does not present that question. Second, my colleagues are attempting to use this case to change the law even though they have not shown that the change in law would have any effect whatsoever on the facts presented in the case before us. Accordingly, because their alleged change in law is entirely irrelevant to deciding the case before us, it is non-precedential *dicta*.

MY COLLEAGUES' *DICTA* FAILS TO PROVIDE A REASONED BASIS FOR JETTISONING THE LONG-STANDING *TRI-CAST* "ABSENCE OF THREAT" ANALYSIS

Assuming that, in a future appropriate case, my colleagues are able to reach the issue and overturn *Tri-Cast*, I will explain here, also in *dicta,* why they do not have a reasonable basis for doing so. My colleagues and I agree that, when employees vote to be represented by a union, they are selecting an *exclusive* representative to bargain with the employer on their behalf about their terms and conditions of employment. As a result, employees' choice to be represented by a union necessarily, and dramatically, transforms the relationship they have with their employer. In particular, the employer's previous authority to unilaterally and directly deal with those employees on all matters related to their employment is significantly constrained.

My colleagues, however, conclude that when an employer makes statements that do not entirely accurately characterize the scope of this change, the Board should find that such statements violate Section 8(a)(1). Their reasoning is based on two fundamental principles. First, they contend that cases that have failed to find that such statements violate Section 8(a)(1) do not comport with *Gissel*, above, which distinguishes an employer's lawful, objectively fact-based statements about its beliefs from unlawful threats. They further argue that, to the extent that the Board has relied on the theory in *Tri-Cas*t to determine Section 8(a)(1) allegations, that theory has served to "categorically immunize[] employer campaign statements that . . . threaten employees with the loss of an established workplace benefit," specifically the "ability" to bring some personal grievances directly to the employer within the limitations established in the proviso to Section 9(a) of the Act.

As I explain below, however, the "absence of threat" rationale set forth in *Tri-Cast* properly draws the line between an employer's unlawful threats and its lawful statements about changes brought on by unionization and is consistent with the Act and Supreme Court precedent. In finding otherwise, my colleagues rely on inaccurate characterizations of *Tri-Cast* and its progeny and a misunderstanding of the proviso to Section 9(a) as describing an "ability" or "statutory protections" afforded represented employees to have their grievances settled directly by their employer. As discussed further below, my colleagues concede that that "ability" is not a substantive or enforceable right guaranteeing that an employer must entertain any such grievances.[22] Finally, my colleagues say that

[20] My colleagues, for their part, assert that they *are* finding that application of the new law to the Respondent in this case would constitute a manifest injustice, contending that this case presents the same circumstances as *Piedmont Gardens*, 362 NLRB 1135, 1140–1151 (2015), enfd. sub nom. *American Baptist Homes of the West v. NLRB*, 858 F.3d 612 (D.C. Cir. 2017). However, in *Piedmont Gardens*, unlike in the instant case, there was no question that the application of the new standard would have changed the outcome of the case. Under extant law, the respondent's refusal to provide the union with witness statements did not violate the Act; following the change in law, it did. Accordingly, the injustice or "ill effect" to the respondent that would have resulted from applying the decision retrospectively in *Piedmont Gardens* was clear and obvious. See generally *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005) (stating that "the propriety of retroactive application is determined by balancing any *ill effects* of retroactivity against "'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles'") (emphasis added) (quoting *Security & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). In addition, my colleagues assert that "in enforcing the Board's decision [in *Piedmont Gardens*], the District of Columbia Circuit gave no indication that the Board could not change its precedent on a prospective-only basis." Contrary to my colleagues' suggestion, however, I am not taking the position that the Board cannot establish new law without retroactive application where—as in *Piedmont Gardens*—ill effects constituting manifest injustice would result if the new standard were to be applied to the case at issue. Rather, our disagreement centers on whether it has been established that retroactive application would produce ill effects for the Respondent in this case and, if not, whether the changed law can be considered relevant to deciding the case before us.

[21] For this reason, my colleagues' suggestion that *Tri-Cast* raised the same problem is utterly baseless. In *Tri-Cast,* the Board applied the law to the facts presented in the case at issue.

[22] *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 61 (1975) (affirming that "the Act nowhere protects this [9(a) proviso] 'right' by making it an unfair labor practice for an employer to refuse to entertain" a represented employee's grievance).

they will return to a case-by-case approach. Of course, the proper standard to use in determining whether a Section 8(a)(1) violation has occurred has almost always been a case-by-case approach. But, contrary to their assertion, it appears that they want to put in place a categorial rule; specifically, that to be deemed lawful, employer predictions about the changing employer-employee relationship must recite almost verbatim even barely relevant and often misleading legal principles.

1. *To begin, any rule pertaining to whether the type of statements at issue violated Section 8(a)(1) must protect objectively reasonable employer predictions about the effect of unionization.*

When employer speech is alleged to violate Section 8(a)(1) of the Act, the Board's analysis must adhere to Section 8(c)'s provision that "[t]he expressing of any views, argument, or opinion" by an employer is not an unfair labor practice if the expression "contains no threat of reprisal or force or promise of benefit." The Supreme Court has characterized Section 8(c) as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers v. Austin*, 418 U.S. 264, 272–273 (1974). Section 8(c) therefore recognizes an employer's right of free speech under the First Amendment as explained in *Gissel*, 395 U.S. at 617:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit. He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control ….

Id. at 618 (internal quotations omitted).

Certain employer statements, namely those about the changed employer-employee relationship after unionization, are also evaluated with consideration of Section 9(a) of the Act, which provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.]

In addition, the proviso to Section 9(a) affirms that it is not necessarily an unfair labor practice for an employer to hear the grievances of its represented employees within certain constraints:

> [A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Specifically, Section 9(a) and its proviso affirm that when employees select a union as their bargaining representative they may still individually present their grievances to their employer for adjustment, but any action taken on such grievances must be consistent with a collective-bargaining agreement in effect *and* the exclusive bargaining representative must be given an opportunity to be present at such adjustment. In terms of the role of 9(a), the Board in *Tri-Cast* generally explained:

> Section 9(a) [] contemplates a change in the manner in which employer and employee deal with each other. For an employer to tell its employees about this change during the course of an election campaign cannot be characterized as an objectionable retaliatory threat to deprive employees of their rights, but rather is nothing more or less than permissible campaign conduct. As the Ninth Circuit has observed, '[I]t is a 'fact of industrial life' that when a union represents employees they will deal with the employer indirectly, through a shop steward.' *NLRB v. Sacramento Clinical Laboratory*, 623 F.2d 110, 112 (9th Cir. 1980).

274 NLRB at 377. Accordingly, in concluding that the employer statement did not constitute objectionable conduct, the *Tri-Cast* Board reasoned that the "[e]mployer's statement, crafted in layman's terms, simply explicates one of the changes which occur between employers and employees when a statutory representative is selected" and that, therefore, "[t]here is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before." Id.[23]

[23] The *Tri-Cast* Board also overruled *Greensboro News Co.*, 257 NLRB 701 (1981), *Armstrong Cork Co.*, 250 NLRB 1282 (1980), and *LOF Glass, Inc.*, 249 NLRB 428 (1980), cases in which the Board had found objectionable employer statements that, upon selection of an exclusive bargaining representative, employees would not be able to individually address workplace issues with management as they previously had done. Those decisions were inconsistent with the principles of *Gissel*. In their *dicta* in this case, my colleagues lean into their predecessors'

Contrary to my colleagues' assertions, the "absence of threat" rationale in *Tri-Cast* is consistent with both Section 8(c) and *Gissel* in drawing a distinction between lawful, objectively fact-based predictions and unlawful threats, as the employer there accurately described the changed employee-employer relationship upon employees' selection of an exclusive bargaining representative under Section 9(a). Because it is a matter of fact that the employer will have to comply with significant statutory and contractual requirements brought on by union representation, the employer did not threaten its employees by stating that, with a union, it could not "handle personal requests as [it] ha[d] been doing." In this respect, the "absence of threat" analysis in *Tri-Cast* recognized that, although an employer has absolute authority to change its *unrepresented* employees' terms of employment and adjust grievances however it so chooses (subject only to state and federal law), an employer's ability to make any such changes unilaterally upon the request of employees once they have an exclusive bargaining representative is severely limited. The proviso to Section 9(a), which my colleagues repeatedly invoke, is not to the contrary.[24] Because a vote to unionize is a vote to bring in an exclusive representative for the employees in dealing with the employer, the existing relationship, and the employer's exclusive manner of dealing with its employees directly, cannot continue as before. By stating as much, an employer does not, as my colleagues claim, threaten to unilaterally take away a "benefit" in retaliation for employees' choice to unionize.[25]

2. *My colleagues' decision mischaracterizes the "absence of threat" rationale set forth in* Tri-Cast *as well as the long line of cases applying that rationale.*

My colleagues assert that the *Tri-Cast* "absence of threat" analysis created a "categorical rule" that disregards "the clear statutory protections of Section 9(a)" and led the Board to "repeatedly f[ind] lawful employer statements that unionization would eliminate employees' ability to address workplace issues individually with their employer—notwithstanding that some of these statements could be understood to threaten employees with a loss of an established benefit, when viewed from the perspective of a reasonable employee." Building upon that assumption, my colleagues assert that the "absence of threat" rationale in *Tri-Cast* must be "replace[d] . . . with [a] case-specific approach" to reviewing allegedly threatening statements.

Ultimately, my colleagues are taking issue with a straw man of their own making. They claim that, under *Tri-Cast*, "as a categorical matter, *all* employer statements on the general subject of employees' ability to address issues individually with the employer after unionization are always lawful." *Tri-Cast* says nothing of the sort. Nor do the cases applying its rationale. In fact, the "absence of threat" principle set forth in *Tri-Cast* is that "[t]here is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before." Id. My colleagues do not, nor can they, disagree with this general principle.

The majority also relies upon several Board decisions that they assert were wrongly decided under *Tri-Cast*. In doing so, however, they fail to accurately characterize those cases. For example, the majority points to *Holy Cross Health d/b/a Holy Cross Hospital*, 370 NLRB No. 16 (2020), as a case in which the Board "found lawful employer statements that unionization would entirely eliminate employees' ability to address workplace issues individually with their employer." My colleagues' characterization is nonsense. The respondent there *actually* stated that "the presence of a union might limit employee access to management by requiring that union representatives be present for such meetings." Id., slip op. at 7. And as the Board there found, the employer's "statements that union representation *might limit direct access to management* … are not threats; rather, they factually advise that representation will change employees' relationship with their employer." Id., slip op. at 1. After all, the proviso to Section 9(a) expressly states that a union representative must at

error by concluding that those cases involve "misrepresentation[s that were] for all intents and purposes a threat."

[24] The Board's reliance in *Tri-Cast* on *Sacramento Clinical Laboratory*, 623 F.2d 110 (9th Cir. 1980), underscores the consistency of its "absence of threat" rationale with *Gissel*. In the underlying decision in *Sacramento Clinical Laboratory*, the Board found that the respondent's business manager unlawfully threatened an employee when he told her "that if the Union came in she would not be able to talk to him as she had, but would have to go through channels." 242 NLRB 944, 944, 947–948 (1979). The court reversed, explaining that the employer's manager "'was not threatening anybody [with this statement] and that the employees were only being reminded of the substantive meaning of collective bargaining.'" 623 F.2d at 112. *Tri-Cast*'s citation to *Sacramento Clinical Laboratory* signals that the Board there was fully cognizant of *Gissel*'s distinction between lawful expressions and unlawful threats.

[25] In this respect, the *Tri-Cast* "absence of threat" rationale is on all fours with *Eagle Comtronics, Inc*., 263 NLRB 515 (1982), in which the Board broadly affirmed that an employer does not violate the Act by telling employees its legal prerogatives in response to union activity without also advising employees of their rights under the Act. As discussed below, my colleagues' efforts to analogize *Eagle Comtronics* is unavailing and, like the rest of today's decision, is premised on their mistaken view that the Sec. 9(a) proviso essentially establishes a right or "benefit," although an admittedly unenforceable one, for employees to have grievances adjusted without the intervention of their exclusive bargaining representative. As I explain below, however, the proviso provides no such right and far less of a "benefit" than my colleagues appear to believe.

least have the opportunity be present for any adjustment, essentially as the employer said.[26] Importantly too, the *Holy Cross Hospital* Board distinguished the employer's *lawful*, factual statements about the changed relationship from its *unlawful* "statements indicating that the [r]espondent's leave policies might become less generous and its shift scheduling less flexible" should the union come on the scene. Id. at 1 fn. 3. The Board made clear that these statements, which were "unaccompanied by any qualification that changes to leave policies and shift scheduling would be collectively bargained," "threatened adverse changes to specific terms and conditions of employment," whereas "the statements at issue in *Tri-Cast* . . . did not." Id. Such a distinction is accurate, analytically sound, and provides crucial clarity and guidance of the sort my colleagues would eradicate if they were to overrule *Tri-Cast* in a future appropriate case.[27]

My colleagues also target *Office Depot*, 330 NLRB 640 (2000), in which the Board reversed the judge's finding that the respondent violated Section 8(a)(1) by telling employees that "we wouldn't be able to communicate with management *in the same way that we are right now* because there would be a representative from the union that would be the middle person." Id. at 642 (emphasis added). Considering the specific language presented to employees, the Board correctly explained that "Section 9(a) contemplates a change in the manner in which employer and employee deal with each other, and an employer's reference to this change cannot be characterized as a retaliatory threat to deprive employees of their rights." Id. Similarly, in *Stern Produce Co.*, 368 NLRB No. 31 (2019), the respondent told its employees "that if they chose the Union to represent them, they would no longer have direct dealings with the Respondent's owner and would have to wait until the Union negotiated with him." Id., slip op. at 4. The Board found that the respondent had "accurately described the precise effect of unionization, conveying that employees would deal with the [r]espondent through the [u]nion rather than directly with the [r]espondent's owner." Id. The accuracy of the statement established its lawfulness. And of course, the Board was correct in its assessment—Section 8(a)(5) prohibits direct dealing with employees after they have selected an exclusive bargaining representative.[28]

[26] And not simply to be present: as Judge Learned Hand, writing for the majority in *Douds v. Local 1250*, 173 F.2d 764, 769 (2d Cir. 1949), read the proviso, any agreement arrived at between the employer and employees is "subject to [the union's] power to cancel it," for in so doing the union "acts for [the employees] as their agent," and the union's "power to represent all within the 'unit' is absolute and beyond question." Id. Given the union's ultimate authority, it is not accurate to unequivocally assert that an employer can resolve grievances after employees choose a representative without the intervention of the union, notwithstanding the proviso's plain language. Because this perceived ability to go around the union is the "benefit" my colleagues refer to, they err in finding that such a benefit must continue after the employees choose an exclusive representative for the purpose of representing them in bargaining and the adjustment of grievances.

[27] My colleague's characterization of *Holy Cross Hospital* underscores the error of their contention that *Tri-Cast* "has been broadly applied to immunize employer statements that, when subjected to normal Sec[.] 8(a)(1) scrutiny under *Gissel*, could have a reasonable tendency to coerce employees." As noted above, in *Holy Cross Hospital*, the Board carefully distinguished lawful statements that union representation *might limit direct access to management*, which is fully consistent with the express language of the Sec. 9(a) proviso, from unlawful threats to change employees' terms and conditions of employment. The *Holy Cross Hospital* Board's analysis is consistent with *Gissel*, yet the majority would use some alternate, ill-defined "normal Sec[.] 8(a)(1) scrutiny under *Gissel*," to hold the employer liable for its objectively factual predictions because the employer theoretically could coerce employees with its "might limit" statement. This is untenable because, as the Board has noted in dismissing a Sec. 8(a)(1) threat allegation, "employee conclusions are certainly not to be viewed as employer predictions." *Michael's Markets*, 274 NLRB 826, 826 (1985) (reversing judge's Sec. 8(a)(1) threat findings and "coextensive" objections where employer circulated a former employee's opinion letter against unionization during union campaign).

[28] Likewise, in *Ben Venue Laboratories*, 317 NLRB 900, 900 (1995), enfd. 121 F.3d 709 (6th Cir. 1997) (mem.), the employer told employees that "if the Union did get in, that [employees] would not have that open-door policy that [they] have with the company now ... [employees] would lose that because the Union would have to do the negotiation for [them]" and that ''there would no longer be an open-door policy." 317 NLRB at 900 fn. 7. The Board went on to describe how the respondent's current practice could not continue and concluded that it would indeed have to change were the employees to choose representation. In *Hyatt Regency Memphis*, 296 NLRB 259, 259 fn. 3, 272 (1989), enfd. in part and remanded in part on other grounds 939 F.2d 361 (6th Cir. 1991), the Board found a supervisor's statement to an employee that, "if you come in this office, that once the union got in there, that we would have to have a witness in there with us," was a lawful statement about the effects of unionization. And in *Koons Ford of Annapolis*, 282 NLRB 506, 506 (1986), enfd. 833 F.2d 310 (4th Cir. 1987) (mem.), cert. denied 485 U.S. 1021 (1988), the employer told employees that "if the Union got in he would not be able to talk directly to the employees as he had been doing but would have to go to the Union." As with the aforementioned cases, the respondent's statement in *Koons* did "not constitute a threat but 'simply explicat[ed] one of the changes which occur between employers and employees when a statutory representative is selected.'" 282 NLRB at 506. My colleagues' reliance on these cases as wrongly decided under *Tri-Cast* shows how they would find accurate statements about the effects of unionization to be unlawful—or, more to the point, that statements not repeating NLRA language of my colleagues' choice will be found unlawful. As with the other cases discussed herein, the Board's findings in these decisions that such statements accurately explicated the effects of unionization would preclude findings of unlawful threats under *Gissel*.

Although I do not pass on every relevant decision over the nearly forty years that have passed since the Board issued *Tri-Cast*, it is fair to say that the Board has generally distinguished objectively fact-based predictions about the changed employee-employer relationship from unlawful threats. Again, in light of the extent to which the Board has relied on the facts of each particular case, my colleagues err by asserting that the "absence of threat" rationale in *Tri-Cast* established any *per se* rule for determining these cases.

Other cases my colleagues discuss in their decision suggest that the breadth of the changes they would make in a future appropriate case are far broader than they have made clear. Their discussion of *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at 1 fn. 2 (2018), enf. denied on other grounds 932 F.3d 465 (6th Cir. 2019), for instance, suggests that employers' negative statements about predictable effects of unionization should almost always be found unlawful. In that decision, the Board dismissed an allegation that the employer unlawfully "told employees that signing union authorization cards or electing the union would negatively impact their ability to individually represent themselves." Id. The *Hendrickson USA* Board, with two members (including then-Member McFerran) not passing on whether *Tri-Cast* was correctly decided, adopted the judge's application of *Tri-Cast* to find that the respondent had not threatened employees with the loss of any benefit. 366 NLRB No. 7, slip op. at 1 fn. 2, 6–7. My colleagues' current position that the language in *Hendrickson USA* was threatening indicates that, in their view, employers' negative predictions about unionization should almost always be considered unlawful. Not only does this create the exact type of *per se* rule that they allege *Tri-Cast* created, but it entirely ignores employer speech rights under Section 8(c) and congressional intent to encourage "robust [] and wide-open debate in labor disputes," as the Court described in *Letter Carriers*, above.[29]

Cases like the above are illustrative of decisions applying the "absence of threat" rationale in *Tri-Cast* that affirm the right of an employer to state that, if employees select a bargaining representative, they will indeed have an exclusive representative in their dealings with the employer, and that will *necessarily* change the way employers and employees deal with each other. As noted above, this is of course what the employees are seeking when they select a representative. And while the majority claims to accept *Tri-Cast*'s general principle that statements about that change are lawful, they simultaneously, and inconsistently, criticize these cases. In asserting, in *dicta,* that *Tri-Cast* should be overruled based on their view that the decision "inhibits, rather than promotes, employees' freedom to exercise the organizational rights guaranteed by Section 7 of the Act," my colleagues ignore the fact that unionization is about selecting an exclusive representative; that except in very limited circumstances, the represented employee does lose the ability to be their own representative in matters related to their terms and conditions of employment; and that an employer's previously unchecked authority will indeed be checked by the selection of the union. So long as an employer's statements are predicated on the fact that the employees will from now on have an exclusive representative when dealing with the employer, the statement that the employee-employer relationship will change and that the employer could no longer deal with employees or resolve their grievances in ways it could do in the past does not indicate a threat of retaliatory action by the employer to take away a "benefit" that the employer is not obligated to provide in the first place. Such changes may not be welcomed by the employer whose authority will be diluted by a union, but, again, the fact that the employer describes such changes in the negative does not transform them into threats.

Further, my colleagues' criticisms of *Tri-Cast* and the above cases reveal a fundamental flaw in their analysis: Although my colleagues indicate that they would apply a case-by-case *Gissel* analysis to cases presenting the question of whether such statements violate Section 8(a)(1) going forward, it is clear to me then that, under *Gissel,* the cases applying the "absence of threat" rationale set forth in *Tri-Cast* would have turned out the same. Under either standard, accurate predictions about the effects of unionization are not unlawful threats. Many of the cases discussed above, and on which my colleagues rely in arguing that the "absence of threat" rationale in *Tri-Cast* should be

[29] As I note above, and contrary to my colleagues' assertion, today's decision cannot be reconciled with *Eagle Comtronics, Inc.*, 263 NLRB 515. The Board there held that an employer did not violate the Act by telling employees that economic strikers "could be replaced with applications on file" without also advising them of their reinstatement rights. Id. at 515. The Board explained that "unless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats, it is protected by Sec[.] 8(c) of the Act. . . . Such a statement, simply describing an employer's legal prerogative … is entirely consistent with the law. Respondent was not required to delineate more specific rights." Id. at 515–516. My colleagues are stuck with a contradiction: they note that the employer's statement that it could replace striking employees without acknowledging their statutory rights is *lawful*, but that a statement apprising employees that if they unionize they will not be able to deal with the employer as they have in the past is *unlawful*. I see no legally coherent rationale for my colleagues' distinction. *Eagle Comtronics*, consistent with *Gissel* and Sec. 8(c), affirms that an employer may advise employees of actions it may take without apprising them of their rights so long as it does not threaten to retaliate against them for protected activity. With today's decision, my colleagues contend that an employer's failure to apprise employees of their preferred interpretation of the Sec. 9(a) proviso is itself a threat to take away certain so-called protections. Specifically, they assert that statements found lawful in the past should be deemed threatening going forward because they failed to include an explanation of the 9(a) proviso. But explaining employee rights is precisely the burden the Board determined should *not* be put on employers in *Eagle Comtronics*. Contrary to my colleagues' assertion, for all relevant purposes the two standards are substantively identical in their particular contexts. Or they would be if the proviso to Sec. 9(a) actually provided the benefit my colleagues claim that it does by permitting the employer to adjust dissident employees' grievances without "intervention" by the bargaining representative. As I note below, the proviso provides no such practical assurance or benefit, at least not without exposing the employer to unfair labor practice charges or a formal grievance by the union if the union does not join in the adjustment.

overturned, involve just that: statements that the Board either expressly or implicitly found to have been accurate predictions of the effects of unionization. For that reason, I believe that my colleagues are not simply attacking the "absence of threat" rationale in *Tri-Cast*, but are questioning the very bases for distinguishing objective, fact-based predictions from unlawful threats.

3. *My colleagues misstate the significance of the proviso to Section 9(a) in determining whether an employer's prediction about unionization is an unlawful threat.*

My colleagues' near-complete reliance on the proviso to Section 9(a) is a red herring: As explained above, the employer's statement in *Tri-Cast* did not contravene the proviso. Further, the proviso neither establishes a substantive right for represented employees to have their grievances heard by their employer[30] nor establishes a "benefit" of permitting grievance adjustments affecting employment terms without providing the exclusive bargaining representative notice and opportunity to bargain.

I recognize that, in my colleagues' view, an employer who tells employees that it will no longer handle any grievances whatsoever upon their selection of an exclusive bargaining representative does not account for the narrowly circumscribed path opened for an employer by the proviso. An employer can, under some circumstances, handle grievances of its represented employees if it so chooses. But because the employer is not obligated to do so, my colleagues' description of the proviso as establishing a "clear statutory protection[]" for employees is simply wrong. Accordingly, neither *Tri-Cast* itself nor the decisions discussed above involved statements contrary to the proviso.

More broadly, however, an employer does not categorically threaten employees when it misstates its own ability to unilaterally handle requests or grievances by failing to expressly account for the proviso, subject to the employer's willingness to hear a represented employee's grievance.[31] First, the Section 9(a) proviso does not describe a right. In the words of the Second Circuit:

> Despite Congress' use of the word 'right', which seems to import an indefeasible right mirrored in a duty on the part of the employer, we are convinced that the proviso was designed merely to confer upon the employee the privilege to approach his employer on personal grievances when his union reacts with hostility or apathy. Prior to the adoption of this proviso in section 9(a), the employer had cause to fear that his processing of an individual's grievance without consulting the bargaining representative would be an unfair labor practice; section 9(a) made the union the exclusive representative of the employees in the bargaining unit, and section 8(a)(5) made a refusal to bargain with the exclusive representative an unfair labor practice. The proviso was apparently designed to safeguard from charges of violation of the act the employer who voluntarily processed employee grievances at the behest of the individual employee, and to reduce what many had deemed the unlimited power of the union to control the processing of grievances.[32]

Second, *Gissel*, which my colleagues would apply instead of *Tri-Cast*, does not require an employer to display a precise, encyclopedic knowledge of Board law such as a seasoned NLRB attorney might have. And the Board decision in *Eagle Comtronics* expressly affirms that an employer is not obligated to tell its employees of their rights under the Act. By implicitly requiring an employer to have and share such precise knowledge before it addresses its employees, my colleagues flatly contravene *Gissel* and *Eagle Comtronics* and turn the robust sharing of views and opinions about unionization that Congress envisioned on its head.

Moreover, my colleagues err by suggesting that employers may rely on the Section 9(a) proviso when adjusting represented employees' grievances without intervention of their exclusive bargaining representative. They take the view that an employer can still adjust represented employees' grievances without intervention of their union, subject to the proviso's requirements, and therefore an employer who says that it cannot do so threatens to take away a "benefit." This claim is deeply flawed for several reasons: first, the proviso as written is inconsistent with requirements of Section 9(a) and 8(a)(5) affirming the role of the exclusive bargaining representative; and specifically, despite the proviso, the union will invariably have the opportunity to intervene in the adjustment of

[30] See *Emporium Capwell Co.*, 420 U.S. at 61.

[31] My colleagues' repeated reference to *Tri-Cast* as a "categorial" rule is nothing more than an acknowledgment that *Tri-Cast* established a clear and predictable standard that has served parties to a union election well. Further, as noted above, the majority is simply attempting to replace what they criticize as one "categorical rule" with another. My colleagues also note that I do not cite any cases in which *Tri-Cast* was applied to *find* an unfair labor practice. But my colleagues' quip is irrelevant. What *is* relevant here is my colleagues' inability to cite any precedent to support their attempt to overrule an objections case in an unfair-labor practice proceeding, or vice versa. Instead, they baldly assert that the Board's reliance by analogy on objections case principles in unfair labor practice cases "obviously" permits them to overrule the objections decision in an unfair labor practice proceeding. Their view is neither obvious nor supported by our precedent.

[32] *Black-Clawson Co., Paper Machine Division v. Int'l Ass'n of Machinists Lodge 355*, *Dist. 137*, 313 F.2d 179, 185–186 (2d Cir. 1962) (affirming that "section 9(a) does not confer upon an individual grievant the power, enforceable in a court of law, to compel the employer to arbitrate his grievance") (cited with approval in *Emporium Capwell Co*., 420 U.S. at 61).

grievances and cannot be excluded from the process assuming that the adjustment involves the grievant's employment terms. In this respect the proviso does not provide the vaunted benefit as my colleagues perceive it.[33]

To begin, the proviso's *only* constraints on the employer who adjusts represented employees' grievances directly and "without the intervention of the bargaining representative" is that "the adjustment is not inconsistent with the terms of a collective-bargaining contract" and that "the bargaining representative has been given opportunity to be present." Under this language, the employer need not give the bargaining representative notice and opportunity *to bargain*, notwithstanding whether the grievance or complaint affects mandatory subjects of bargaining.[34] The precise "benefit" for employees, as my colleagues see it, is that the employer may preclude union intervention and adjust the grievance directly with the employee or employees. This would be true even if the employer set wildly new and different employment terms for an employee or a group of employees despite union objections and without offering an opportunity to bargain. That is what the proviso suggests. My colleagues' implication that an employer may rely on it is reckless; I'm sure that they would agree that an employer who enters into a bilateral agreement with employees and changes certain terms and conditions of employment prior to execution of a collective-bargaining agreement and without giving the union notice *and opportunity to bargain* violates Section 8(a)(5). E.g., *NLRB v. Katz*, 369 U.S. 736, 747 (1962) (holding that an "employer may not unilaterally change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes."). According to my colleagues, however, this ability to adjust employee grievances and presumably change a grievant's terms and conditions of employment "without the intervention" of the union is the "benefit" that an employer "threatens" to take away when it tells employees that it will not continue to resolve complaints or grievances with them directly. Given Sections 9(a) and 8(a)(5) (and the opinion in *Douds*, 173 F.2d at 769), it is not accurate to claim that an employer retains its prior ability to resolve grievances affecting employment terms directly with represented employees and be shielded from liability by the Section 9(a) proviso. Further, because any adjustment to mandatory bargaining subjects must require the opportunity to *bargain*, not merely to *be present*, the proviso's "benefit" of adjusting complaints or grievances *without* union intervention is, for all practical purposes, nonexistent.

Further, nothing in the proviso prevents a union from filing Board charges or pursuing grievances over changes to an employee's employment terms as a result of resolving a complaint or grievance without union agreement. In this respect, the first proviso to Section 9(a) says that the employer may adjust grievances with employees "as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract." A tall order, largely unrealistic in practice, that gives no protection to an employer unless the employer accedes to the union's interpretation of the contract and, if applicable, the requirements of a contractual grievance procedure. In this respect, Section 9(a) does not indicate how disputes about the consistency of the adjustment with the collective-bargaining agreement is to be resolved.[35] But as my colleagues are well aware, disputes over contract interpretation are among the most common to come before the Board. An employer relying on the proviso to adjust grievances affecting employment terms without obtaining union agreement with the adjustment simply invites Section 8(a)(5) charges or grievances filed by the union over a lack of opportunity to bargain, contract interpretation with regard to the adjustment, and/or adherence to a contractual grievance process. For these reasons, it is not true

[33] Further, to my knowledge, the proviso has not been applied to shield employers from liability for preventing the exclusive bargaining representative from "intervening" in the adjustment of grievances or not providing notice and opportunity *to bargain*.

[34] In this respect, see Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 302 (1948), noting the proviso's ambiguity about, inter alia, the role of the exclusive bargaining representative in adjusting grievances.

[35] See Cox, 61 Harv. L. Rev. at 302, noting that, despite the proviso's ambiguity about the role of the exclusive bargaining representative, conflicts over adjustments will likely have to be resolved "by permitting the union to protest any adjustment . . . and to appeal it through the grievance machinery to arbitration despite the mutual agreement of the individual and the employer." Id. Hardly a shield for the employer hearing grievances without the intervention of the union, nor a "benefit" for employees who believe their grievances can be adjusted without the union only to find that their so-called "benefit" keeps them in limbo for the pendency of litigation or a formal grievance procedure.

More potential confusion about the proviso's so-called "benefit" is what it actually covers and what "group" of employees may bring grievances. See *West Texas Utilities Co. v. NLRB*, 206 F.2d 442, 446-448 (D.C. Cir. 1953) (noting disagreement with the Second Circuit's interpretation of the proviso over the distinction between grievances and other complaints under the Act and the definition of "a group of employees" as used in the proviso).

Moreover, if there is a collective-bargaining agreement, and assuming a grievance procedure is in place, the 9(a) proviso will likely be applicable only to the period before a contract is reached and at a time when any reliance on it is unlikely to provide an employer with statutory protection if it bilaterally resolves, with employees, disputes about their employment terms without permitting the union notice and opportunity to bargain. See *Katz*, supra. That would nullify my colleagues' "benefit" of proceeding without the union as the employer would have done in the past. Further, the lack of cases actually applying the proviso to shield employers from unfair labor practice liability suggests its obsolescence in any practical sense.

that the proviso gives the employer a green light to resolve grievances of its represented employees "without the intervention" of their exclusive bargaining representative. When the employer says it will not or cannot hear grievances or resolve complaints directly once employees vote in the union, it is not the employer who would take away the "benefit" of dealing with their employer without the union, but the operation of the Act.

As it is neither unlawful nor objectionable for an employer to *refuse* to hear employee grievances despite the proviso, e.g., *Emporium Capwell*, it follows that it is neither unlawful nor objectionable for an employer to *say* so, e.g., *Gissel*. And under, e.g., *Midland* and *Eagle Comtronics*, it is neither objectionable nor unlawful for an employer to misstate the law or my colleague's misperceptions about it to employees—even if my colleagues were correct about the employer's options or obligations, which they are not.

As should be clear from the above, an employer who is familiar with the body of Board law applying Section 8(a)(5) and understands that a union is the *exclusive* representative of its employees would have good reason to believe, based on the objective, fact-based understanding of Board decisions, that it could not unilaterally resolve grievances without the participation of the exclusive bargaining representative, as doing so may amount to direct dealing or effect unilateral changes to terms and conditions of employment and subject an employer to 8(a)(5) liability notwithstanding my colleagues' interpretation of the proviso. Needless to say, the boundary between lawful resolution of grievances and unlawful Section 8(a)(5) conduct is not precise in the proviso or in the cases addressing it and would not be clear even to the reasonably informed employer who actually knew that the proviso existed. Therefore, to avoid potential liability, an employer may very reasonably refuse to put its faith in the proviso. In light of the above, my colleagues' position that an employer's failure to account for the proviso when explaining changes resulting from unionization is a threat to strip employees of a "benefit" is wholly contrary to *Gissel,* Section 8(c), and *Eagle Comtronics*, and puts far too heavy a burden on the robust exchange of opinions Congress sought the Act to encourage.

CONCLUSION

This case would make Shakespeare proud. It is truly a decision full of sound and fury that signifies nothing. My colleagues assert that they are overruling *Tri-Cast*, but they are doing no such thing. In order to overrule that case*,* my colleagues will need to decide a case that presents the question of whether the Board, in *Tri-Cast*, correctly found that the statement at issue in that case constituted *objectionable conduct*. That question is unquestionably not at issue in this case.

Arguably, my colleagues could be attempting to overrule past cases in which the Board applied the reasoning in *Tri-Cast* in determining whether statements violated Section 8(a)(1) of the Act, but there is no reason whatsoever to reach that issue either. Because my colleagues are finding the statement at issue in the instant case to be lawful, they are not changing the law as an "alternate theory" for their conclusion. Nor are they asserting that, were they to apply their new standard here, the statements at issue in this case would be found unlawful. Rather, they are stating that they are overruling extant precedent on a prospective basis, even though they fail to establish that application of their new standard would have any effect, let alone create a manifest injustice, if applied to the case actually before us. This has never been, and should never be, how the Board operates when exercising its quasi-judicial function. Rather, the Board is tasked with deciding cases based on the facts before us. Should my colleagues wish to change the law in the absence of an appropriate case, they are required to follow the procedures set forth in the Administrative Procedure Act.

Finally, even if my colleagues were able to reach and overrule the "absence of threat" *Tri-Cast* rationale as applied to unfair labor practice cases, I have explained in *dicta* why that analysis appropriately distinguishes noncoercive statements about some of the effects of unionization from threats. Overruling *Tri-Cast* in a future appropriate case would therefore be inconsistent with Section 8(c) and would contravene the bedrock decisions in *Gissel*, *Midland,* and *Eagle Comtronics*. Moreover, their decision is premised on their misunderstanding of the significance of the proviso to Section 9(a), so that the loss of the "right" or "benefit" to which they refer is, simply put, neither a right nor a meaningful "benefit" in the sense that they assert.

As discussed above, I dissent from my colleagues' findings that certain conduct currently before us violated Section 8(a)(1). I further dissent, for the reasons set forth above, to their attempt both to use a case not presenting the relevant issues to overrule precedent and to create new law through *dicta* without actually determining whether that new law would affect the outcome of the case currently before us. Because my colleagues cannot overrule *Tri-Cast*, a representation case, in the unfair labor practice case before us, it is clear to me that that case remains good law.

Dated, Washington, D.C. November 8, 2024

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that existing benefits will be reduced if you select union representation.

WE WILL NOT threaten you that you will lose existing benefits if you select union representation.

WE WILL NOT threaten you that selecting union representation would be futile.

WE WILL NOT threaten you that, if you select union representation, we will prioritize nonunion stores and union-represented stores will not receive added benefits.

WE WILL NOT threaten you that, if you select union representation, you would have to be union members and that, if there were a strike, you would have to participate in the strike.

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

WE WILL direct our supervisor Elijah De La Vega to delete the February 14, 2022 Facebook posts that threaten you with the reduction or loss of existing benefits, and WE WILL take appropriate steps to ensure De La Vega complies with this directive.

SIREN RETAIL CORP. D/B/A STARBUCKS

The Board's decision can be found at https://www.nlrb.gov/case/ 19-CA-290905 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

Sarah M. McBride, Esq., Alice J. Garfield, Esq., and *Sarah K. Burke, Esq.,* for the General Counsel.

Ben Berger, Esq. and *Gabe Frumkin, Esq. (Barnard Iglitzin & Lavitt, LLP),* for the Charging Party.

Renea I. Saade, Esq., Noah J. Garber, Esq., and *Jeffrey E. Dilger, Esq. (Littler Mendelson PC),* for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me on September 14, 15, and 16, 2022, in Seattle, Washington.[1] Based upon a charge filed by Workers United, affiliated with the Service Employees International Union (Union or Workers United), on May 18, a complaint and Notice of Hearing (complaint) issued alleging that Siren Retail Corp. d/b/a Starbucks (Siren Retail or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by making various threats to employees during a union election drive, and by holding captive audience meetings with employees to discourage union activity. Respondent denies the allegations.

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by the General Counsel, the Union, and Respondent, I make the following findings of fact and conclusions of law.[2]

I. JURISDICTION AND LABOR ORGANIZATION

Siren Retail is a corporation organized under the laws of the State of Washington, and is a subsidiary of Starbucks

[1] All dates are in 2022 unless otherwise noted.

[2] Testimony contrary to my findings has been specifically considered and discredited. Unless otherwise noted, witness demeanor was considered in making all credibility resolutions.

Corporation.[3] (Tr. 360)[4] Respondent operates destination establishments in a limited number of large metropolitan areas known as the Starbucks Reserve Roastery, where the company roasts coffee and sells food and beverages to the public including coffee, tea, alcoholic drinks, pastries, pizzas, and related items and merchandise. Siren Retail maintains one such store in Seattle, Washington, located at 1124 E. Pike Street (Seattle Roastery or Roastery). At the Seattle Roastery, Respondent derives gross revenues in excess of $500,000 and purchases and receives goods or services exceeding $50,000 directly from points located outside the State of Washington. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and the National Labor Relations Board (NLRB or the Board) has jurisdiction pursuant to Section 10(a) of the Act. *Siren Retail Corp.*, 372 NLRB No. 10 (2022).

II. FACTS

A. Seattle's Starbucks Reserve Roastery

The Seattle Roastery is located in the Capitol Hill neighborhood of the city. Unlike regular Starbucks coffee shops, referred to as "core" stores, the Roastery is situated in a much larger building, and contains a roasting/manufacturing plant within the facility where patrons can watch as Respondent roasts and packages coffee to be sold throughout the country. The Roastery also employs many more workers than a regular Starbucks coffee shop. On any given day, up to 40 retail employees can be found working the various sales counters and bars which the Roastery uses to provide a distinctive retail experiences for patrons. (Tr. 42–48)

The Seattle Roastery has two floors with open seating. The centerpiece of the facility, on the main floor, is a large copper cask that is used as part of the roasting/manufacturing process. A glass barrier separates the manufacturing area from the rest of the facility. The main bar is located on the first floor near the entrance. Here, patrons can order coffee drinks to enjoy in the store, or to take home, an experience that is similar to a traditional Starbucks coffee shop. To the right of the entrance is the "mixology bar" where customers can enjoy specialty cocktails crafted using alcohol mixed with Starbucks coffee and tea. Just to the right of the mixology bar is the "Princi" bakery which sells oven baked pastries, pizzas, and related items. The first floor also contains a "lifestyle area," where shoppers can buy various coffee related merchandise, clothing, and items from local area artists. (Tr. 44–46)

Going downstairs Roastery customers will find the "experience bar," a craft coffee area where baristas make drinks with showmanship using different specialty brew methods. Also downstairs is the "library," which resembles a conference room with books, chairs, and a large table that seats between 20 to 25 people. The library has sliding doors made of wood and glass that allows the area to be closed off from customers for employee meetings when needed. (Tr. 44–45, 74–75, 146–148)

B. Retail employees at the Seattle Roastery

Just over 100 retail employees work at the Seattle Roastery. Just like other Starbucks retail employees, workers at the Roastery are referred to as "partners." *Starbucks Coffee Co.*, 354 NLRB 876, 881 (2009) ("Starbucks stores are staffed by employees known as 'partners.'"). And, Roastery employees enjoy similar benefits and work arrangements available to all Starbucks employees, including free tuition to attend university online through a program between Arizona State University (ASU) and Starbucks, known as the "Starbucks College Achievement Plan." According to Starbucks, under this program, which was started in 2014, eligible partners in the United States can complete their college education for free; Starbucks provides them with 100% upfront tuition coverage for a first-time bachelor's degree through ASU's online program. Starbucks estimates that, as of January 2022, more than 20,000 partners throughout the country were taking online classes at ASU through the Starbucks College Achievement Plan, and more than 7,500 partners will have graduated through this program.[5] (Tr. 36, 51, 62)

Roastery employees can also apply to participate in a program which allows them to work in other areas of the Starbucks organization, known as time or term limited assignments (TLAs). TLAs were described as "essentially a paid internship within Starbucks," where employees can "intern" in various job positions to get work experience in other areas of the overall company. (Tr. 61) For example, retail partners at the Roastery have worked under a TLA on the manufacturing side of the facility, which is owned by a different corporate subsidiary named Starbucks Manufacturing. TLAs ranges in duration from 3 to 6 months, and they can sometimes turn into a permanent position at the new location/job. Otherwise, employees go back to their old jobs, which remain open during this time. Both TLAs and the free ASU online university tuition were considered by

[3] See https://www.sec.gov/ix?doc=/Archives/edgar/data/829224/000082922422000058/sbux-20221002.htm (including Exhibit 21) (Starbucks Corporation Form 10-K, with exhibits, filed with the Securities and Exchange Commission (SEC) on November 18, 2022, for the fiscal year ending October 2, 2022). For purposes of background, I take administrative notice of the 10-K filed by Starbucks with the Securities and Exchange Commission. *Pacific Greyhound Lines*, 4 NLRB 520, 522 fn. 2 (1937) (Board takes judicial notice of facts stated in company's annual report filed with the Security and Exchange Commission); Fed. R. Evid. 201(b). All filings referenced herein were last accessed on January 30, 2023. See also Tr. 360.

[4] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, and Joint exhibits are denoted by "GC," "R," and "J" respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are based upon the entire record and may include parts of the record that are not specifically cited.

[5] See https://www.sec.gov/Archives/edgar/data/829224/000120677422000270/sbux3974881-def14a.htm (Starbucks Corporation 2022 Proxy Statement filed with the SEC on January 28, 2022). Roastery employees also participate in a Starbucks employee equity plan known as "Bean Stock." Id. (See also Tr. 161) For background, I take administrative notice of the Starbucks 2022 Proxy Statement, which contains public statements made by the company regarding the Starbucks College Achievement Plan and the Bean Stock employee equity plan. *Pacific Greyhound Lines*, 4 NLRB at 522 fn. 2.; Fed. R. Evid. 201(b).

Roastery employees to be important benefits. (Tr. 61–63, 104, 357–358)

During the relevant time period, Elijah De La Vega (De La Vega) and Tam Marpoe (Marpoe) were the associate managers at the Seattle Roastery. They reported to the store operations managers, which included Scott Underriter (Underriter) and Heather Kaufman (Kaufman).[6] Mary Clare Barth (Barth) was Respondent's managing director responsible for overseeing all of the retail operations at the Seattle Roastery, including the partners and their various supervisors and managers. The supervisory/agency status of De Le Vega, Marpoe, Underriter, and Barth, while they were working in their various capacities at the Roastery, are not in dispute. As discussed later, Respondent disputes whether De La Vega was acting as Respondent's supervisor/agent at the time he made various Facebook posts. (Tr. 37, 50, 128–131, 135, 143, 157, 170, 234–235, 248, 351–352; GC 1(i) ¶4; J. 1)

C. Seattle Roastery Reserve retail employees unionize

On February 14, Respondent received a letter signed by Roastery partners, informing the company of their intentions to form a union. The letter, which is on Starbucks Workers United letterhead, is signed by fifteen employees and says the other baristas supporting the union drive wished to remain anonymous. That same day the Union filed a petition to represent a unit of the approximately 100 baristas, bakers, mixologists, and operation leads working at the Seattle Roastery. The parties contested whether the election should occur by mail-ballot, or if a manual election was appropriate; the Union wanted a mail-ballot election due to the state of Covid-19 pandemic and Respondent sought a manual election. The parties entered into a stipulated record and submitted written position statements to the Regional Director of NLRB Region 19 (Regional Director). On March 17, the Regional Director issued a Decision and Direction of Election finding that a mail-ballot election was appropriate.[7] (R. 3; Tr. 360–361; J. 1)

The mail-ballot election was held between March 31 and April 21. On April 21 the ballots were opened and counted and a Tally of Ballots issued showing that a majority of employees had voted to unionize. Respondent filed objections to the election and on May 17, the Regional Director issued a decision overruling the objections and certifying the Union as the exclusive collective-bargaining representative of Respondent's employees in the following unit:

> Included: All full-time and regular part-time baristas, operation leads, bakers, and mixologists employed by the Employer at its Reserve Roastery store located at 1124 Pike Street, Seattle, Washington.
>
> Excluded: Office clericals, managers, and guards and supervisors as defined in the Act.

In order to test the propriety of the Regional Director's certification, Respondent refused to recognize and bargain with the Union. On November 30, the Board issued its ruling, affirming the certification and finding that Respondent has been refusing to bargain with the Union in violation of Section 8(a)(5) of the Act. See *Siren Retail Corp.*, 372 NLRB No. 10 (2022).

D. Respondent holds meetings with Seattle Roastery employees about the union drive

After the petition was filed, Respondent told employees there would be specific times that partners could "sit down and get the facts" and talk about the "process." (Tr. 141–142) Thereafter, Respondent held a series of meetings with workers regarding the union. Throughout the union drive, Respondent maintained the position that it preferred to have a direct relationship with employees, without a union in place at the Roastery. (Tr. 70, 374)

During a four-week period between the filing of the petition and the start of the mail ballot election, Respondent held multiple meetings per week with employees about the union drive. It appears that each employee attended at least three such meetings and they occurred in groups of about 10 to 20 workers. Barth participated in 90% of these employee meetings, which occurred during worktime; partners were paid while they attended the meetings. (Tr. 36, 70, 89, 84, 74, 142, 147–148, 247, 353–354)

For partners, these meetings appeared on their work schedules as a block of time set aside for either a Siren Retail "promo set" or "training" session. A promo set is a common phrase used at Starbucks and generally involves meetings where participants to go over the launch of a new item or holiday offerings. For example, over the Christmas period the company has promo set meetings to review menu boards for the holidays. Or, the Roastery has promo set meetings to review and sample with employees new drinks or merchandise that is being offered. Training meetings are generally just another term used for a promo set meeting and the two terms were largely used interchangeably. (Tr. 71–72, 84, 113, 319–324; GC 11, 12)

Employees understood that they were required to attend whatever appeared on their work schedules, including meetings, and failing to show up for something on your schedule could potentially subject a partner to discipline. During one of the March meetings about the union drive, a partner asked whether the meetings were mandatory, and Kaufman answered "Yeah . . . We do have an obligation."[8] (GC 5(b) 40:24–40:46) (GC 9, p. 30).

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[6] The parties stipulated that De La Vega and Marpoe had the title of "Assistant Store Manager," that Kaufman's title was "Store Manager," and that Barth was the "Managing Director." (J. 1) At various times during the hearing, De La Vega and/or Marpoe were also referred to as being an "AM" or "Associate Manager" (37, 49–53, 99, 129, 143, 156, 328, 359, 376), Kaufman and Underriter were referred to as being an "OM" or "Operations Manager," (74, 163, 170, 248), and Barth was referred to at times as the "DM" or "District Manager". (74, 148, 163)

[7] I take administrative notice of the Regional Director's March 17 Decision and Direction of Election in *Siren Retail Corp., d/b/a Starbucks*, 19–RC–290608. See *Lord Jim's*, 264 NLRB 1098, 1098 fn. 1 (1982) (The Board may take judicial notice of its own files); *J. S. Abercrombie Co.*, 83 NLRB 524, 524-525, (1949) (Board takes judicial notice of representation proceeding, noting it "is the practice of the Board to take judicial notice of its own records and proceedings.").

[8] Recordings of two different meetings were introduced into evidence (GC 5(a), 5(b)) Transcripts of these recordings, commissioned by the government, were also accepted into evidence as an aid only. (GC 7, 9, 10) I have carefully listed to each recording. All quotations showing the words used in the various meetings come from the actual recordings themselves.

After the partner said that some workers did not want to be in the meetings, and were unsure if they were mandatory, Kaufman clarified her initial statement by saying that, if a meeting is on a work schedule more than 10 days in advance, employees are obligated to attend. If something has been added to a work schedule within 10 days, technically partners did not need to attend, but if they did, Kaufman said they would receive "predictability." (GC 5(b) 43:00–43:28) (GC 9, p. 31–32) Kaufman's clarification appears to be an acknowledgment of an employer's obligations, albeit using the wrong number of days, under a City of Seattle ordinance titled the "Secure Scheduling Ordinance," which went into effect in 2017. See SEATTLE, WASH. MUN. CODE § 14.22.005 (2022).[9] This ordinance requires covered employers, such as Respondent, to post employee work schedules at least 14 days in advance and to respect an employee's right to decline to work any hours that were not included on their original schedules. Id. at §§ 14.22.040–14.22.045 And, absent certain exceptions, when an employer adds a shift to a schedule, or when a shift date or time is changed within this 14 day window, the employer is required to pay to the employee as compensation one additional hour of pay, at the employee's scheduled rate of pay. Id. at § 14.22.050. Employees refer to this additional hour of pay as "predictability pay." (Tr. 83) (Tr. 72–73, 83–84, 144, 255, 320)

For the first employee meeting about the union drive, Respondent offered workers predictability pay. However, the second and third meetings (on March 11 and March 22) were posted on employee work schedules three weeks in advance of the meetings.[10] Regarding these meetings, even though they appeared on employee work schedules as a block of time set aside for a promo set or training session, many times partners did not know the actual topic that was going to be discussed during the meeting until just before the meetings actually occurred. Sometimes employees attended a promo set meeting one day, involving an actual new product launch, and the next day had a promo set meeting that, in reality, was a meeting about the union election. (Tr. 82–83, 247–249, 318, 321, 323)

At some of the meetings, Respondent had literature/talking points set out on a table that was available for employees to take if they wanted. The literature, which was provided to Respondent's managers during training that was given by the company's legal counsel, contained information about collective bargaining, negotiations, strikes, and voting, with citations and links to various websites, including the NLRB and the Department of Labor. Respondent did not read from the literature during the meetings, nor was it passed out to employees. Partners were simply told the information was available to take if they wanted. (Tr. 362–367, 387–388; R. 4)

There was differing testimony as to whether Respondent did, or did not, take attendance at these meetings.[11] Regardless, the evidence shows that Respondent monitors the time of Roastery employees by having them clock in and out at the start and end of every shift and also during breaks. If employees stayed for a meeting that was scheduled during their shift, Respondent's records would show the employee as having been clocked-in during that time. (Tr. 79–82, 354, 369–370)

1. The March 11 meeting

Respondent held a meeting with employees on March 11 to discuss the union organizing drive and petition. At the time, everyone was still waiting for a determination regarding the date and manner of the union election. Keanna Jo "K.J." Lesser (Keanna) attended this meeting, which occurred in the Roastery library.[12] Keanna had worked at the Seattle Roastery as a barista since August 2021, and previously was a barista at various Starbucks coffee shops in Florida.[13] Keanna's March 11 work schedule shows that she was scheduled for a "promo set" meeting from 4:15 p.m. to 5:45 p.m. that day. Employees receive their work schedules three weeks in advance of their assigned work dates, and when Keanna got her schedule she did not know what would be discussed during the March 11 promo set meeting. It turned out to be a meeting about the union drive. This was the second such meeting that Keanna had attended; she recorded the March 11 meeting on her iPhone. (Tr. 181, 139–140, 144–146, 181, 321–322; GC 5(a); GC 7)

The March 11 meeting Keanna attended included about 20 to 25 of her coworkers. Present for Respondent was Barth, Kaufman, Underriter, and Marpoe. Everyone sat around the large table in the library. Keanna placed her iPhone on the table in plain view. The recording of the meeting made by Keanna is just over one hour and thirty minutes long. The General Counsel alleges that certain statements made by Respondent's officials during this meeting were unlawful. (Tr. 147–149, 156–157; GC 5(a))

a. The relationship with management if workers unionize

The March 11 meeting started with Marpoe telling the gathered employees that she wanted to give them a road map and update of where they are in the NLRB election process, information and facts about Workers United, an overview of how unions work in general, and of collective bargaining. Marpoe told partners that they were encouraged to do their research. She directed them to the NLRB's website, and said there are also other links out there for them to understand about unions and that that means for them. (GC 5(a) 0:00–0:57; GC 7, p. 2) (Tr. 156–157) Marpoe next told the employees that:

> If you want a union to represent you—uh—you want to give your right to speak to leadership through a union, you're going to check off 'yes' for the election. If you want to maintain a direct relationship with leadership, you'll check off 'no.'" (GC 5(a) 0:58–1:15) (GC 7, p. 2)

[9] See also, Kelly M. Lyden, *Predictive Scheduling is Trending: Is Milwaukee Next?*, 22 Marq. Benefits & Soc. Welfare L.R. 111, 115 (2020) (discussing predictive scheduling ordinances passed by various cities, including the Seattle Secure Scheduling Ordinance).

[10] Tr. 82–83, 318. See also, GC 5(b) 43:46–44:14 (employee noting that the March 22 meeting was scheduled in advance and was not subject to predictability pay); GC 9, p. 32.

[11] If employees could not attend their scheduled meeting, they were allowed to attend one of the other meetings, as Respondent was holding multiple meetings per week during this period. (Tr. 112–113, 353–354)

[12] Between the time of the union petition/election and the hearing in this matter, Keanna got married and changed her last name from Cohen to Lesser. (Tr. 327)

[13] At the time of the hearing, Keanna no longer worked for Respondent, having voluntarily left the company in June 2022. (Tr. 140)

Marpoe then reminded employees that the vote will be by secret ballot, and they should vote for what is best for them, not based upon whatever promises that have been made or whether they are in a movement. She also told employees that, because they are now in the election process, signed union cards do not mean anything and, by law, they can vote 'yes' or 'no' in the election, regardless of whether they had signed a union card. (GC 5(a) 1:17–1:55) (GC 7, p. 2–3)

After some discussions about union cards, and the anticipated election date, Marpoe told the partners "I think what's at stake, is our culture." Marpoe said that she could not stress enough the openness, transparency, and connectivity she has had with partners and leadership and believes she can go to her peers and leaders, tell them how she is, what she thinks, and that she will be heard. Marpoe said "that culture, with a union, is not the same." She said that if partners unionized, "a third party comes in, and they speak for you." (GC 5(a) 3:42–4:19) (GC 7, p. 3–4)

Marpoe explained that she was in a union once when she worked at Macy's, and remembered a time when she needed more hours. She went to the person who hired her to say that she needed more hours, but was told that she needed to talk to her union representative. (GC 5(a) 4:20–4:38) (GC 7, p. 4) Marpoe then said:

> That's it. I could not have any other conversation with them [referring to the person who hired her]. And so that's—that is—a representation of a union is the rules of employment will then be grounded in a contract. And if it's not in that contract, it's not a conversation in my opinion that's going to happen with leadership. We'll be bound by the contract. So the union will be bound. And Starbucks will be bound. So I want to be clear on that. That a third party comes in and speaks for you. And everything will be grounded, from my experience and my opinion through the lens of that contract. (GC 5(a) 4:38–5:20) (GC 7, p. 4–5) (Tr. 161)

Marpoe then discussed Workers United, saying that it has about 85,000 members and that union members pay dues. She then continued on discussing the topic of dues and her experiences at Macy's. (GC 5(a) 5:20–6:28) (GC 7, p. 5)

b. The collective-bargaining process

After discussing the issues of dues, Marpoe returned to the topic of Workers United, saying that it represented American and Canadian workers in the textiles, gaming, pharmacy, and laundry industries, and that it is a division of a larger union, the Service Employees International Union. She then discussed the vote, saying that a vote for the union does not give workers any wages, benefits, or hours; it is simply a vote on whether to give the Workers United the right to collectively bargain with Starbucks. "It's just, are you willing to give your voice to a third party to speak for you, for collective bargaining purposes? That is the vote." (GC 5(a) 7:13–7:23) (GC 7, p. 5–6) Marpoe then discussed collective bargaining saying:

> For collective bargaining, it can, there is no timetable for when an agreement may or may not happen. It can take on average a year to eighteen months for any kind of agreement to be reached.
>
> Currently the core store in Buffalo, New York, they have been 3 months into the process and nothing has been reached. So just be mindful of the fact that nothing overnight changes. And with regards to your wages, benefits, or hours, that is what's going to be negotiated in a contract, and everything is on the table. So your benefits, wages, and hours, could go up, could stay the same, or you could lose benefits.
>
> And, also be mindful that, if a contract is ratified, it usually is on average in place for three years. So Starbucks can roll something out—benefit wise. I remember a couple of years ago, they gave us bean stock that paid out in May, just as a, like, hey thanks for all your hard work. Any of those things that aren't in the contract will not be afforded to that, those union members. It has to be in the contract for you to receive it. So I want to be clear on that process, that any promises that are being made that your wages, benefits, or hours are going to go up or get better, that's not a guarantee because Starbucks is going to come to the table with something and the union is going to come to the table with something. And there will be representation of course, on both sides, from the Roastery and from Starbucks, beyond just the lawyers, but it will be the lawyers ultimately coming to an agreement on a contract, that you will have to ratify or not ratify.
>
> Neither side can be compelled to make an agreement or to give a concession. That is in the NLRB.gov law, you can go there and look at that. You can't be compelled to agree to something, neither you or Starbucks. As long as we're—as long as Starbucks and the Unions are bargaining in good faith, which means—good—a reasonable time, a reasonable place, and an open mind. Then the bargaining process can go on, for a very long time. (GC 5(a) 7:24–10:00) (GC 7, p. 6–7)

Marpoe told the employees that they were gathered together to "just talk about it," that they should get the facts for themselves to decide what they want, that Starbucks wants everyone to vote and make this decision on their own, and that she was "here for the partners." After saying that the leadership team was there to hear from partners and listen to their perspectives, Marpoe opened the meeting up for questions. (GC 5(a) 10:04–12:13) (GC 7, p. 8–9)

c. Time Limited Agreements (TLAs)

The meeting continued with employees asking questions about various subjects, including how unionization would affect the leadership working on the floor, and company-wide programs, like stock benefits, with Marpoe saying that her understanding was that "if it's not in the contract, you would not benefit from it," and then the issue becomes whether the union wants to renegotiate the contract, and the costs associated with renegotiating in order to try and add something new. But, she said, that if it is not negotiated in the contract, it will not be given by Starbucks. (GC 5(a) 16:37–17:33) (GC 7, p. 12) (Tr. 168)

This discussion led to the issue of TLAs, with an employee asking if access to TLAs, lateral transfers within the company, or moving from store to store, would be impacted. Marpoe replied "it could be," and told them that hours, benefits, and wages "are going to get negotiated into that contract." So, Marpoe said, "if that is something that's important to partners," like

transferring to a store back home to be with family, or to a store in another state because someone was going to school, "I don't know. I can't say. But that can be part of it. If it's not in the contract, it might be a different process." Marpoe then told the partners that at licensed stores, like core stores inside Safeway grocery stores, employees cannot transfer to a nonlicensed stores but have to apply instead. So, Marpoe said "if it's something that's important to partners and they want to get in that contract, that may also be part of the process." (GC 5(a) 17:36–18:45) (GC 7, p. 13–14) (Tr. 168–169)

Underriter then said that TLAs are "super complex." Kaufman followed upon saying the complexity with TLAs was that a partner "here" would be protected under the union, but your contract would only be union protected where you work. Kaufman then said that whether a unionized partner would be allowed to go from their home store to other stores "is a big question. And maybe all of that needs to be specifically outlined on what is okay for that to be done. But you know, current working knowledge is current TLAs, as more TLA opportunities, would that be then,"[14] at this point, Marpoe interjected, saying:

> Yeah, in my opinion. I'm speaking from my opinion. I think TLAs go off the table because you're still a union. And if you go there, you're still in a union, but you're in a non-union home. And I don't see how, in my opinion, either Starbucks or the union would allow you to not adhere to union rules in a contract because then, you know, we're talking a lot of stuff that goes on, like, you're doing things, you're paying your membership dues, but you're not actually in a union job, and you're not actually following the union rules. What does that say about the agreement? So in my opinion, TLAs are going to be sticky or gone. (GC 5(a) 19:28–20:14) (GC 7, p. 14–15) (Tr. 170)

> Marpoe's comments were followed by a six second pause, nobody in the room said anything; Marpoe broke the silence by asking if anybody needed any chocolate, saying "I could use some right now." [GC 5(a) 20:14–20:20) (GC 7, p. 15) (Tr. 171) This provoked laughter from some in the room. Marpoe then said, "I don't know about you, but this is not an easy conversation to have and I want to be open and honest. I don't want to sugarcoat anything. I don't know. Right. But I can tell you what, in my opinion, is probably going to happen. If it's not in that contract, it's not going to happen." (GC 5(a) 20:23–20:40) (GC 7, p. 15)

At this point, Keanna replied saying that she believed Respondent's scare tactics were a little inappropriate. When asked by Barth for examples, Keanna pointed to the company saying that benefits will be off the table and said she was a little disappointed in the way things were being said to sway people one way. Kaufman thanked Keanna for her honesty, but told the group that she was just going to be honest "about where I'm at." She said that the most important thing Respondent can do is to make sure that everyone understood the permutations and that with any kind of negotiations, as with anything people do, there are no guarantees. Kaufman said that sometimes there is a misunderstanding that you cannot lose something that you value. Therefore, she said it is important to know that some benefits are more important than others to different people, and to acknowledge that those benefits could be at risk if there is "an ask for something that's really, really, really, important to the Union members—to the partners" that may outweigh some of the other things that are on the table in the "list of ethics."[15] Kaufman said there was a lot to choose from, because the list of ethics was 50 pages long. For example, Kaufman said that if some partners are not at a stage in life where maternity leave is of value, that "can come off, if there's something else that you're getting" in the give and take of negotiations. Kaufman said that she did not think that "anybody is intentionally trying to scare" anyone but Respondent wants to make sure that everyone is "aware . . . of it," and employees should look at the resources, including NLRB.gov, case studies, and "other things you can look at" for the organization they are considering. (GC 5(a) 20:45–23:20) (GC 7, p. 15–17) (Tr. 172–173)

Kaufman acknowledged there are some personal feelings involved, that in other meetings everyone has been asked "what do you think" and stated she will share that willingly. She said, however, that it is more complex than it may seem, that Respondent is trying to share that there is more complexity involved, that some partners have more information than others, and there is a lot she wants to include for those partners who are still learning. Kaufman continued by saying that, because of the short time period involved, what Respondent is trying to do is get everyone up to speed and understand what is on the table, the importance of the decision, and "to just have the facts" in order to "make the decision that's right for you" because there is a lot to learn. In reply, Keanna complained that Respondent was saying "get the facts for yourself and decide for yourself," but at the same time was telling partners to "vote no." Barth replied saying "Well, that's the company position . . . that's the company's position, and—I don't think that that's—an unknown to anybody in this room." (GC 5(a) 23:23–25:00) (GC 7, p. 17–18) (Tr. 173)

d. Tipping

Respondent's counsel admitted at the hearing that the issue of customers not being able to leave credit card tips at Starbucks locations across the country, including at the Seattle Roastery, was one of the issues in the unionization campaign. The issue of tipping was discussed a few times during the March 11 meeting. At one point during the meeting, a barista named Ean spoke, saying many workers believed there was a discrepancy between their pay and the amount of work they perform. He expressed that it was unfair for Respondent to say partners' relationship with management would change in a negative way if employees unionized, when their "main asking point" is that customers have the ability to tip partners in more ways, which would then increase worker pay without Starbucks having to pay for it. And, he said, tipping was something Starbucks could have implemented "way before now and chose not to," even though partners had been asking about this for a long time. Ean communicated his dismay that Respondent would say that, because workers are

[14] See GC 5(a) 18:50–19:28; GC 7, p. 14; Tr. 169–170.

[15] It is unclear from the record what "list of ethics" Kaufman was referring to.

seeking these benefits they are going to have other benefits taken away or that their relationship with management would change, especially in light of the fact that everyone wants to increase their income at a time when inflation is high and wages are not keeping up with the cost of living. (GC 5(a) 28:56–30:30) (GC 7, p. 21–22) (Tr. 38–39, 176)

After discussing an unrelated question asked by another employee, Barth told Ean that she wanted to touch on one thing about tips, saying "it's a technology piece that is in the way, um—and it has—it has been for years." (GC 5(a) 35:18–35:26) Barth said that tips have been a topic of conversation for some time, and the challenge for the company has always been on the back end; it was the technology piece that was the difficulty. Barth said everyone in the room wanted partners to make more, because they are incredibly valuable and they work their "butts off," but she believed there is a constraint to the technology that is preventing that from happening and she is not sure the union is going to change that. (GC 5(a) 36:02– 36:41) (GC 7, p. 26–27) (Tr. 184–185)

Ean replied saying that Starbucks is a billion dollar company, that there are other companies that tip through mobile pay all the time, and that Starbucks has had a mobile app forever. Ean said the issues on the back end should have been resolved by now and there is no logical reason why a company with as much money and resources as Starbucks cannot figure out a mobile tip system and make it a priority when they are not even paying their baristas a living wage. Ean stated that the money on tips is not coming out of the company's pocket, and by doing nothing, Starbucks is making a choice regardless of what is on the back end holding things up. Barth replied saying that for the last three years this has been on their annual operating plan wish list because they know that the Roastery is more like a restaurant than it is a coffee shop; Ean said three years is a long time. (GC 5(a) 36:42–37:47) (GC 7, p. 28) (Tr. 185–187)

Barth told the room that it was a question of resources, she was not defending it, but was just expressing how the topic comes to her. Ean noted that partners bus tables, and that in restaurants where people bus tables customers tip 25 percent most of the time, and "we don't get that." Ean said that "when it comes to our labor and what we make in wages, it's not adding up," and this is the reason why so many stores across the country, and not just the Roastery, are unionizing. Barth replied saying that "we've heard it loud and clear that wages and tips have been a big issue." (GC 5(a) 37:56–38:42) (GC 7, p. 28–29) (Tr. 187)

The conversation about tipping went on, going back and forth, with a couple employees discussing their opinions on tips, their work, whether the Roastery is more like a restaurant or coffee shop when it comes to tipping and if Roastery employees should be paid more than partners at a Starbucks core store. The discussion then transitioned to wages, with an employee asking if Roastery employees will receive the same raise that Starbucks had recently given to workers at the core cafes. (GC 5(a) 41:09–43:03) (GC 7, p. 29–33) (Tr. 192)

Barth replied saying that, as a general rule, everything that happens at the Starbucks core stores will happen on the Siren Retail side as well, but it might seem less impactful because Roastery employees are paid higher than the market rate to begin with. (GC 5(a) 43:00–44:21) (GC 7, p. 34–35) After discussing the starting wage rates in general, including those at the Roastery and Starbucks core stores, Marpoe told the employees that if they voted for the union they would get whatever wages are negotiated into the contract, that is what you live with. Marpoe said that she cannot sugarcoat that things could go up, stay the same, or employees could lose some things that, for most people may not be important, but for some might be important. (GC 5(a) 47:26–48:25) (GC 7, p. 37–38) (Tr. 195).

At this point, Kaufman said that it sucks having to be the person who is "just trying to share facts in terms of this is a big flipping decision with huge ramifications." And, as a manager, Kaufman stated that she is conditioned to look out for partners and tries to go to every one of these meetings because she wants to hear from partners and what matters to them, but that it is hard and is a lot of "heavy stuff." (GC 5(a) 48:28–49:00) (GC 7, p. 38) (Tr. 195) Kaufman then told the employees:

> I would say, like, hell yeah, if, you know, credit card tips could be, like, if that could just be switched on—that would be amazing. That server, that code, doesn't exist yet. And, um, contract negotiations isn't going to create the code. We use registers that are used in every other Starbucks. What updates on ours will impact every other Starbucks. When we talk about like mobile—you know when you go to like Square, or whatnot, like that front end, credit card, those registers flip, so that a customer can make a personal choice as to how much to tip. Our equipment doesn't do that. And negotiations is going to have a hard time in us getting brand new equipment in here, plus server code. It's just honest. (GC 5(a) 49:03–50:04) (GC 7, p. 38–39) (Tr. 195–196)

After this comment, the room was silent for half of a minute, until Marpoe announced that she was going to make some coffee. (GC 5(a) 50:04–50:34) (GC 7, p. 39) (Tr. 196)

e. Strikes

Over an hour into the meeting, the conversation turned to strikes. Leading into this discussion, there was a dialogue about whether employees could vote the union out, with Keanna saying that partners were not stuck with the union forever if they unionized and down the road they could vote the union out if they wanted. Marpoe said she believed it was only after the end of the first contract that the employees could have another vote. Underriter then said his understanding was that, if employees voted to unionize, they could not change the decision until one year from the date of the original vote. Underriter further said that, if the store voted to "deunionize" after one year while contract negotiations were still ongoing, "that gets sticky." He said there were different rulings from the NLRB as to whether that is allowed "so like that gets sticky if you're in negotiations." (GC 5(a) 1:06:01–1:07:10) (GC 7, p. 49–51) (Tr. 204–205)

Kaufman then told employees that, once a contract is signed there is no getting out of the union until the contract ends. Then the NLRB would need to conduct a vote, similar to what was currently happening at the store, but in reverse; that would be the only way to deunionize. Kaufman further said that, if a contract is signed and partners wanted the agreement to be renegotiated before it ended, workers would contact their representatives; the representatives would go to the lawyers who would then attempt

to bring Starbucks back to the negotiating table. However, she said there is no guarantee, but there are other rights to exercise. (GC 5(a) 1.07.31–1:07:44) (GC 7, p. 51) (Tr. 206)

At this point a barista named Justin asked about what he said was a common practice he had read about involving "scheduled walkouts, or those type of things," where a group of workers go to their leaders and communicate they are "walking out because of these terms are not met and will not work until these terms are met or renegotiated." In reply, Kaufman said: "Yup—and for that all union partners would have to strike." Marpoe then added "there is no opt-out in the State of Washington. Everyone will be union, if you go union, and the contract is ratified." And Kaufman finished by saying "the strike would be a simple majority as well." (GC 5(a) 1:08:24–1:09:04) (Tr. 167, 206 – 207) (GC 7, p. 52).

In reply to these comments, the barista named Ean said that employees can choose not to strike, and explained that he was in a union at the University of Washington food services where a strike occurred, but he went to work instead and nothing happened. In reply, somebody said "Hmm." Marpoe then told employees they only had 15 minutes left and they moved on to another question. (GC 5(a) 1.09.04–1:09:36) (GC 7, p. 52–53) (Tr. 177, 207–208)

2. The March 22 meeting

Respondent held another employee meeting on March 22. This meeting also occurred in the Roastery library and was attended by Keanna along with between 15 to 20 baristas. Kaufman and Barth were present for Respondent. (Tr. 246–247)

Keanna's work schedule for March 22 shows that she was scheduled for "SR Training" from 2:30 p.m. to 4:00 p.m. The previous day Keanna was also scheduled for an hour and a half "SR Training" meeting, which turned out to be an actual promo set meeting to sample new products that were being launched. On March 22, she learned about 10 minutes before the scheduled meeting that the "training" that day was actually going to be a meeting about the union. This was the last meeting that Keanna attended about the union election; she also recorded this meeting on her iPhone. (Tr. 247–249, 316–317, 323–325) (GC 5(b), 9, 10, 12)

The March 22 meeting started with Kaufman saying she appreciated everyone being present, acknowledging that it is "a lot," but given the timeline there was "just so much." Kaufman said she did not expect to be studying so much law, and that she appreciated everyone's contributions, questions, efforts, and positive energy. Kaufman said it was Respondent's obligation to make sure all partners were informed of the process and the journey and this was why they were having these meetings. She informed everybody of the election details, and said everyone has the same goal, which was 100 percent participation. (GC 5(b) 0:00–1:19) (GC 9, p. 2)

Kaufman discussed the election, saying that ballots are anonymous and the question to be voted on was whether employees wanted to be represented by Workers United for collective bargaining. She said Workers United had committed to use members "from our team" to determine bargaining priorities because apparently they do "not know how the Roastery works . . . and we do." If employees voted to unionize, Kaufman said that collective bargaining will begin, that she believes the Union will reach out and start collecting priorities from partners, and "until then, we are frozen." (GC 5(b) 2:40–4:09) (GC 9, p. 3–4)

Kaufman said things are frozen in both benefits and standard operations, calling it "the dynamic status quo," and that everything goes on as it would be before the vote and remains that way after the vote. Kaufman said promotions can happen, along with annual raises based upon years of service, and whatever percentage increase that is announced Starbucks wide, is what partners will get, but no other changes to benefits or pay outside of those normal cycles will be given until there is a contract. (GC 5(b) 4:40–5:10) (GC 9, p. 4–5) After discussing whether employees were due to receive a raise, the discussion returned to things being frozen, with Kaufman saying that what is legally binding as per the NLRB's status quo requirement is that "none of your benefits can be added to you, and none of them can be taken away." Barth followed up by saying that what normally happens will continue to happen, until such time as a contract is reached. (GC 5(b) 6:36–6:49; 7:50–7:52) (GC 9, p. 6)

The conversation on this subject continued, and the participants discussed various other matters including collective bargaining, negotiations, strikes, and the election process. Regarding collective bargaining, Kaufman said that the partners would elect and prioritize things they would ask for, and then bargaining in good faith takes place; however neither side is obligated to agree to anything. (GC 5(b) 8:40–9:25) (GC 9, p. 7) Kaufman told workers that the priorities they gathered will go to the negotiating table, and that "you will not be negotiating with us; it will be with Starbucks' lawyers." She said things might get better, stay the same, or partners might lose—which is a strong word—but some things could be negotiated away; whatever happens is up to that negotiating table. For example, Kaufman said that as the process goes on, Starbucks could say that workers have great pay and benefits, so the company could not meet certain other demands. At this point, negotiating table priorities would have to change or compromises made. (GC 5(b) 12:30–13:49) (GC 9, p. 10–11)

Regarding strikes, Kaufman said that the "process," referring to negotiations, may take a long time and that partners can strike until generally a contract is signed, at which point there's always a clause that says there will not be any labor issues during the contract; but striking before a contract is signed is possible. Kaufman discussed the Union's strike fund, said that during a strike employees will not be able to receive paid sick time or vacations, their benefits could run out, and they cannot file for unemployment. She said the company is also allowed to bring in temporary workers and continue operating. Kaufman was unsure whether workers could continue working during a strike, and a discussion then ensued amongst the various participants about this issue, with Keanna noting that in an earlier meeting employees were told that they had to participate in a strike, but that Ean proved that statement was wrong. Kaufman replied by saying that it depends upon the Union's bylaws as to whether or not a strike is determined by a majority of employees, but even if someone chooses to work during a strike, "you're striking but you're working." (GC 5(b) 14:40–15:25; 16:04–16:26) (GC 9, p. 11–12)

Kaufman then said that there was much interest in what

workers would be able to negotiate. She told the partners that the odds they would receive miles above everybody else is challenging without a compromise. While the workers might ask for wage increases in a three to five year contract, either tied to inflation or tied to the minimum wage, she said "the approach on the other side will always be much more conservative because nobody knows what happens, like a pandemic for example. So high risk is challenging, without compromise." (GC 5(b) 16:33–18:10) (GC 9, p. 13)

Kaufman also said that Starbucks has thousands of stores, which is unlike bargaining for a single factory, or a couple hundred hotels or grocery stores in one region. Therefore, she said "I think for unionized stores to get a super great deal, it's going to be hounding, I think, for Starbucks to move all those billions of dollars that go to partners over to their legal department that's constantly negotiating contracts." (GC 5(b) 18:13–18:58) (GC 9, p. 13) Kaufman then discussed five Starbucks stores in Canada that unionized, saying that only one still has its union contract because the others voted to "deunionize." And for the one remaining unionized store, she said that they negotiated a pay increase of 69 cents, but also negotiated more paid time off. However, because they had a signed contract, those employees did not receive any of the increases that the rest of the market has received, so that store now makes less than the rest of the stores around them. To this comment, Keanna can be heard on the recording whispering "more scare tactics." Kaufman then said that she thinks, it is "really really important to know that," while partners will be present at the negotiating table, "this will be the lawyers duking it out." (GC 5(b) 19:00–20:12) (GC 9, p. 13–14) (Tr. 172) Kaufman then said:

> And, uh—um, this will be lawyers duking it out for sure. Uh, and then also, you know—I think this relied on Starbucks having business for their part going up higher and higher. Or it is—considering—uh, them to also prioritize, frankly, un-unionized stores over unionized stores. I'm just being honest. (GC 5(b) 20:20–21:03) (GC 9, p. 14)

Keanna then asked if Kaufman was saying that partners won't have much of a voice; Kaufman replied that they will definitely and absolutely have a voice, that their voice is incredibly important, but that it is a legal process and the lawyers will duke it out. Keanna then asked Kaufman about her statement that the company will "pay attention to other stores, rather than us." (GC 5(b) 21:03–21:27) (GC 9, p. 14–15) Kaufman replied by saying:

> Well, we'll be in contract, collective bargaining. We'll be, wuh—your voice will be at that table, for sure. But—um—if—uh—benefits are added, they will be added to non-collective bargaining stores. (GC 5(b) 21:29–21:48) (GC 9, p. 15)

Keanna asked "so we won't get the new benefits that other stores will get?" And Kaufman said, "it's a risk." Keanna then said, "unless we negotiate it in the contract, which why wouldn't we?" And Kaufman replied again saying "it is a risk." (GC 5(b) 21:48–22:00) (GC 9, p. 15)

After this, a barista named Mark asked an open question to anyone in the room about "deunionizing" and whether they could deunionize without having a contract. Kaufman and a couple employees addressed the question, to the best of their understanding, with some employees relating things they had heard in other company meetings. Kaufman then told the workers that she has never had to learn so much about the law and ultimately it is none of her business whether employees choose to organize and collectively bargain. She said everybody has been through the worst two years of their lives, everyone is tired, everyone wants to get paid more, in her mind she is not in the upper class, and if employees "do it," they should write a great/phenomenal contract because the likelihood of Starbucks coming back to revisit it is not that high. (GC 5(b) 22:03–24:35) (GC 9, p. 15–16)

The meeting then continued in the same general format for almost another hour. Sometimes company representatives made various statements, resulting in questions from employees. Other times topics were raised, and employees discussed the issue amongst themselves, until moving on to another issue. And, there were instances where individuals made long statements about how they felt about the entire process.

E. Facebook post by Respondent's assistant manager

On February 14, the day the petition was filed, De La Vega, posted on Facebook about the petition. De a Vega's post reads as follows:[16]

> As a leader of a prominent location, I've come across so many fantastic leaders and many that were the worst imaginable.
>
> However, one of my favorite quotes passed down from me is this: "We always look at the mountains in front of us and forget the mountains behind us were just as hard to climb." [mountain emoji]
>
> This quote will continue to ground me in how I show up as a leader for others and most importantly, myself! Today my location has decided to begin the process of unionization. As I'm certain most media will begin to initiate propaganda but would like my friends and family to know.
>
> Overall, the road ahead is unclear and fogged up with thoughts and feelings from others and myself. But I will always stay true to what has inspired me about leadership...and these are the times that forge what a true leader is.
>
> However, I won't be a martyr for anyone which side. I am my own person and will stay true to that
>
> [smiley face emoji]

De La Vega's post sparked replies from his Facebook "friends," some of whom were also employees of the Seattle Roastery. The first employee to respond to the post, named Liza, worked on the roasting/manufacturing side at the Roastery. Liza wrote that she was against having a union, that unionization has never succeeded and it would "tear us apart." She said that the company calls them "partner for a reason" and once the union comes in they would lose most of their good benefits. Susan, another employee who also worked on the manufacturing side at the Roastery, commented saying "everyone was miserable after the

[16] All of the Facebook posts discussed in this section are found in GC 4.

maintenance union was voted in" at another roasting plant.[17] De La Vega replied thanking them both for their comments. (Tr. 93)

The third person to comment on De La Vega's post was Melissa Slabaugh (Slabaugh). At the time, Slabaugh had been working as a mixologist at the Roastery for about four and a half years; she had started working at Starbucks in 2013.[18] In her reply, Slabaugh wrote "[a]s I know both of you and support your perspectives, let me share some tidbits of what we have seen with unions," and remarked that the cafe side of the Roastery "is a different entity with different struggles." Slabaugh further wrote that union dues were only $10 per week, would only apply after a contract was negotiated, and that her coworkers would only vote on a contract that essentially negated those fees; she also shared a link to an article about union enrollment. Slabaugh continued her post saying that "the vote to unionize does not impact the manufacturing side because you guys are a different company essentially. A totally different entity. Which is why y'all's practices are so different from ours." Slabaugh ended her response by saying that the unity and comradery "on the Cafe side has been stronger than" what she had seen in quite some time, and while this "does not negate any experiences y'all may have had" it illustrates what was happening "on our side of the store." (Tr. 42, 48–49, 53–54, 93–94)

De La Vega responded to Slabaugh, saying "as you travel the road less traveled! Know I'm here for ya! As many times before this to!" Slabaugh replied with link to the Workers United website. Susan responded, thanking Slabaugh "for some solid information," and saying that she has "seen the scheduling retail partners have to deal with, and I understand. I am hopeful that upper management will take note of our grievances." Liza wrote, "it will impact manufacturing side no matter what." Slabaugh answered writing "it really won't," noting that the petition was specifically filed for the hourly cafe side workers, that the manufacturing side employees will not vote and therefore the union election will "not impact your structure back there" since the manufacturing side is "a different company and different entity." Slabaugh said she was trying to understand Liza's comment, and asked her to "elaborate" in order to "understand where you're coming from." Liza responded that this was "not a good place to discuss this issue." Slabaugh acknowledged Liza's position, but disagreed, writing "it's an excellent place to discuss the issue," and then wished Liza "a great day."

De Le Vega responded to the posts saying "[a]dditionally, if passed, it does effect other locations and business units relationships." De La Vega then wrote the following series of posts:

> Mel[issa] Slab[augh] Liza . . . if union vote is passed, TLA opportunities would be on the table. As they wouldn't be considered a part of the theoretical union. Since they are two different entities, we can't share partners anymore for legality reasons.
>
> Nothing will be guaranteed and everything will be on the table. Some might lose their free ASU others their healthcare. And much else. Even negotiating higher wages wouldn't be guaranteed.
>
> From personal experience, I agree while corporate has made decisions for all of our lives. Let's remember they paid for us to stay home for two months, instead of laying us off. And hourly wages have been the highest they've ever been. There has never been a priority on mental health or sick like there is now on our store.
>
> And seeing decisions being made at the top, I can guarantee everyone the partners are always front and center in every decision we make. And when we don't agree with corporate nonsense, we do what's best for our store.
>
> I'm still not positive what there is to gain besides showing corporate leaders up? And I can attest I'm not a fan of them either.
>
> Well you can, but it's pretty controversial. And the pandemic is looming to a end. And with a potential unionization. Some of us will be forced with making a choice if this is still for us or not. I am too in that boat, in this moment.

Liza wrote back saying "Elijah . . . thank you for making it clear, we are all Starbucks employee no matter what." This prompted De La Vega to draft another series of posts saying:

> All in all, these are all facts.
>
> Being all locked into a three year contract, doesn't seem to wise. When our world economics is 10 seconds to midnight [clock emoji] I'd leave some flexibility in policy during this time. But that's from experience, how we had to pivot to partner safety and business.
>
> Not to mention, this third party has never consulted a coffee company quite like ours. And not to mention a multi-retail experience. Just seems to me, every detail hasn't been figured out. And a very big opportunity on change management.

Slabaugh responded writing "I had a comment posted, but tbh, I don't really trust this being out anymore. Happy to talk in person Elijah or through personal messages." Notwithstanding, Slabaugh went on to post that she was "admittedly . . . checking on TLAs, however . . . this would be a corporate decision to take those benefits away. That would mean they came to the bargaining table NOT in good faith. PERIOD. We are the union. No one is speaking for us." De La Vega responded writing that:

> everyone has an opinion on what's best for their life. I haven't found any evidence of supporting my life beneficially. In all honesty, undue stress on a human level. But at this rate I'm resilient. What I'd encourage is all to vote in fair election with transparency of what we can & can't do. Let the voters decide what is best for our store. We are partners, and this company is why we have the opportunity to even go through this process. I owe very much of my success to the leaders of Starbucks

[17] The Seattle Roastery Reserve employees who worked in the packaging, manufacturing, and roasting area were not part of the petition filed by the Union, and are not part of the certified unit. It appears they worked for Starbucks under the Starbucks Manufacturing Corp. subsidiary. Tr. 104; see also, footnote 3 (Exhibit 21) (listing Starbucks Manufacturing Corp. as a Starbucks subsidiary).

[18] At the time of the hearing, Slabaugh no longer worked for Respondent. She graduated from ASU's online program through the Starbucks College Achievement Plan, and left the company in May 2022 to seek a job in her field of study. (Tr. 42, 51–52)

guided by mission and values.

Slabaugh replied:

> Elijah . . . the labor laws fought for by activists are why we have the ability to do this. Not the company. To be clear.
> You shouldn't have to be resilient, you should be protected. Legally.
>
> Union's aren't radical. And you're right, we all have a right to choose what's best for our life.
>
> No one was pushed into this, information was given on a pro and con perspective. People saw more pros than cons, and we are being transparent. To imply anything else is disappointing and hurtful–on a human level.

This comment prompted a response from De La Vega who wrote:

> thank you for the learning. I'm unaware of such policies due to the fact when I have an issue with my employer, I've learned to use my own voice to meet my concerns and find solutions. Even for others.
>
> I've never thought of a need to be in a union. My goal is not to be at the Starbucks reserve Roastery decades.
>
> I would rather get what I need from the company, and start my own business. I think that is what true success looks like to me.
>
> And I've been lucky to find leaders at the Roastery that have given me stability in my life.
>
> No matter what is chosen. The world is in a bigger crisis than unionizing revolution in Starbucks. Full stop. Finding peace in others and community is more important to me.

Slabaugh replied saying:

> we both have that in common. Others just haven't been as lucky in their outcomes.
>
> I don't want to be here for decades either, but we want everyone's time here to be enjoyable and fair for everyone, for whatever amount of time they are here. Long after any individual is gone from the building.
>
> I too find so much respect in leaders at the Roastery, but time and time again I've stated there's only so much y'all can do and it's true.
>
> Also true about the world. We can fight to make it better though collectively

De La Vega replied to Slabaugh writing, "I appreciate this conversation with you. Thank you for your patience and grace with me!" Slabaugh responded saying "But this fight comes in bite sized pieces. This is one of those pieces."

At this point in the Facebook conversation, Keanna posted a comment. Keanna learned about De La Vega's post from Slabaugh and added De La Vega as a Facebook friend because she wanted to read what he was saying. In her comment, Keanna wrote "i second the notion that you are great, but y'all can only do so much for us. when you come to learn a majority of our partners struggle with food insecurity, it can put things into a different perspective." De La Vega replied saying, "no hard feelings y'all! Thank you for sharing your perspectives! It is hard to hear people are having food insecurity. While I can't control these variables specifically. If there is anything we can do to combat in the meantime, let me know." (Tr. 326–327, 335–336)

A couple unknown people who did not work at the Roastery made brief comments in reply to this exchange, that solicited a short reply from De La Vega, saying thank you and hoping "all is well." Then a former Roastery employee named Anton commented. Anton praised De La Vega's leadership, said that what is transpiring amongst the "petitioned union cafes" was a literal title wave and long overdue, especially at the Roastery, and observed that he was "pretty sure" he would have been fired if he "uttered the word union" during his tenure. Anton offered to help if De La Vega needed any support, saying he now managed a cafe with unionized employees. A former Roastery employee named Brittany responded to Anton's post with four heart emojis. And, Slabaugh responded by saying that Anton was "incredible," and she was "inspired by present and past partners every single day." She also wrote "I also very much second Anton's post in regard to you, Elijah. [smiley face emoji]." (Tr. 94–96)

De La Vega responded as follows:

> Mel[issa] Slab[augh] union or not. We are pressed with creating the space we want to see. I'm interested in hearing pro-union side more transparently and strategic. As the Roastery is prominent, I want to ensure we aren't being used as a Trojan horse for everyone else political game. And the partners leading the initiative, protect not only their experience but the experience for all and find how a third party will support the initiatives mentioned. And bring this culture changer. What continues to ring clear to me…what evil is better? I'm confused either way but in time we will find our way one step at a time.
>
> If union were to occur, it'd be interesting how my roles and responsibilities will change? What people can expect from me vs. union? How efficient is the process for 150 people? How will promotions be handled? What change can actually be accomplished while a contract is being drawn up for months, maybe years? As person who has admittedly work their a** off for corporate leaders that could care less. I understand the push. However, pro-union will not make you a better employee and might create a better work environment, but that isn't clear just yet as no contract has been approved. This third party, can force everyone to go on strike whenever they want unpaid or face the consequences. Also, we are not protected from layoffs. (Repeating what I was told) All in all, sifting through propaganda is troubling lol
>
> Protect, educate, and advocate for your own needs, not others [shield emoji] you can't let this decision be decided by others. You are faced with knowing what your truest needs are and communicating and voting accordingly.

For Anton, De La Vega wrote "Anton . . . def would like to meet up for coffee to catch up soon! Appreciate you and your tireless support along my journey! I'll always hold dear the values you carried in the Roastery, that was failed to be recognized by leaders. You are a true gem! [diamond emoji]

Slabaugh replied to De La Vega's posts writing:

> Elijah . . . with strikes, it has to be voted on by the union…btw. so us. But your role wouldn't really change. All of those things you mentioned? On the table for bargaining (including promotions which aren't handled with consistency or transparency atm). During that time nothing is legally allowed to change. Benefits are legally protected. But in contract negotiations we would be pushing for better, more comprehensive benefits and fairer workplace practices. All in all, it's biggest push is to hold accountability to those above that hinder our resources in the store.
>
> The union is the workers. The workers do the bargaining, but with legal help. They represent us only in legalities but they don't SPEAK for us. We do that.
>
> Elijah . . . if you know me, you know then that I was up until odd hours constantly researching this particular union, researching pros and cons of unions, looking at just about everything imaginable before literally doing anything.
>
> I have lost so much sleep making sure this was something that would benefit our partners, not take away from them.
>
> I don't do anything on others agenda
>
> Elijah . . . and that wasn't meant to sound aggressive lol it was meant to remind you that I don't take anything lightly, and I feel you know that already. I am excited to be able to talk about this openly now because man there is some seriously bad info swarming about right now in general, and all over the place.

De La Vega responded to Slabaugh's post saying "I appreciate you and have always and will always respect your voice! Thank you for not taking my partner experience lightly! For that, you have my respect [raised fist emoji] you a leader too. [smiley face emoji]" De La Vega then posted "Man these Xbar peeps, are revolutionary! [sparkles emoji] #workingintrenchestogether!" And in another separate post wrote "We've come a long way! Proud we are able to have a discussion and share perspectives! [heart emoji]"

After this post, a former Roastery employee named Megan commented that she had "so many mixed feelings" on the subject. She wrote that De La Vega was one of the few leaders that took time to help develop her skills, that she looks up to him, and hoped for the best during the process. De La Vega thanked Megan her for her words of positivity and expressed hope that all was well with her and her store. Another person, unidentified in the record, responded by posting an emoji of clapping hands. A person named Sean, who was also not identified in the record, responded by saying that all this comes as a surprise as he had not heard the "faintest whisper in the store," that this was even happening. A former employee named Ryan responded to Sean's comment by saying that he knew the union drive was happening even though he doesn't even work at the Roastery. Slabaugh responded to Sean by tagging him and saying, "message me." (Tr. 98)

An unknow person named Stephanie commented, "Elijah, I know you can lead through anything," telling him to stay true to his values, listen to those he leads, and to remember that she is "just a phone call away." De La Vega responded by saying he appreciated Stephanie, that she continues to inspire him and her insights as a leader will always resonate with him. This appears to be the last comment made by anyone involving De La Vega's post.[19]

III. ANALYSIS

A. Group meetings with management about the union petition and election

The General Counsel alleges that the group meetings Respondent held about the union petition and the election violated Section 8(a)(1) of the Act. (Compl. Para 6(a), 6(f), 7) In support of this allegation, the General Counsel argues that the Board should overrule *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), and return to earlier precedent which held that an employer independently violates Section 8(a)(1) of the Act by compelling employees to listen to a speech on self-organization during work time. *Clark Bros. Co.*, 70 NLRB 802, 804–805 (1946). (GC Br. at 27–44) In its brief, the Union sets forth its support of the General Counsel's position.[20] (Union Br. at 8–20)

Respondent, in turn, claims that the meetings in question were not mandatory. (R. Br. at 20–21) The Roastery contends that there is no evidence partners were compelled to attend these meetings, claims no employee was disciplined for failing to attend a meeting, asserts that attendance was not taken, and points to the fact that employees were invited to share their perspectives and some employees made prounion statements. The company maintains that the meetings constituted a free exchange of ideas from partners regarding their thoughts on unionization. Id. at 21. Finally, Respondent asserts that no violation can be found because under extant Board precedent, citing *Babcox & Wilcox*, it is lawful for an employer to hold mandatory meetings with employees to discuss their efforts to unionize. Id. at 20–22.

[19] Throughout this Facebook exchange, the individuals posting "tagged" each other in their comments. A Facebook "tag" is a means of addressing a public communication to someone who then gets a notification directing their attention to the post. *Majumdar v. Fair*, 567 F. Supp. 3d 901, 911 (N.D. Ill. 2021). It is similar to the way an email user receives a notification when an email is received, except the contact is made in public. Id.

[20] The analysis section of the Union's brief is limited to this allegation only. In its brief, the Union provided links to various notes from speeches given by Starbucks CEO Howard Schultz, along with a video and other items, that were taken from the Starbucks website and asks that I take administrative notice of these matters. Although the Union participated in the hearing, it did not attempt to introduce any of these items into evidence. Because I find that the items in question are ultimately irrelevant to my determination regarding this allegation, I decline to take administrative notice of them. *Hargis v. Access Cap. Funding, LLC*, 674 F.3d 783, 793 (8th Cir. 2012) ("Courts are not required to take judicial notice of irrelevant materials."). I further decline to take administrative notice of the Starbucks employee handbook which the Union appended to its brief; no attempt was made at trial to introduce the handbook into evidence. The Union claims that the authenticity of the document cannot be seriously questioned, and cites various cases in which it asserts the handbook has already been received into evidence by the NLRB. However, all of the cases cited by the Union involve Starbuck Corporation only; none involve Siren Retail. In any event, I similarly find that the handbook is not relevant to this allegation. Id.

1. Respondent's postpetition group meetings were mandatory

The evidence supports a finding that the postpetition meetings management held with Roastery employees to discuss their unionization efforts and the pending election were mandatory. The meetings occurred during work time and employees were paid for the time spent in the meetings. Also, the meetings appeared on employee work schedules, and there is nothing on those schedules to indicate that the meetings were voluntary or that employees otherwise did not have to attend. (GC 11, 12) See *Relco Locomotives, Inc.*, 359 NLRB 1145, 1155 (2013) (reasonable employee could only conclude their meeting attendance was required where the meeting notification listed their names and time of the meeting, the meetings appeared to have occurred during the work day, and there was nothing on the notification informing employees that they did not have to attend), reaffirmed 361 NLRB 911 (2014).

I credit the testimony from Keanna and Slabaugh that, like work shifts, employees were expected to attend meetings that appeared on their work schedules and that failing to do so could result in discipline. (Tr. 72–3, 144, 320) And, the Roastery presented no evidence to the contrary. As for Respondent's assertion that "no partners were disciplined for failing to attend" the meetings (R. Br. at 21), there was simply no evidence introduced that any employee had actually missed a scheduled meeting. Under these circumstances, it is reasonable to presume that no partners were disciplined because everyone attended the meetings that appeared on their work schedules, knowing that attendance was mandatory.

Similarly unremarkable is Respondent's claim that the meetings were voluntary, because no attendance was taken. (R. Br. at 21) Conflicting evidence was presented as to whether attendance was, or was not, taken during some of the meetings. Notwithstanding, it is undisputed that Respondent monitors time and attendance by having employees clock in and out at the start and end of their work day and during breaks. If desired, Respondent could simply review the time and attendance records to ascertain whether an employee missed a scheduled meeting. And, the meetings themselves were small enough, anywhere from 10 to 25 people, that Respondent could easily determine whether someone who was scheduled to work that day was absent from a meeting. In these circumstances, the lack of someone physically taking roll during a meeting is insignificant to the question of whether the meetings were mandatory.

Contrary to Respondent's claim, the fact the company did not stifle some employees from making prounion statements and invited partners to share their perspectives about the unionization effort did not make the meetings voluntary. While some employees did make statements in support of the union, other employees present did not speak during the meetings. For example, in the March 22 meeting, of the approximately 15 to 20 employees present, only about nine were identified as having said anything during the meeting. (GC 9) And, I credit Slabaugh's testimony that she did not want to attend these meetings, but did so only because they were on her schedule and she was concerned about being disciplined if she did not attend. (Tr. 77–78)

Finally, supporting a finding that these meetings were not voluntary, is the statement made by Kaufman on March 22 that these meetings were, in fact, mandatory. In reply to a question from Keanna asking if the meetings were mandatory, Kaufman said "Yeah . . . We do have an obligation." She then clarified this statement by saying that employees were obligated to attend if the meeting appears on an employee work schedule more than 10 days in advance. The evidence shows that the March 11 and March 22 meetings appeared on employee work schedules more than 14 days in advance, thereby making them mandatory. Accordingly, the evidence fully supports a finding that these meetings were, in fact, mandatory and employees were potentially subject to discipline if they did not attend.

2. Respondent's postpetition group meetings were lawful

Section 7 of the Act give employees the right to engage in union activities along with the right to refrain from any or all such activities. *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 42 (1954) (employees have the right "to abstain from union activities without" their jobs being affected); *Tamosiunas v. NLRB,* 892 F.3d 422, 425 (2018) (Section 7 protects the right of employees to bargain collectively through representatives of their own choosing, as well as the inverse right: to abstain from unionization). And, the Board has found that an employer violates Section 8(a)(1) of the Act when it forces employees to attend union meetings against their will. *Injection Molding Co.*, 104 NLRB 639 (1953), enfd. 211 F.2d 59 (8th 1954).

In *Injection Molding*, workers were represented by a labor union which had fined an employee one dollar for his nonattendance at a union meeting.[21] The union notified the employer of the fine, and the employer deducted the fine from the employee's pay without consent. The Board found that the employer's conduct, in deducting the fine over the employee's protest, constituted a violation Section 8(a)(1) of the Act "because it tended to force [the employee] to attend union meetings against his will." *Injection Molding Co.*, 104 NLRB at 646. The Board further found that "such conduct was in direct derogation of the right of employees under Section 7 of the Act to refrain from union activities."[22] Id.

The Board had previously applied this same general reasoning to meetings where an employer compels its employees to listen to a speech on self-organizing, finding that such conduct impairs employee free choice which is guaranteed in Section 7 of the Act. *Clark Bros. Co.*, 70 NLRB 802, 804–805 (1946). However, after Section 8(c) was amended into the Act, in *Babcox & Wilcox*, 77 NLRB 577, 578 (1948), the Board changed course, holding that, even assuming employees were required to attend and listen to an employer's anti-union speeches, Section 8(c) of the Act, and its legislative history, "make it clear that the doctrine of *Clark Bros.*, no longer exists as a basis of finding unfair labor practices."

[21] A concise summary of the facts are found in the Circuit Court's opinion. *NLRB v. Injection Molding Co.*, 211 F.2d 59, 65 (8th Cir. 1954).

[22] The Board noted that an exception exists for situations where union membership is required pursuant to a valid union-security clause, as authorized in Sec. 8(a)(3) of the Act. *Injection Molding Co.*, 104 NLRB at 646.

Courts have recognized that the "captivity" of an audience is an important factor in determining the proper degree of First Amendment protection for certain speech. *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 871–872 (Cal. 1999) (Werdegar, J. concurring) (consolidating United States Supreme Court cases discussing the applicability of First Amendment protections to various speech involving different types of captive audiences, and arguing that the relative captivity of an audience is a relevant and important, if not dispositive, factor in determining whether government restrictions on speech in the workplace are permissible under the First Amendment). And, various commentators have remarked on the wisdom of the Board's decision in *Babcox & Wilcox*, along with whether reforms in this area of the law should, or should not, occur. See e.g., Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 Berkeley J. Emp. & Lab. L. 65, 78 (2010); Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 Berkeley J. Emp. & Lab. L. 356, 358 (1995); Daniel V. Johns, *The Coddling of the American Worker's Mind: The Anti-Free Speech Nature of Popular Labor Law Reforms*, 30 Wm. & Mary Bill of Rts. J. 755, 762 (2022). Ultimately, however, whether *Babcox & Wilcox* was rightly decided is beyond my purview. I am compelled to "apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied." *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (internal citations omitted). The facts here fall squarely within the ambit of *Babcox & Wilcox* and do not resemble the situation where the Board found an 8(a)(1) violation in *Injection Molding Co.* As such, I recommend that this allegation be dismissed.

B. Statements made at the March 11 meeting

1. Maintaining a direct relationship with management

Complaint paragraph 6(a)(i) alleges that the Roastery violated Section 8(a)(1) of the Act when Marpoe told employees during the March 11 meeting that, to maintain a direct relationship with Respondent, employees must vote against unionization and that if something is not in the contract employees cannot raise or have a conversation about that issue with management. Regarding these allegations, the evidence shows that, at the start of the March 11 meeting, Marpoe told employees that she wanted to give them an update about the election process, information and facts about unions and how they work, and discuss collective bargaining. Marpoe encouraged employees to do their own research and then said:

> If you want a union to represent you—uh—you want to give your right to speak to leadership through a union, you're going to check off 'yes' for the election. If you want to maintain a direct relationship with leadership, you'll check off no.

The General Counsel asserts that this statement violates Section 8(a)(1) of the Act as Respondent did not equate union representation with collective bargaining and did not explain the legal obligations on all parties with respect to good faith bargaining. (GC Br. at 20) The government also asserts that the vagueness of the statement could lead a reasonable employee to believe that they could not have a casual conversation with a supervisor, or that they would lose their right to speak with people in nonsupervisory roles if they are considered part of leadership.

For many years the Board "consistently held" that an employer violates Section 8(a)(1) by telling employees "they would lose their right to speak directly with management" if they selected union representation. *Dish Network Corp.*, 358 NLRB 174, 175, 175 fn. 3 (2012) (Member Block concurring in part) (collecting cases where the Board found violations). However, that changed in *Tri-Cast*, 274 NLRB 377 (1985). In *Tri-Cast*, the Board found that there "is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and employer will not be as before." 274 NLRB at 377. The Board has since applied *Tri-Cast* to find no violation where an employer stated that "union representation might limit direct access to management," *Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 1 fn. 3 (2020), and where an employer said, "if the union came in, employees could no longer come directly to management with problems . . . [and they] would have to go to the union with any complaint." *Montgomery Ward & Co* , 288 NLRB 126, 126 fn. 3 (1988), remanded on unrelated grounds 904 F.2d 1156 (7th Cir. 1990). Here, I find that Marpoe's comments fall within those statements that are privileged by the Board's holding in *Tri-Cast* and its progeny. Therefore I recommend that complaint paragraph 6(a)(i) be dismissed.

2. Discussing something that is not in the contract with management

Complaint paragraph 6(a)(ii) alleges that Marpoe violated Section 8(a)(1) of the Act by telling employees they cannot raise or have conversations with Respondent about matters that are not in their contract if they unionize. The evidence shows that, during the March 11 meeting, Marpoe discussed with partners what she said was her experience working at Macy's, where employees were unionized. Marpoe told the partners there was a time when she went to the person who hired her to ask for more hours and was told she needed to talk to her union representative, and "[t]hat's it. I could not have any other conversation with them." She then said:

> And so that's—that is—a representation of a union is the rules of employment will then be grounded in a contract. And if it's not in that contract, it's not a conversation in my opinion that's going to happen with leadership. We'll be bound by the contract. So the union will be bound. And Starbucks will be bound.

Marpoe then said that she wanted to be "clear on that. That a third party comes in and speaks for you. And everything will be grounded, from my experience and my opinion through the lens of that contract."

The General Counsel asserts that Marpoe's statement is unlawful, as she incorrectly tells employees that they will not be able to speak with their supervisors, does not equate union representation with collective bargaining, or explain the obligation to bargain in good faith. And, as with the previous allegation, the General Counsel also asserts that Marpoe's use of the term "leadership" could be construed to make employees to believe that they cannot speak with nonstatutory employees in leadership

roles. (GC Br. at 20) Respondent asserts that this allegation should be dismissed because Marpoe's comment is confusing, open to multiple interpretations, and is grounded in opinion. (R. Br. at 23–24)

In context, I believe Marpoe's statements are covered by the Board's holding in *Tri-Cast*, 274 NLRB 377 (1985), with respect to whether employees, after they unionize, will being able to speak with management about matters. Accordingly, I recommend that complaint paragraph 6(a)(ii) be dismissed. *Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 1 n. 3; *Montgomery Ward & Co* , 288 NLRB at 126 fn. 3.

3. Time Limited Agreements (TLAs)

Employees considered TLAs to be an important benefit, and during the March 11 meeting someone asked how bargaining and negotiations would effect TLAs and lateral transfers. Marpoe replied saying that they both could be impacted because hours, benefits and wages are all negotiated into the contract. She said that if something is important to the partners and they want to get it in the contract, "that may also be part of the process." Underriter then said that TLAs are "super complex." And Kaufman followed-up saying TLAs are complex because a unionized partner is protected under the contract, but only protected where they work, and it is "a big question" as to whether a unionized partner would be allowed to go from their home store to another store, and maybe all of that needs to be specifically outlined on what can be done. Marpoe then interjected saying that:

> Yeah, in my opinion. I'm speaking from my opinion. I think TLAs go off the table because you're still a union. And if you go there, you're still in a union, but you're in a non-union home. And I don't see how, in my opinion, either Starbucks or the union would allow you to not adhere to union rules in a contract because then, you know, we're talking a lot of stuff that goes on, like, you're doing things, you're paying your membership dues, but you're not actually in a union job, and you're not actually following the union rules. What does that say about the agreement? So in my opinion, TLAs are going to be sticky or gone.

Neither Underriter nor Kaufman said anything in reply to Marpoe's statement. After a 6 second pause where nobody spoke, Marpoe asked if anyone wanted some chocolate; some in the room laughed. Marpoe then said this is not an easy conversation to have, that she wants to be open and honest and does not want to sugarcoat anything. But, Marpoe added, she can tell workers her opinion on what is probably going to happen. Then she said that if it is not in the contract it is not going to happen.

In complaint paragraph 6(b)(iii) the General Counsel alleges that Marpoe's statement about TLA's being "off the table . . sticky or gone," violates Section 8(a)(1) of the Act. (GC Br. at 21) Respondent argues that no threats were made, and instead claims that Marpoe's comments were "the conveyance of personal opinions about the potential future of such a benefit in a unionized environment and an explanation that [the] ultimate fate is that TLA's would be *sticky*–meaning still possible–or gone." (R. Br. at 9) (italics in original) The company further asserts that Marpoe's explanation of "sticky or gone" was because TLAs "were, in fact, complicated." Id. at 12 Finally, Respondent argues that there should be no violation because in the March 22 meeting Marpoe explained that TLAs would "get hammered out in the contract." Id. at 10.

In assessing alleged threats, the Board uses an objective standard, whether a remark would tend to coerce a reasonable employee, *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at 5 (2018). And, the Board considers the totality of the relevant circumstances in determining whether an employer's statement constitutes a violation. *Ebenezer Rail Car Services*, 333 NLRB 167 fn. 2 (2001). Here, I believe that, considering the totality of the relevant circumstances, a reasonable employee would understand Marpoe's statement about TLAs as a threat of losing an existing benefit if employees unionized and therefore violates Section 8(a)(1). Marpoe told the assembled employees she believed "TLAs go off the table because you're still a union," and that in her opinion "TLAs are going to be sticky or gone."[23] This occurred during a meeting where company officials said they were present to make sure employees "just have the facts" to "make the decision that's right for you," and to present the "facts" regarding what the company described as "a big flipping decision with huge ramifications." Given her position with the company, and the fact Marpoe spoke in the presence of Barth, who did not contradict or her statement or otherwise say anything in response, employees would understand that Marpoe was speaking as a representative of Respondent, and that her statements were the company's position on the matter.

Advancing the coercive nature of Marpoe's comments was the fact they were made during a mandatory meeting, whose purpose was to discuss the unionization petition, the pending election, and to persuade employees to adopt the company's position that they should forego unionization. *Aldworth Co. Inc.*, 338 NLRB 137, 141 (2002) (In finding statements violated Section 8(a)(1), the Board considered the context in which they were made, including the fact they occurred during a meeting whose purpose was to discuss the union campaign); *Mautz Paint & Varnish Co.*, 117 NLRB 496, 508 (1957) (judge considers context in which statements were made, noting the employer "was not conducting a sedate seminar on the law. It was attempting to induce employees to forego union representation."). And, employees, in fact, understood Marpoe's statement about TLAs as a threat. Immediately after her comment, Keanna said that Respondent's scare tactics were inappropriate, and when asked for examples, she pointed to company statements about benefits being taken off the table.

Respondent cannot point to the fact that Marpoe used the words "I think" or "in my opinion" to forestall the finding of a violation. The Board long ago recognized that an employer

[23] In the context used, in combination with the word "gone" and after saying that TLAs would be "off the table," a reasonable employee would understand Marpoe's use of the word "sticky" to mean something that is unpleasant or problematic. See *Merriam-Webster Dictionary Online*, including "unpleasant," and "problematic" as definitions for the word "sticky." https://www.merriam-webster.com/dictionary/sticky (last visited January 27, 2023). That various employees complained regarding perceived threats about losing benefits during the meeting supports this finding.

cannot immunize its statements by simply characterizing them, "however coercive, as expressions of opinion." *J.S. Abercrombie Co.*, 83 NLRB 524, 530 (1949); see also *Chief Freight Lines Co.*, 111 NLRB 22, 24–25 (1955), enfd. 235 F.2d 105 (10th Cir. 1956) (Board noting that it would not "excuse an employer representative, defending an 8(a)(1) charge, because he had only told the employees that 'he thought' they would be discharged if they persisted in exercising the rights guaranteed them by Section 7 of the Act.").

While an employer can express a prediction on the precise effects it believes unionization will have on the company, such predictions must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). "And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." Id. at 617. "The underlying message of Section 8(a)(1) is that an employer . . . needs to take care in the rhetoric it uses when discussing union issues with its workers." *AutoNation, Inc. v. NLRB*, 801 F.3d 767, 774 (7th Cir. 2015).

Here, Marpoe statements were not phrased based upon objective facts outside of the company's control. She said "TLAs go off the table because you're still a union," and "are going to be sticky or gone." Also, her comment about how neither Starbucks nor the Union would allow employees not to adhere to union rules, while paying union dues, did not cure the damage caused by her statement. There are multiple Board cases describing collective bargaining agreements with provisions allowing unit employees to take a leave of absence for a certain period of time, even to work elsewhere with their employer's approval, and then return to the bargaining unit while keeping their seniority. See, e.g., *Appalachian Power Co.*, 198 NLRB 576, 576, 1972 (contract provision allowing employees, when conditions permit, to take a leave of absence for up to one year, and work elsewhere during this time, with the approval of the company); *California Saw and Knife Works*, 320 NLRB 224, 309 (1995) (describing contract provision where, when granted, an employee can take a leave of absence for up to six months and return to their position with full seniority); *Electrical Workers IBEW Local 1212* , 288 NLRB 374, 378, (1988) (contract provision allowing employees to take a 2 year leave of absence to conduct union business in connection with the broadcasting industry while allowing them accrue/retain seniority throughout their leave). There is certainly no reason beyond Respondent's control that Siren Retail and the Union could not craft an agreeable contract provision to allow for unit employees to continue to enjoy TLA benefits, and then return to their bargaining unit positions when the TLA expired.

Finally, as for Respondent's claim that there was no threat because of subsequent statements made about TLAs in the March 22 meeting (R. Br. at 10–12), there is no evidence that the same employees were present in both the March 11 and 22 meetings. See *Service Employees Local 399 (City of Hope)*, 333 NLRB 1399, 1401 (2001). ("[T]here must be adequate publication of the repudiation to the employees involved."). Accordingly, by telling partners that TLAs would be off the table, sticky or gone, if they unionized, Respondent threatened employees with decreased benefits in violation of Section 8(a)(1) of the Act. Cf. *Bethany Medical Center*, 328 NLRB 1094, 1105 (1999) (telling employees that if they persisted in activities protected by Section 7 of the Act their accrued benefits "may be in jeopardy" constituted an unlawful threat); *Textron, Inc.*, 199 NLRB 131, 135 (1972) ("Section 8(c) does not protect the expression of an intention to make bargaining demands that will place in jeopardy the employees' existing benefits").

4. Tips

For years, merchants have had the ability to process customer credit card tips at the point of sale.[24] However, Starbucks stores including the Roastery historically have been unable to do so. The inability of customers to leave credit card tips was one of the issues that drove employees during the union campaign.

At one point during the March 11 meeting, an employee named Ean said there was a discrepancy between the amount of work partners perform and the pay they receive. He complained that Respondent was telling employee their relationship with management will change in a negative way and benefits will be taken away if they unionized, when the main asking point in the union drive was for the company to give customers the ability to tip partners in more ways, which would increase worker pay without Starbucks having to pay for it. Ean also said that partners had been seeking increased tipping options for a long time, and Starbucks could have implemented this at any time but had chosen not to do so.

Barth replied saying that the issue with tips was "a technology piece that is in the way" and it has been for years. She said tips have been a topic of conversation for some time, that the challenge for the company is on the "back end," and the technology piece was the difficulty. Barth further said she believed there was a constraint on the technology preventing this from happening and was not sure the union was going to change that. Ean responded that Starbucks was a billion dollar company and the issues on the back end should have been resolved by now. Barth said this issue had been on their annual operating plan for three years and Ean countered that three years was a long time. He later noted that partners at the Roastery bus tables, but do not get tips, while at restaurants where workers bus tables, customers leave tips of 25 percent most of the time. Ean said that, when it comes to employee wages in relation to their labor, it was not adding up and this was the reason why employees at so many Starbucks stores, including the Roastery, were unionizing. Barth

[24] See *Ghee v. Apple-Metro, Inc.*, No. 17-CV-5723 (JPO), 2018 WL 575326, 2018 U.S. Dist. LEXIS 13112, at *1-3 (S.D.N.Y. Jan. 26, 2018) (describing practice of New York restaurants which use tablets for payment and tipping and do not allow customers to tip less than a predetermined percentage); Simon Hedlin and Cass R. Sunstein, *Does Active Choosing Promote Green Energy Use? Experimental Evidence*, 43 Ecology L.Q. 107, 121, 121 fn. 71 (2016) (discussing that taxis and restaurants have installed credit card touchscreens or tablets, which have suggested tip amounts, to process credit card payments); John Keith, *FROM THE CHAIR*, 40 Los Angeles Lawyer 8, 8 (November, 2017) (describing Las Angeles bakery that uses a tablet for payment and requires a tip between 18 to 30 percent).

replied saying "we've heard it loud and clear that wages and tips have been a big issue."

For the next 10 minutes the conversation on tips continued and a discussion ensued about wages. Then, Kaufman said it sucks being the person who is "just trying to share the facts in terms of this is a big flipping decision with huge ramifications." Kaufman said that she is conditioned to look out for partners and tries to go to every one of these meetings because she wants to hear from employees about what matters to everyone, but said it is hard and a lot of heavy stuff. Kaufman then told the partners

> I would say, like, hell yeah, if, you know, credit card tips could be, like, if that could just be switched on—that would be amazing. That server, that code, doesn't exist yet. And, um, contract negotiations isn't going to create the code. We use registers that are used in every other Starbucks. What updates on ours will impact every other Starbucks. When we talk about like mobile—you know when you go to like Square, or whatnot, like that front end, credit card, those registers flip, so that a customer can make a personal choice as to how much to tip. Our equipment doesn't do that. And negotiations is going to have a hard time in us getting brand new equipment in here, plus server code. It's just honest.

After this comment, the room went silent for half of a minute, until Marpoe said that she was going to make some coffee.

Pursuant to Section 8(d) of the Act "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining. 29 U.S.C. 158(d). The definition of "wages" is broad. *Weyerhaeuser Timber Co.*, 87 NLRB 672, 675, (1949). It includes tips and gratuities that employees receive from customers, even though the employer is not the source of the benefit. *The Capital Times Co.*, 223 NLRB 651, 652 (1976). "The payment of tips is beneficial to the employer in that it gives an incentive to the employee to render good customer service on behalf of the employer to the customer." Id.

An employer is also required to bargain with the union representing its employees regarding the means of payment relating to wages. *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007) enfd. (564 F.3d 1330) (DC. Cir. 2009) (Since employee payroll deductions are a mandatory subject of bargaining, by extension the means by which those deductions are made, direct deposit, is also a mandatory subject of bargaining); *Electro-Flyte, Inc.*, 331 NLRB 633, 636, 2000 ("The subject of health insurance premiums and the means of their payment relates to wages, hours, and other terms and conditions of employment . . . and is a mandatory subject . . . of bargaining."); Cf. *Titan Box Corp.*, 208 NLRB 787, 789 (1974) (A wage incentive plan that could increase employee wages based upon their personal effort, and in no way is dependent upon the company's profit or loss, is a method of payment and a mandatory subject of bargaining.). The timing of these payments are also a mandatory subject of bargaining. *Somerville Mills*, 308 NLRB 425, 439 (1992) ("the hour at which employees can obtain their paychecks constitutes a mandatory subject of collective bargaining.").

Over the years counter-service credit card tipping has become omnipresent, and Respondent's employees were frustrated with the company's inability to offer credit card tipping. This was a big issue in the organizing drive. When employees raised the matter during the March 11 meeting, Barth said the issue was a back-end technology piece and she was unsure the Union would change that. Kaufman then followed up saying that the server and code for credit card tipping does not exist yet, and contract negotiations is not going to create code. She also said that, while other merchants have credit card tipping at the point of sale, the company's "equipment doesn't do that" and "[i]t's just honest" that negotiations would "have a hard time in getting brand new equipment in here, plus service code." In short, by these statements both Barth and Kaufman were telling employees that changes to tipping could only flow from the Respondent, and not the collective-bargaining process. I believe that, in context, Respondent's reply to the concerns raised by partners in the meeting would lead reasonable employees to believe that it would be futile for them to select the Union to bargain with Respondent over the issue of credit card tipping. By so doing, Respondent violated Section 8(a)(1) of the Act.

5. Bargaining

About seven minutes into the March 11 meeting, Marpoe told employees that the pending unionization vote does not give workers any wages, benefits, or hours and it was simply for partners to decide on whether to give the Union the right to collectively bargain with Starbucks. Marpoe then discussed collective-bargaining and told the gathered employees that:

> For collective bargaining, it can—there is no timetable for when an agreement may or may not happen. It can take on average a year to eighteen months for any kind of agreement to be reached.
>
> Currently the core store in Buffalo, New York, they have been 3 months into the process and nothing has been reached. So just be mindful of the fact that nothing overnight changes. And with regards to your wages, benefits, or hours, that is what's going to be negotiated in a contract, and everything is on the table. So your benefits, wages, and hours could go up, could stay the same, or you could lose benefits.

Marpoe then told employees to be mindful that, if a contract is ratified, it is usually in place for three years and during that time Starbucks "can roll something out" involving benefits, like Bean Stock, and that any of those things that are not in the contract will not be afforded to union members; for them to receive it, it has to be in the contract.[25] Marpoe said any promises being made that wages, hours or benefits will go up or get better is not guaranteed because both the Union and Starbucks will both "come to the table with something," that neither side is compelled to make

[25] Respondent telling employees that, if they unionize, they will not receive anything that is not specified in their contract is not necessarily accurate. If a benefit has become an established past practice, an employer cannot unilaterally cease providing it to employees, even if the benefit is not expressly embodied in the collective bargaining agreement. *Central Illinois Public Service Co.*, 139 NLRB 1407, 1415 (1962), enfd. 324 F.2d 916 (7th Cir. 1963) (gas discount had become an established past practice which employer could not unilaterally cease, even though it was never written into the collective-bargaining agreement); *Dearborn Country Club*, 298 NLRB 915, 915 (1990) (longstanding practice of allowing servers to work overtime had become an extracontractual condition of employment).

an agreement or give a concession, and as long as both Starbucks and the Union is bargaining in good faith, which means "a reasonable time, a reasonable place, and an open mind. Then the bargaining process can go on, for a very long time."

Citing *Airtex*, 308 NLRB 1135, 1135 fn. 2 (1992), and *Valerie Manor Inc.*, 351 NLRB 1306 (2007), the General Counsel argues that Marpoe's statements violate Section 8(a)(1) of the Act. (GC Br. at 22–24) Respondent asserts that these statements were "objectively lawful." (R. Br. at 12–13).

As noted by the General Counsel, in *Airtex*, 308 NLRB 1135, 1135 fn. 2 (1992), the Board found a violation where the company president told two employees during a restaurant conversation that negotiations could last a year, that he only had to negotiate with the union, and not sign a contract. Id. In finding a violation, the Board noted that these statements did not stand alone, and the company president had also threatened one of the employees, who was the lead union adherent, with job loss, while making specific offers to him of a supervisory position and other "blandishments" if he gave up his support of the Union, thereby browbeating him in front of a coworker. The Board said that, in this context, the president's statement about negotiations and not having to sign a contract "was not a mere statement of law" but was "a threat that employee support for the union would be futile." Id. In *Valerie Manor Inc.*, 351 NLRB 1306, 1313 (2007), the Board found a violation where the employer said negotiations could take up to two years and the parties could reach an impasse. Again these statements were made in the context of other extensive and serious unfair labor practices including: repeated threats of facility closure, job loss, and loss of wages and benefits. Id. at 1306–1307.

In other contexts, the Board has found that statements about bargaining taking years, without any guarantees, to be lawful. *Histacount Corp.*, 278 NLRB 681 (1986). In *Histacount Corp.*, no violation was found where the employer sent a letter to employees that said: bargaining can continue for weeks, months, or even years until the parties come to a mutual agreement; there is no guarantee existing benefits will survive bargaining; the company is legally entitled to bargain from ground zero; every benefit is up for grabs; and while the company would bargain in good faith, it would do so in light of all its legal rights. 278 NLRB at 686. Ultimately, these statements were found lawful, with the Board finding that, in context, they did not appear to relay the message that the employer would unilaterally discontinue existing benefits if the employees selected union representation, but rather that existing benefits may be lost as a result of bargaining. *Histacount Corp.*, 278 NLRB 681, 689 (1986).

It appears, therefore, that in reviewing statements made by an employer about bargaining, the Board looks at the statement itself, and its immediate context, to determine whether what was said is coercive and constitutes a violation. *Wild Oats Markets, Inc.*, 344 NLRB 717, 717–718 (2005); See also *Mantrose-Hauser Co.*, 306 NLRB 377, 377–378 (1992) (no violation where statements in mailing sent to employees were devoid of any other unlawful statements and the employer did not commit any other unfair labor practices). And, "[w]hen the question is close, a critical factor in determining whether the statement has a threatening color is whether the context of the statement includes contemporaneous threats or unfair labor practices. *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465, 472 (6th Cir. 2019) (internal quotations omitted).

Here, Marpoe's comments occurred in the context of other coercive statements that were made during the March 11 meeting, including the threat that TLAs would be "off the table" if employees unionized, and the threat that the Union could not bargain about credit card tips. Accordingly, given the other contemporaneous threats made during the March 11 meeting, I find that, in context, Marpoe's statements here, including her comments about how long bargaining can take, are coercive and violate Section 8(a)(1) of the Act.

6. Statements about strikes

About a half-hour before the March 11 meeting ended, there was a discussion regarding whether employees could vote the union out at some later date. Kaufman said that, once a contract is signed there was no getting out of the union until the contract ends, and then NLRB would have to conduct another vote. Kaufman further said that, if partners wanted to renegotiate a signed contract during the term of the agreement, there were no guarantees that Starbucks would come back to the negotiating table; she said there are no guarantees, but there were other rights to exercise. At this point a barista named Justin asked about what he described as a common practice he had read about involving a "scheduled walkout, or those type of things," where workers go to their leader and say they are walking out and would not work until certain terms are met or renegotiated. Kaufman then said: "Yup—and for that all union partners would have to strike." Marpoe followed up saying "there is no opt-out in the State of Washington. Everyone will be union, if you go union, and the contract is ratified." And Kaufman finished by saying "the strike will be a simple majority as well." In reply to Respondent's comments, another barista said that employees can choose not to strike, and conveyed his experience working during a strike without suffering any repercussions.

Complaint paragraph 6(d) alleges the statements by Respondent that all union partners would have to strike, and that there is no opting out in the State of Washington, constitute violations of Section 8(a)(1) of the Act. I disagree.

After Justin asked about what he described as a common practice of a "scheduled walkout, or those type of things" in order to get an employer to agree to negotiate the modification of a signed collective bargaining agreement, Kaufman said: Yup—and for that all union partners would have to strike. In context, it is unclear exactly what Kaufman was trying to explain, because Justin's question about a "scheduled walkout, or those type of things," occurring mid-contract was similarly vague. Whether workers can strike during the term of a contract depends upon a variety of variables. See e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957); *Caterpillar Tractor Co. v. NLRB*, 658 F.2d 1242, 1247 (7th Cir. 1981); 29 U.S.C. § 158(d).

What is clear is that Kaufman did not say "all employees would need to strike if they were represented by a union" as argued by the General Counsel, nor do her words "imply that a strike would be an inevitable result of unionizing." (GC Br. at 25) Her comments about a strike came in response to a very narrow hypothetical poised by Justin where: (1) employees had

unionized; (2) the Union and Respondent had entered into a collective bargaining agreement; (3) employees wanted to modify the contract during the term of the agreement; (4) Respondent refused to renegotiate the contract; and (5) employees wanted to engage in a "scheduled walk out, or those type of things" to pressure Respondent to bargain a modification. Considering Kaufman's words objectively, and in context, I find that her statement was not coercive, and would not reasonably tend to interfere with employee rights. As such, I recommend that the allegation in complaint paragraph 6(d)(i) be dismissed.

As for Marpoe immediately following up with the statement " there is no opt-out in the State of Washington. Everyone will be union, if you go union, and the contract is ratified," clearly this is a misstatement of the law. There is no blanket requirement that everyone must join a union once a majority of employees vote for union representation and after a contract is ratified. Nevertheless, the Board has held that misstatements of the law, including telling employees they would have to join the union if the union won the election, are not in themselves a violation of Section 8(a)(1) if there is no express threat that the employer, by its own action, would impose dire consequences upon employees and if the statement does not contain an implicit threat on employee rights. *Daniel Construction Co.*, 257 NLRB 1276, 1276 (1981), enfd. mem. 732 F.2d 139 (1st. Cir. 1984). While Marpoe's statement came immediately after Kaufman's comments, I find it significant that Marpoe did not say anything one way or another about the status of any employee who might strike, what actions the employer would take on its own initiative, or that anything negative would happen to an employee if such a strike occurred. Accordingly, taken in context, I find that Marpoe's statement, although false, does not contain either an explicit or implicit threat on employee rights, and falls within the misrepresentations of the law that the Board has countenanced. Therefore, I recommend that complaint paragraph 6(d)(ii) be dismissed.

C. Statements made at the March 22 meeting

The March 22 meeting lasted about an hour and 15 minutes. Kaufman and Barth led the discussion, which was attended by anywhere from 15 to 20 baristas, including Keanna who recorded the meeting. About 15 minutes into the meeting, Kaufman told employees that negotiations may take a long time and that during this process employees can generally strike until a contract is signed, at which point there is always a clause in the agreement that prohibits any labor issues during the term of the contract. However, she said that striking before a contract is signed is possible. They continued to discuss strikes, the Union's strike fund, and whether employees could or could not continue working during a strike. Kaufman then told partners that there was much interest in what employees would be able to negotiate in a contract and said the odds of employees receiving miles above everybody else is challenging without compromise. Kaufman said that, while partners might ask for a wage increase in a three to five year agreement that is tied to inflation or the minimum wage, Respondent will always be much more conservative, because nobody knows what happens, like a pandemic; high risk is challenging without compromise.

Kaufman told employees that, unlike bargaining for a single factory, or a few hundred hotels or grocery stores in one particular region, Starbucks has thousands of stores. Therefore, she said "I think for unionized stores to get a super great deal, it's going to be hounding, I think, for Starbucks to move all those billions of dollars that go to partners over to their legal department that's constantly negotiating contracts." Kaufman then discussed five Starbucks stores in Canada that had unionized, saying that all but one had voted to deunionize later. For the one remaining store, Kaufman said that while they had bargained for more time off, the pay increase they negotiated in their contract was 69 cents. Therefore, because that store had a signed contract, it did not receive any of the other increases the rest of the market received so they now make less than the rest of the stores around them; after this comment, Keanna can be heard whispering "more scare tactics." Kaufman followed-up by telling partners that, while they will be present at the negotiating table, it will be the lawyers duking it out. She then said:

And, uh—um, this will be lawyers duking it out for sure. Uh, and then also, you know—I think this relied on Starbucks having business for their part going up higher and higher. Or it is—considering—uh, them to also prioritize, frankly, un-unionized stores over unionized stores. I'm just being honest.

Keanna then asked if Kaufman was saying that partners won't have much of a voice, to which Kaufman said that they will definitely and absolutely have a voice, that their voice is incredibly important, but that it is a legal process and the lawyers will duke it out. Keanna then asked Kaufman about her statement that the company will "pay attention to other stores, rather than us." Kaufman replied by saying:

> Well, we'll be in a contract, collective bargaining. We'll be, wuh—your voice will be at that table, for sure. But—um—if—uh—benefits are added, they will be added to non-collective bargaining stores.

Keanna asked "so we won't get the new benefits that other stores will get?" And Kaufman said, "it's a risk." Keanna then said, "unless we negotiate it in the contract, which why wouldn't we?" And Kaufman replied again saying "it is a risk." After this exchange, another employee present at the meeting said that he wanted to ask an open question to anyone in the room about deunionizing, asking whether they had to have a contract in place or if workers could deunionize without having a contract. At the end of the discussion about deunionizing, Kaufman told the workers it was ultimately none of her business whether they chose to unionize, that everyone has been through the worst two years of their lives, everyone was tired and wanted more pay, and that she does not view herself as being in the upper class. She told the partners that if they "do it" they should write a great/phenomenal contract because the likelihood of Starbucks coming back to revisit it is not that high.

Complaint paragraph 6(e) alleges that the statements at the meeting about Respondent prioritizing nonunionized stores over unionized stores, and about benefits being added to

nonunionized stores, constitutes a violation of Section 8(a)(1).[26] I agree.

In context, I believe the message from Respondent was objectively clear, if employees unionized the company would prioritize nonunionized stores for additional upgrades or benefits over the Roastery. By threatening employees that future upgrades and/or benefits could be put at risk if employees unionized, Kaufman violated Section 8(a)(1) of the Act, as her statements would be perceived as threats by a reasonable employee. *EPE, Inc. v. NLRB*, 845 F.2d 483, 492 (4th Cir. 1988) (Board properly found an 8(a)(1) violation where company president told employees that "union members would not be eligible for benefits that were to be available to nonunion workers.") enfg. 284 NLRB 191, 197, 201 (1987); Cf. *Gem Knits, Inc.*, 174 NLRB 449, 452 (1969) (statement to employees, in the context of discussions about the union, that the employer would not purchase new equipment until things had worked out a violation); *Stahl Specialty Co.*, 364 NLRB 635, 640, 652, (2016) (Management speech during mandatory meeting, including comments that suggested further investment in the plant would be put at risk if employees unionized, a violation); *Melville Confections, Inc. v. NLRB*, 327 F.2d 689, 691 (7th Cir. 1964) cert. denied 377 U.S. 933 (1965) (Employer violated Section 8(a)(1) by maintaining a profit sharing plan which, by its terms, specifically excluded employees represented by a union), enfg. 142 NLRB 1334 (1963).

D. De La Vega's Facebook posts

Complaint paragraph 5(b) alleges that De La Vega's Facebook posts threatened employees by telling them they would lose their TLAs, ASU tuition, and/or healthcare benefits in violation of Section 8(a)(1) of the Act. Respondent asserts there can be no finding of a violation because: (1) "De La Vega's Facebook posts cannot be attributed to Starbucks;" and (2) De La Vega's statements were lawful. (R. Br. at 27-30)

Regarding De La Vega, the Roastery entered into a written stipulation that, as the assistant store manager, at various times, he was a supervisor within the meaning Section 2(11) of the Act, and/or an agent of Respondent within the meaning of Section 2(13) of the Act. And during the hearing, Respondent's counsel clarified the stipulation stating there was no dispute that De La Vega was an associate store manager on February 14, and that his job with the Roastery is supervisory. Respondent's position is that De La Vega's Facebook postings were not part of his job duties and/or were outside the scope of his job duties and therefore were not attributable to Respondent. (Tr. 128–131; J. 1)

The fact that De La Vega's Facebook posts may have occurred while he was not at work is immaterial, as some of his Facebook "friends" were employees at the Roastery and he was directly addressing the unionization efforts at the Roastery in his posts. *Big Ridge, Inc.*, 358 NLRB 1006, 1020 (2012), affirmed by 361 NLRB 1372 (2014), enfd. 808 F.3d 705 (7th Cir. 2015) (collecting cases where violations were found based on statements made after work and finding that Facebook posts made by a foreman while he was not at work violated Section 8(a)(1) of the Act). Likewise, even if De La Vega "had not intended his Facebook posts to be seen by . . . employees, it was virtually certain under the circumstances, and therefore reasonably foreseeable, that they would be," and he received several responses from Roastery employees. Id. at 1020–1021. Therefore, the only remaining issue is whether De La Vega's Facebook comments are objectively coercive. I find that they are.

During the back and forth between De La Vega and his various Facebook friends, in one post he addressed Slabaugh and Liza directly saying:

> . . . if union vote is passed, TLA opportunities would be on the table. As they wouldn't be considered a part of the theoretical union. Since they are two different entities, we can't share partners anymore for legality reasons.
>
> Nothing will be guaranteed and everything will be on the table. Some might lose their free ASU others their healthcare. And much else. Even negotiating higher wages wouldn't be guaranteed.

Regarding De La Vega's statement about TLAs, his post is objectively read as saying that employees would no longer be able to partake in TLAs if they unionized, because the Roastery and the other Starbucks corporate entities where employees work under a TLA "are two different entities, [and] we can't share partners anymore for legality reasons." Sharing partners between two different areas of the Starbucks organization, in order for employees to gain work experience and a broader understanding of the company, is the primary purpose of TLAs. While De La Vega claimed that, if employees unionized, TLAs would cease for "legality reasons," he did not give a "a lawful explanation based on objective facts as to why such a loss of benefits would occur." *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 485 (5th Cir. 2001) (internal quotation omitted); see also *Gissel Packing Co.*, 395 U.S. at 618 (while an employer can express predictions about the effects of unionization it must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control."). Accordingly, under the circumstances, I find that the statement constituted a threat of a reduction in benefits, specifically TLAs, if employees unionized, and violated Section 8(a)(1) of the Act.

I also find that De La Vega's comment that "some might lose their free ASU others their healthcare. And much else," is coercive and a violation of Section 8(a)(1). De La Vega was not simply saying that, if employees unionized, certain existing benefits might be negotiated away through the natural give and take of collective bargaining. Instead, he was relaying a message to employees that, if they voted to unionize, some existing benefit will definitely be lost, whether it was ASU tuition benefits, healthcare, or "much else." This comment is objectively coercive and constitutes an unlawful threat.

CONCLUSIONS OF LAW

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

[26] The complaint alleges that Marpoe made these comments, however the evidence shows that it was Kaufman who was speaking. (GC 9, pp. 14–15) (Tr. 255)

2. Workers United, affiliated with the Service Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees that existing benefits will be reduced if they vote to unionize, Respondent violated Section 8(a)(1) of the Act.

4. By threatening employees that they will lose existing benefits if they vote to unionize, Respondent violated Section 8(a)(1) of the Act.

5. By threatening employees that it would be futile for them to unionize, Respondent violated Section 8(a)(1) of the Act.

6. By threatening employees that, if they unionize, the company will prioritize nonunion stores and unionized stores will not receive added benefits, Respondent violated Section 8(a)(1) of the Act.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions, as further set forth in the Order below, designed to effectuate the policies of the Act. The Respondent shall be required to post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010), and *Durham School Services*, 360 NLRB 694 (2014).

In the complaint, the General Counsel seeks additional remedies including a request for a notice reading and training for supervisors and managers on employee rights under the Act. The General Counsel's arguments in favor of both of these remedies is limited to one footnote. (GC Br. at 45, fn. 39) In this same footnote, the General Counsel also asks that a posting of employee rights be ordered, to be posted alongside the notice. Because the General Counsel has not shown that the Board's standard remedies are insufficient to remedy the unfair labor practices found herein, I find that these additional remedies are not necessary.

Consistent with *FDRLST Media, LLC,* 370 NLRB No. 49, slip op. at 1 fn. 5 (2020), enf. denied 35 F.4th 108 (3d Cir. 2022), and *Tesla, Inc.*, 370 NLRB No. 101, slip op. at 9 (2021), I shall also order Respondent to direct De La Vega to delete the unlawful posts from his personal Facebook page/account and to take appropriate steps to ensure that De La Vega complies with the directive.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[27]

ORDER

Respondent Siren Retail Corp. d/b/a Starbucks, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees by telling them that existing benefits will be reduced if they vote to unionize.

(b) Threatening employees by telling them that they will lose existing benefits if they vote to unionize.

(c) Threatening employees by telling them that selecting union representation would be futile.

(d) Threatening employees by telling them that, if they vote to unionize, the company will prioritize nonunion stores and unionized stores will not receive added benefits.

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

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

(a) Direct its agent/supervisor Elijah De La Vega to delete the February 14, 2022 posts—"if union vote is passed, TLA opportunities would be on the table. As they wouldn't be considered a part of the theoretical union. Since they are two different entities, we can't share partners anymore for legality reasons" and "Nothing will be guaranteed and everything will be on the table. Some might lose their free ASU others their healthcare. And much else. Even negotiating higher wages wouldn't be guaranteed."—from his personal Facebook page/account, and take appropriate steps to ensure De La Vega complies with this directive.

(b) Within 14 days after service by the Region, post at its Seattle Reserve Roastery, located at 1124 E Pike Street, Seattle, Washington, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the

[27] 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.

[28] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

Respondent at its Seattle Reserve Roastery at any time since February 14, 2022.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 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. January 31, 2023

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 employees that benefits will be reduced if they vote to unionize.

WE WILL NOT threaten employees that they will lose existing benefits if they vote to unionize.

WE WILL NOT threaten employees that selecting union representation would be futile.

WE WILL NOT threaten employees that if they unionize the company will prioritize nonunion stores and unionized stores will not receive added benefits.

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

WE WILL direct our agent/supervisor, Elijah De La Vega to delete the February 14, 2022 posts—"if union vote is passed, TLA opportunities would be on the table. As they wouldn't be considered a part of the theoretical union. Since they are two different entities, we can't share partners anymore for legality reasons" and "Nothing will be guaranteed and everything will be on the table. Some might lose their free ASU others their healthcare. And much else. Even negotiating higher wages wouldn't be guaranteed."—from his personal Facebook page/account, and WE WILL take appropriate steps to ensure De La Vega complies with our directive.

SIREN RETAIL CORP. D/B/A STARBUCKS

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-290905 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.