

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION**

DOSS AVIATION, INC.,

Employer

and

Case 27-RC-102605

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, LOCAL LODGE 47,
AFL-CIO,

Petitioner

**HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO
CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

This report contains my findings and recommendations regarding two Petitioner objections to the conduct of the May 21, 2013¹ election. The Petitioner objected to the election on the grounds that the Employer, through its Site Manager Donald Lee Hall (Hall), made statements that it would contract out all the maintenance work if the Petitioner won the election. Additionally, the Petitioner objected on the grounds that the Employer, through Hall, made threats that employees would lose their jobs if the Petitioner won the election. As described below, based on the record as a whole, I recommend that both of the Petitioner's objections be sustained and, therefore, that the election be set aside and that a new election should be ordered.

Pursuant to a petition filed on April 11, and pursuant to a Stipulated Election Agreement approved on April 19, an election by secret ballot was conducted on May 21 for the following unit of employees (Unit):

¹ All dates hereinafter refer to calendar year 2013, unless otherwise specified.

Included: All full-time and regular part-time facilities maintenance employees, including all electricians, general maintenance workers, groundskeepers, and parts employees employed by the Employer at its Pueblo facility.

Excluded: All office clerical employees, guards, and supervisors as defined by the National Labor Relations Act, as amended.

Upon the conclusion of the election, the parties were served with a copy of the Tally of Ballots which reflected that of approximately 7 eligible voters, 2 voted for and 5 voted against the Petitioner, with 0 challenged ballots.

Thereafter, on May 23, the Petitioner filed timely objections to conduct affecting the results of the election, a copy of which was served on the Employer. In Objection 1, the Petitioner alleged that “[d]uring the critical period, the employer made statements that they would contract out all the maintenance work if the Union won the election.” In Objection 2, the Petitioner alleged that “[d]uring the critical period, the employer made threats that if the Union won the election that the whole unit at DOSS (200) employees would lose their jobs.”

On June 18, after preliminary investigation, the Acting Regional Director, pursuant to Section 102.69 of the Board’s Rules and Regulations, Series 8, as amended, issued and served on the parties a Report on Objections, Order Directing Hearing and Notice of Hearing (Report). Concluding that the Petitioner’s objections raised substantial and material issues of fact, including credibility resolutions, which could best be resolved at a hearing, the Acting Regional Director ordered that a hearing be held before a Hearing Officer for the purpose of receiving evidence to resolve the Petitioner’s Objections, and that the designated Hearing Officer prepare and cause to be served upon the parties a report containing a resolution of credibility of witnesses, findings of fact, and recommendations to the Board regarding the Petitioner’s objections.

Pursuant to the Order of the Acting Regional Director, a hearing was held before the undersigned designated Hearing Officer on June 27, at Pueblo, Colorado. At the hearing, the parties fully participated and were afforded full opportunity to be heard, to present evidence, to call, examine and cross-examine witnesses, and to introduce evidence relevant to the issues involved.²

Upon the entire record, including my observation of the manner and demeanor of the witnesses and my consideration of the parties' arguments and contentions made at the hearing, I make the following findings, conclusions, and recommendations.

FINDINGS OF FACT

Background

The Employer operates a facility in Pueblo, Colorado at which it provides initial flight training for the United States Air Force (Air Force). Up to 300 students at a time train and live full-time at the Employer's Pueblo facility. The Employer operates its Pueblo flight school facility pursuant to a 10-year federal contract with the Air Force, which is renewable annually. Approximately 200 employees are employed at the Employer's Pueblo facility and are under the overall supervision of Site Manger Hall. At the time of the election, there were seven facility maintenance employees in the petitioned-for bargaining unit, also under the overall supervision of Hall.

Following the filing of the petition and prior to the election, the Employer held approximately five mandatory meetings with the seven facilities maintenance employees to discuss the upcoming representation election. The parties primarily presented evidence about

² The parties were given the opportunity to file post-hearing briefs at the June 27 hearing. Both parties declined the opportunity to file briefs and instead made closing arguments. In formulating my recommendations I have carefully considered both parties' closing arguments.

three of these meetings,³ which were conducted by Hall on May 7, 14, and 16.⁴ Additionally, the parties presented evidence about alleged statements made by Hall on May 2 while he was posting the election notice in the maintenance department shop. The Acting Regional Director's Report only specifically references May 2 and May 16. However, the Petitioner's objections do not attach dates to the objectionable conduct other than "the critical period" and the dates included in the Acting Regional Director's Order are approximate. Therefore, I will address and analyze the statements made by Hall on May 2, 7, 14, and 16, all of which are within the critical period and are related to Petitioner's objections, to determine whether the Employer engaged in objectionable conduct on any of those dates as alleged in Objections 1 and 2.⁵

May 2 Incident

Three witnesses testified about the May 2 incident – Site Manager Hall, current facilities maintenance employee Jacob Montoya (Montoya), and former facilities maintenance employee

³ Limited evidence was presented about the other two mandatory meetings. On May 20, Vice President for Training Paul Walker conducted a meeting with Hall. Hall testified that he did not speak at this meeting. In contrast, former employee Troy Morgan testified that Hall and Walker both talked back and forth. I do not credit Morgan's testimony in this regard because it is not corroborated by any other witnesses. On an unknown date prior to the election, the Employer's labor consultant also held a mandatory meeting with the seven facilities maintenance employees. It is undisputed that Hall did not speak during this meeting.

⁴ I credit Halls' testimony regarding the dates of the three meetings. As the individual who administered the meetings he was in the best position to recall the dates and his testimony in that regard was confident. None of the other witnesses recalled the dates of the meetings.

⁵ I find that the issue of whether Hall engaged in objectionable conduct by informing employees that he was concerned they could lose their jobs if they went on strike is also properly considered by me. The Board has held that issues that do not exactly coincide with the precise wording of the objections set for hearing nevertheless warrant consideration of the merits, when those issues are sufficiently related to the objections set for hearing and have been fully litigated. *Pacific Beach Hotel*, 342 NLRB 372, 373 (2004); *Hollingsworth Management Service*, 342 NLRB 556, 559 fn. 3 (2004); *Fiber Industries, Inc.*, 267 NLRB 840, 841 fn. 2 (1983). Those two requirements are met here. First, Hall's strike related job loss statement is encompassed by the more general job loss allegation articulated in Objection 2. The Acting Regional Director's Order defines Objection 2 as encompassing the following conduct "Site Manager Lee Hall told employees that employee would lose their jobs if the Petitioner won the election." This description aptly fits Hall's statement that "[he] was concerned that they [employees] would lose their jobs, potentially, if they chose to go out as economic strikers." See *Virginia Concrete Corp.*, 334 NLRB 796, 797 (2001) (finding that an unalleged threat that employees could be permanently replaced and lose their jobs was related to the objection set for hearing, which expressly alleged threat of job loss). Second, the issue was fully litigated at the hearing. Indeed, Hall admitted to making this statement on direct examination by the Employer's counsel and there were no evidentiary objections to the admission of this evidence. Accordingly, I conclude that Hall's statement concerning job loss in the event of an economic strike was fully litigated and is sufficiently related to Objection 2 to warrant my consideration on the merits.

Troy Morgan (Morgan). The Employer called Montoya and Hall as witnesses but they were only questioned about the May 2 incident on cross examination by Petitioner's representative. The Petitioner called Morgan.

Morgan was employed at the time of the election and he participated in the election. His testimony regarding the May 2 incident was brief and lacked detail and specificity. The entirety of Morgan's testimony about this incident is as follows.

What happened is Mr. Hall called us in the conference room again after posting a pamphlet on the board for the...the election notice...And called us to his office [and Hall said] 'Damn it, guys...[e]ver since all the Union stuff started...[a]ll I've heard is they're going to try to contract the department out.' He didn't said (sic) he would persipically (sic) contract it out. He just said the CEO was looking at contracting the whole maintenance department out.

On cross examination, Hall testified that on about May 2, near the end of the facilities maintenance employees' shift, he went to the shop to post the election notice, which he had received that day. When Hall walked into the shop he observed four facilities maintenance employees playing poker. Hall testified that he was angry that the employees were playing poker on company time so he left the shop, went to his house and "cooled down." Later that same day, Hall called the four employees to his office and issued formal write-ups to the four employees for playing poker while on duty. Hall unequivocally denied telling the employees that the Employer would contract their work out. More specifically, the following exchange took place during cross examination.

Q. You remember telling the workers after you called them to their little meeting, said, 'Damn it, guys, ever since this union stuff started, all I've heard is we should contract the whole maintenance department out.'

A. No.

Q. You never said that?

A. No. The whole focus-- because I was careful, because I was concerned that we in the middle of a union election, and I -- and this was a separate issue. And so, I wanted to deal with the poker playing on duty as a separate --

Q. Uh-huh
A. -- issue.

Montoya has worked as a facilities maintenance employee for about one year and he participated in the May 21 election. Montoya's testimony about this incident occurred during cross examination by Petitioner's representative. Montoya admitted that he was one of the four employees caught playing poker during work time. Montoya testified that Hall saw them playing poker and requested that they not play poker on company time. He further testified that about ten minutes later, the four employees were called up to Hall's office and that Hall said he was disappointed that the employees were goofing around on the clock. Montoya emphatically denied that Hall told employees the Employer would contract out the facilities maintenance work. The following exchange took place between Petitioner's representative and Montoya:

Q: He didn't make any threats about contracting work out?
A: No he didn't.
Q: So he never said since this union stuff started, all I've heard is that we should contract this whole maintenance department?
A: No.
Q: Did you ever hear anything to that effect?
A: No.
Q: Did you ever hear that anywhere mentioned by Mr. Hall?
A: No.

Morgan is the only one of the three witnesses who testified that Hall threatened that the CEO was looking at contracting out the maintenance department. Although I find that Morgan endeavored to testify truthfully, I cannot credit his testimony in this regard. His testimony lacked detail and context. He failed to mention the poker playing aspect of the incident, he did not testify to the date the incident took place, and he did not testify about the names or the number of the employees involved. In contrast, Hall's testimony about the May 2 event is corroborated by Montoya. Their version of events is detailed and consistent. Moreover, both Hall and Montoya unequivocally and repeatedly denied that Hall told employees the Employer

would contract out the maintenance department work at any time on May 2. Therefore, I conclude that the credible evidence fails to establish that on May 2, Hall told employees that the Employer would contract out the maintenance work if the Petitioner won the election.

May 7th Mandatory Meeting with Facilities Maintenance Employees

The following facts are undisputed regarding the May 7 meeting. This was the first meeting Hall conducted with the facilities maintenance employees as part of the Employer's election campaign. The meeting took place in the Employer's conference room. All of the facilities maintenance employees were present at this meeting except for Morgan.⁶ Facilities Maintenance Supervisor Alan Rocco (Rocco) and HR representative Tiffan Evens (Evens) also attended the meeting. Hall did all of the talking on behalf of the Employer and conducted a Power Point presentation. However, the exact content of Hall's speech at this meeting is disputed. The parties called two witnesses to testify about the specific details of the May 7th meeting. Petitioner called current facilities maintenance employee Jeffrey Volk. The Employer called Site Manager Hall.

Volk testified that that it was a basic meeting and lasted between 20 and 45 minutes. He testified that Hall said he enjoyed having the employees work at the facility and he appreciated the job they did for him. Volk further testified that Hall discussed the labor laws and some of the pros and cons as pertaining to electing a union or not. Specifically, Volk testified, Hall said the following:

⁶ There is some confusion in the record regarding whether former facilities maintenance employee Morgan attended the May 7 meeting. I have credited Hall's testimony that the first mandatory meeting was held on May 7. Hall testified that Morgan attended this meeting. Additionally, Morgan testified that he attended a mandatory meeting held by Hall on about May 6. However, Morgan consistently testified on direct and on cross examination that he did not attend the first mandatory meeting held by Hall because he was not at work that day. Further, Morgan did not have good recollection about specific dates overall. I credit Morgan's testimony that he did not attend the first mandatory meeting because he is in the best position to recall whether or not he attended a specific meeting.

Basically, that it could be -- if the union were to organize, it could be viable for them if they found it economically beneficial towards Doss to replace us and/or contract the facility's jobs out.

The following exchange then took place on direct examination by Petitioner's representative:

Q: So, Mr. Hall says, basically, that it would be -- if it was economically feasible, they would subcontract the work out at Doss, correct?

A: Right, according to particular labor laws.

However, on cross examination, Volk denied that Hall made statements about contracting out the facilities maintenance work at the first meeting. Specifically, the following exchange took place on cross examination:

Q: And you don't recall Mr. Hall making any statements about contracting out work during the first meeting?

A: I don't remember, no.

Later during cross examination, the Employer's attorney further questioned Volk about Hall making statements about contracting work out.

Q: Prior to the union vote on May 21st, you never heard Mr. Hall say that he heard that maintenance work would be contracted out if the union won.

A: No, I don't believe so.

Hall testified that his goal for the first meeting was to "essentially convince our employees that they were getting a fair shake at Doss aviation." He discussed the provisions of the federal wage system; compared the wages of the unionized aircraft workers⁷ with wages under the federal wage system; and discussed the Services Contract Act. Hall testified that he told employees "I like you guys. I like what you do for us. And you're paid fairly. So why are you unionizing?" Hall denied discussing contracting out the maintenance work and job loss at the May 7 meeting.

Only Hall and Volk provided specific testimony about this meeting. Volk testified that Hall said that if the union were to organize, it could be viable for the Employer, if it found it

⁷ The Employer's aircraft maintenance employees at the Pueblo facility are currently represented by Petitioner.

economically beneficial to replace us and/or contract out the facility's jobs. Hall denied making any such statement. From my observation of Volk, I feel he undertook to give truthful testimony. In that regard, he thoughtfully considered the questions and was responsive to both Petitioner and the Employer. However, I cannot credit Volk's testimony in this specific instance. On cross-examination, Volk changed course and testified that Hall did not mention contracting out the maintenance work on May 7. As discussed further below, Volk's testimony about what Hall said on May 7 closely parallels the subcontracting statement Hall admitted making on May 14. Therefore, it is entirely conceivable that Volk confused the dates during his direct examination and that his testimony about what Hall said on May 7 actually occurred on May 14. This would be consistent with Volk's admission on cross examination that Hall did not discuss contracting out maintenance work on May 7.

Hall unequivocally denied making any statements about contracting out work during this meeting. In that regard, Hall's testimony about his speech on May 7 tracks the Power Point slides⁸ he presented, which do not include information about subcontracting. Accordingly, I conclude that on May 7, Hall did not threaten employees that it would contract out the facilities maintenance work if Petitioner won the election.

May 14th Mandatory Meeting with Facilities Maintenance Employees

It is undisputed that on May 14 Hall conducted a second meeting with the facilities maintenance employees in the Employer's conference room. The seven facilities maintenance employees along with Facilities Maintenance Supervisor Rocco and HR representative Evens attended the meeting. The parties called four witnesses who gave specific testimony about the statements Hall made during this meeting. The Employer called Site Manager Hall and current

⁸ The Power Point slides are contained in Employer's Exhibit 2.

facilities maintenance employee Montoya. Petitioner called former facilities maintenance employee Morgan and current facilities maintenance employee Volk.

Hall described the second meeting in detail. He presented a Power Point presentation and reviewed the issues he had previously discussed in the first meeting. Then Hall discussed five “possible” scenarios, which he admits is “the area where the controversy...comes about.” Hall informed employees that the five scenarios “were possible outcomes that I thought they should consider as they moved towards a union vote.” In the first scenario, Hall said employees could vote not to join the union, at which time things would remain status quo.

The second scenario Hall presented to employees was that Doss would negotiate more fiercely than they had in the past with the aircraft maintenance workers, and they would come out of negotiations with a small raise that would cover their dues. Hall informed employees that in his opinion this was the most likely outcome.

Next Hall testified at length about the third scenario. Following is his testimony in its entirety in that regard:

[T]he company would come and give a sizable raise along the lines of what we have done with our aircraft maintenance workers, putting them well above the WD. My concern with that was that we have 200 employees at Doss. My concern was that there was the possibility that, if we give them a large raise, why would the other employees at Doss not unionize. It just made common, logical sense to me, that if folks who worked in my facility got a very sizable three, four percent raise, why wouldn't I choose to unionize. I would. And I thought Doss would oppose that. But if -- that was a possible scenario. And my concern was if everyone unionized, so now we have the facilities maintenance guys, the housekeepers, the janitors, the kitchen help, all of those folks choose to unionize, then we would present the Air Force with a large bill at exactly the time when budgets were being slashed. And the fact that we are 10 one-year contracts, and we have to earn our stripes every year, I thought that now is not a good time to be going to the Air Force asking for a large raise, and to increase the cost of the contract.

Hall's fourth scenario involved his predictions about strikes in the event of unionization.

His complete testimony regarding the fourth scenario is as follows:

The fourth scenario I discussed was Doss comes in with a fairly stingy proposal, and employees try -- decide to strike. And they go out as economic strikers. My concern with that -- and I told them. I said in the law, we can replace economic strikers permanently. And I was concerned that they would lose their jobs, potentially, if they chose to go out as economic strikers.

Finally, Hall admitted that he told employees the following about contracting out the maintenance work:

And the final scenario I discussed was -- a fifth scenario was if they chose to unionize, that nothing in the law...prevent[s] Doss Aviation down the road -- and if they could prove an economic case to the Air Force that they could do this more cheaply by contracting out that small function, that that was another potential possibility in my opinion.

He testified that the fifth scenario "was the last scenario I discussed, and it was the briefest scenario I discussed, other than maybe the no vote." On cross examination, Hall admitted he told employees the following about contracting out their work: "there's nothing in the law that would present (sic) Doss Aviation, in their case or any other case, from saying we can do this particular function more cheaply" and "[i]f, down the road, Doss could figure out a cheaper way to do this function, that is within the realm of possibilities."

Hall testified that he framed the scenario discussion "in the reality of the sequester" and that his "concern [was] with unionization at this time, at the time of the sequester." Hall testified that he "talked a lot about the sequester at this point, the sequester being the Department of Defense has been -- had a \$500 billion cut from their budget this year and on through the next 10 years. And I talked about, particularly, the pressures raised by the sequester." Hall did not

testify about what else, if anything, he told employees specifically about the Federal sequester's effects on the Employer's contract with the Air Force.⁹

Morgan also testified that he attended this meeting. He did not have a clear recollection about the dates of the meetings he attended. Further, Morgan had trouble matching Hall's specific statements to a particular meeting. However, he testified that at one of the meetings he attended Hall talked about the sequester, which parallels the theme of the second meeting. Specifically, Morgan testified that Hall said "the sequester there's -- there's not going to be any money to redo the contract. The Air Force could drop at any time and stop the training, so that everybody would be out of a job there."

Morgan further testified that Hall made the following statement about job loss:

[Y]our going to-- we're going to lose your jobs, you know. Doss is going to go down. I don't want to see -- I care about this company, I want to see -- I don't want to see everybody lose their jobs.

He further testified that Hall said the following at the second mandatory meeting:

[I]f the union gets voted in there's going to be 200 people out of a job...[I]f we go union, then -- then the housekeepers are going to want to go union, and the janitors. And before you know it. Lexco, which is the kitchen facilities people and security, they'll go union next. ... Because of the high cost of getting the union in, that Doss couldn't compete when they make their bids.

Finally, Morgan testified that at every meeting he attended Hall told the facilities maintenance employees "...if you all vote the union in, you're going to be out of a job because ... they're going to see about contracting the whole maintenance department out."

⁹ The Employer introduced into evidence a document from the Air Force about its plan to deal with the sequester and an article from the Air Force Times about the sequester. Hall testified that he relied upon the information contained in these exhibits to inform his discussion about the sequester in the meeting with employees. There is no evidence that Hall told employees about the specific information contained in these documents or provided the Air Force report or Air Force Times article to employees.

Volk testified that at the second mandatory meeting Hall basically reiterated the same points made during the first meeting and that he described the laws and what could happen if Petitioner won the election. Specifically, Volk testified:

I don't recall exactly what occurred at the meetings, but a few of the key points were basically what we had discussed in the prior meeting about -- that the contract could be lost and we could, you know, effectively, not have a place to work anymore.

That is the entirety of Volk's testimony on direct examination about Hall's statements during the second meeting.

On cross examination the following exchanges took place regarding the second mandatory meeting between the Employer's counsel and Volk:

Q: And in the second meeting you attended where Mr. Hall spoke, you told me that Mr. Hall did not tell you that the guys would lose their jobs if the union was voted in.

A: Correct.

....

Q: And prior to the vote on May 21st, you didn't hear Mr. Hall say that employees would lose their jobs if the union won the election.

A: No, not directly. But again, it was a possibility.

Montoya testified that during one of the meetings, he did not identify a date, Hall "expressed concerns about people losing their jobs." When questioned further about whether he remembered the specific words Hall used, Montoya testified "[j]ust, in his opinion, I believe, he just thought if, you know, we went union, others might follow. And he was just concerned that we wouldn't be able to get new contracts and stuff since it's a budget based program."

Based on Hall's admissions, I find that Hall made the following statement about contracting out the facilities maintenance work as alleged in Objection 1:

if they chose to unionize, that nothing in the law...prevent[s] Doss Aviation down the road -- and if they could prove an economic case to the Air Force that they could do this more cheaply by contracting out that small function, that that was another potential possibility in my opinion.

Additionally, based on Hall's testimony, I find that he made following statement regarding job loss in the event of an economic strike which, as discussed above, I find is encompassed by Objection 2:

I said in the law, we can replace economic strikers permanently. And I was concerned that they would lose their jobs, potentially, if they chose to go out as economic strikers.

Finally, there is a factual dispute regarding whether, in conjunction with scenario three, Hall threatened that if Petitioner won the election, all of the employees would lose their jobs. In that regard, Hall admits that he said if the facilities maintenance employees organized and negotiated a sizeable raise then all of the Employer's employees would also unionize. Further, Hall admits he said that "his concern was if everyone unionized" that it would be a bad time to increase the cost of the Air Force contract. Hall did not testify that he said all 200 employees could lose their jobs.

However, based on the relatively consistent testimony of Montoya, Morgan and Volk, I find that, in connection with scenario three, Hall took the next step and threatened that all of the Employer's employees could lose their job. Employer witness Montoya testified that Hall said "if we went union, others might follow" and that Hall "expressed concerns about people losing their jobs" because "we wouldn't be able to get new contracts and stuff since it's a budget based program." Similarly, Morgan testified that Hall said "if we go union" then the housekeepers, janitors, kitchen facilities, and security will go union next; "[b]ecause of the high cost of getting the union in, that Doss couldn't compete when they make their bids" and "if the union gets voted in there's going to be 200 people out of a job." Likewise, Volk testified that Hall told employees their contract with the Air Force could be lost and that "it was a possibility" that employees could lose their jobs if Petitioner won the election.

Accordingly, I find that the aggregate credible evidence establishes that Hall told the facilities maintenance employees that if they unionized and negotiated a sizeable wage increase the other employees would also organize, which would raise the cost of the employer's contract with the Air Force and that all of the Employer's employees could lose their jobs as alleged in Objection 2. This finding is consistent with the overall tenor of Hall's speech on May 14, during which he admitted to making additional comments about job loss and subcontracting work in the event the employees voted for the Petitioner.¹⁰

May 16th Mandatory Meeting with Facilities Maintenance Employees

It is undisputed that this meeting also took place in the conference room and was attended by all seven of the facilities maintenance employees. Site Manager Hall, current facilities maintenance employee Volk, and former maintenance employee Morgan provided testimony about this specific meeting. Hall testified that the third meeting with the facilities maintenance employees was not part of the campaign plan but was an "impromptu" meeting in response to some of Petitioner's literature¹¹ concerning the Employer's open door policy. Hall testified that he did not discuss contracting out maintenance work or talk about job loss during this meeting.

Volk testified consistently with Hall. Volk testified that at the third meeting Hall talked about the Petitioner's pamphlet discussing open door policy. Volk did not testify that Hall said anything about job loss or contracting out work at this meeting.

Morgan testified that at one of the meetings Hall "talked against" Petitioner's handouts and pamphlets. The record is not clear at which meeting Morgan was referring to. Additionally,

¹⁰ The Employer called current employees Jerry Vandonge and Lewis K. Powell to testify. They generally denied that Hall threatened job loss or to contract out work if Petitioner won the election. In making my findings of fact, I do not give weight to their testimony because it was in response to leading questions, was conclusory, and lacked detail and context.

¹¹ Petitioner's literature that prompted this meeting is contained in Employer's Exhibit 5.

Morgan testified Hall said “the same thing every meeting” and that Hall said “we’re going to lose your jobs, you know” and “Doss is going to go down.”

Based on my observation of Morgan, I find that he undertook to give truthful testimony. However, his testimony lacked detail, was contradictory at times, and he had difficulty linking his testimony about what Hall said to the specific meetings he attended. Additionally, it is conceivable that Morgan confused the content of the May 14 and May 16 meetings. In contrast, Hall’s testimony was specific and detailed. Hall testified that at the May 16 meeting he did not discuss job loss or contracting out the facilities maintenance work. Hall’s testimony in this regard is corroborated by Volk and, therefore, I credit Hall and Volk in this specific matter. Accordingly, I conclude that on May 16, Hall did not threaten employees with job loss if Petitioner won the election.

THE OBJECTING PARTY’S BURDEN TO SET ASIDE AN ELECTION

“Representation elections are not lightly set aside.” *Safeway, Inc.*, 338 NLRB 525, 525 (2002) quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). Ballots cast under specific NLRB procedural safeguards are presumed to reflect the true desires of the employees. *Id.* Thus, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (quoting *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989), cert. denied 412 U.S. 928 (1973)). To satisfy its burden, the objecting party must show that the conduct in question affected employees in the voting unit, and had a reasonable tendency to affect the outcome of the election. *Id.* (internal citations omitted); *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999). In other words, the objecting party must show that the conduct had “the tendency to interfere with the

employees’ freedom of choice.” *Cambridge Tool & Manufacturing Co.*, 316 NLRB 716, 716 (1995). The test is an objective one.¹² *Id.*

**THE EMPLOYER ENGAGED IN OBJECTIONABLE CONDUCT ON MAY 14 AS
ALLEGED IN OBJECTIONS 1 and 2**

I now consider whether Hall’s May 14 predictions of job loss and contracting out the facilities maintenance work if the Petitioner won the election interfered with employees’ free choice in the election. The Petitioner contends that Hall’s statements about job loss and contracting out the maintenance work destroyed laboratory conditions and interfered with the employees’ free choice in the election. In contrast, the Employer argues that Hall’s “predicted opinions of the precise effects of unionization” are based on objective facts within the meaning of *NLRB v. Gissel Packing Co.*, 395 U.S. 578 (1969)

In *Gissel*, the Supreme Court held that an employer’s adverse predictions about the effects of unionization must be “carefully phrased on the basis of objective fact.” *Id.* at 618. In reaching this decision, the Court struck a balance between an employer’s right to free speech and employees’ Section 7 rights:

[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific view 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 or to convey a management decision already arrived at to close the plant in case of unionization.

¹² Because the test is “objective,” I do not find persuasive Respondent’s argument that Hall’s statements did not interfere with employees’ free choice based on witness testimony that employees did not feel threatened by Hall’s comments. See *Cambridge Too & Mfg.*, 316 NLRB 716, fn. 4 (1995) (“The fact that a threat does not produce the desired result does not mean that there was no threat.”). Conversely, I do not give weight to Morgan’s testimony that he and other employees felt threatened by Hall’s comments about job loss and contracting out work.

Id. An employer's predictions that employees will lose their jobs if the union is voted in must be based on "reasonable predictions" and must be based on circumstances "beyond the employer's control." *Jonbil, Inc.*, 332 NLRB 652, 655 (2000); *Grand Central Partnership*, 327 NLRB 966, 970 (1999). Applying this standard to Hall's comments, I find that Hall crossed the line by linking the possibility of job loss and contracting out the maintenance work to circumstances within the Employer's control and by making adverse predictions about the effects of unionization that were not reasonably based on objective fact.

I first analyze Hall's scenario three predictions that if the maintenance employees unionized, its remaining 200 employees would also organize, which would raise the cost of the employer's contract with the Air Force and result in a loss of jobs. On its face, Hall's prediction that if the maintenance employees organize then all the other employees will follow is sheer speculation as opposed to a "reasonably based" consequence of unionization. The Employer did not present any objective evidence to support Hall's prediction in this regard. Even more importantly, Hall's forecast of job loss is predicated on his assumption that union representation will lead to a large wage increase for employees. There is nothing objective about Hall's view that the Petitioner would necessarily make such unreasonable wage increase demands or that the Employer would agree to wage increases that would place it in danger of losing its Air Force contract. See *Jonbil*, 332 NLRB at 662 (concluding that the employer's statement that giving in to union demands would cause the company to go under because it could not afford increased costs was not based on objective fact).

Moreover, in order to qualify as a lawful prediction under *Gissel*, the Employer must demonstrate that its predictions are based on facts beyond its control. The Employer has failed to meet that burden here, because the negotiation of wage increases is fully within the

Employer's control. See *Grand Central Partnership*, 327 NLRB at 970-971 (concluding that any decision about whether revenues can be used for pay increases is clearly within the employer's control). Accordingly, I find that Hall's scenario three job loss predictions were not supported by objective facts as to probable consequences beyond its control; rather, Hall's prediction of job loss was made contingent on the success of Petitioner's organizational campaign and, therefore, constitutes a threat of reprisal. See *AP Automotive Systems, Inc.*, 333 NLRB 581, 581 (2001).

I now turn to evaluating Hall's scenario five, in which Hall admitted he told employees the following:

if they chose to unionize, that nothing in the law...prevent[s] Doss Aviation down the road -- and if they could prove an economic case to the Air Force that they could do this more cheaply by contracting out that small function, that that was another potential possibility in my opinion.

I find that this statement does not meet the requirements of *Gissel*.¹³ It is significant that Hall's comment about contracting out the maintenance work is not predicated on circumstances outside of the Employer's control. Rather, Hall admitted that it is within the Employer's discretion to make the case to the Air Force that the maintenance work could be "done more cheaply" if it were contracted out. Moreover, Hall's comment was not based on the Employer's actual economic circumstances. The Employer did not present employees with any objective evidence concerning the necessity of contracting out work based on the Employer's poor financial status. Rather, Hall directly linked employee's decision to "unionize" to the possibility of contracting out the maintenance work down the road, which constitutes a threat of reprisal. See *Mr. Z's Food Mart*, 325 NLRB 871, 889 (1998) (finding that the employer's threat to close the store was

¹³ Hall's statement is also legally inaccurate. Under established Board law, an employer's decision to subcontract work based on labor costs is a mandatory subject of bargaining. *Dorsey Trailers, Inc.*, 321 NLRB 616 (1996), enf. denied 134 F.3d 125, 130 (3d Cir. 1998).

made contingent on the success or failure of the union's organizational campaign, not on economic necessities).

I now turn to Hall's statement that he was concerned employees could lose their jobs in the event of a strike. The framework for analyzing Hall's strike statement is set forth in *Eagle Comtronics*, 263 NLRB 515 (1982). In that case, the Board held that "an employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*, so long as it does not threaten 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. Thus, employer statements about permanent replacements that also specifically reference "job loss" are generally deemed to be unlawful because ordinary employees would not interpret such statements to mean they have a *Laidlaw* right to return to work. *Baddour, Inc.* 303 NLRB 275, 275 (1991) (finding unlawful the following statements: "union strikers can lose their jobs" and "you could end up losing your job by being replaced with a new permanent worker").

For example, in *Larson Tool and Stamping Co.*, an objections case, the Board concluded that the employer violated Section 8(a)(1) and engaged in objectionable conduct by including the following statement in its pre-election literature: "During [an economic] strike, you could lose your job to a permanent replacement." 296 NLRB 895 (1989). The Board reasoned that the employer's unqualified statement about job loss in the event of a strike "may fairly be understood as a threat of reprisal." Id. at 896. Similarly, in *Wild Oats Markets, Inc.* the Board reasoned that the phrase "lose your job" conveys to the ordinary employee that employment will be terminated and that message is reinforced when the employee is further told that her job will be lost to a permanent replacement. 344 NLRB 717,740 (2005) (finding unlawful the following

statement “when Unions go on strike, wages can be lost and many have lost their jobs because striking workers are replaced”).

Hall’s statement is similar to those made in the above-cited cases. Specifically, he told employees that it is lawful to “replace economic strikers permanently” and that he was concerned they would “lose their jobs” if they went on strike. A reasonable employee would interpret Hall’s statement to mean that if the employees decided to strike they could ostensibly lose their jobs to permanent replacements, which is inconsistent with their *Laidlaw* rights. There is no evidence in the record that Hall informed employees that economic strikers have the right to return to work when positions become available. Moreover, Hall’s comments about strike replacements were made during the same captive audience speech in which he threatened employees that the Employer could contract out the maintenance work in the event Petitioner won the election, and made other threats of job loss. Accordingly, I conclude that Hall’s statement to employees during a captive audience meeting that he “was concerned that they [the employees] would lose their jobs, potentially, if they chose to go out as economic strikers” constitutes a threat of reprisal for engaging in Section 7 activity. See *Ozburn-Hessy Logistics, LLC.*, 357 NLRB No.136, slip op. (2011) (concluding that the employer violated Section 8(a)(1) by telling employees that in the event of an economic strike the employer would have “some leeway” in whether the employees could return to work); *Virginia Concrete Corp.*, 334 NLRB at 796 (finding that the employer engaged in objectionable conduct by telling employees that striking employees can be permanently replaced and lose their jobs).

The Employer argues that Hall’s statements to employees on May 14 did not interfere with employee free choice because Hall’s statements were based on facts about the Federal sequester and the Air Force’s sensitivity to cutting costs as a result of the Federal sequester. In

support of this argument, the Employer relies on the Board's decision in *Kawasaki Motors Mfg, Corp.*, 280 NLRB 491, 491 (1986). In *Kawasaki Motors*, the Board concluded that the Employer did not, in violation of Section 8(a)(1), threaten plant closure or relocation at a captive audience meetings because the employer's statements were "premised upon undisputed objective economic fact." *Id.* at 492. The Board based its decision on evidence that the employer presented employees with information, figures, and charts about the plant's performance including figures showing profit losses, layoffs, payroll decreases, shortened work week, and overstocked inventory. *Id.* Thus, the Board held, that the employer "clearly created the impression that any decision to close the plant would be based on its profitability and competitive status in the world market" and that the employer's "predictions of possible closure were not based on reasons unrelated to economic necessities." *Id.*

I conclude that *Kawasaki Motors* is distinguishable from the present case. Respondent's statements about the Federal sequester do not transform Hall's predictions about unionization into "objective fact." As opposed to the employer in *Kawasaki*, Hall did not provide the employees with any of the sequester articles that he relied upon during his May 14 speech. Moreover, the record reveals that Hall talked only in general terms about the Federal sequester and the possible effects of the sequester on the Air Force. He failed to present the employees with objective facts about the actual consequences of the Federal sequester on the Employer's operations. Finally, while the Employer does not have control over the Federal sequester, the Employer does have control over negotiating the terms of its contract with the Air Force. Moreover, as discussed fully above, Hall directly connected his adverse predictions of job loss and subcontracting the maintenance work to employees' decision to unionize. In these

circumstances, I cannot find that the Employer's statements of job loss are based on the demonstrably probable consequences of the Federal sequester.

The Employer also argues that Hall's predictions about the consequences of unionization are not objectionable because they were phrased as "possibilities" and in terms of Hall's personal opinion. Contrary to the Employer's arguments, it is no defense that Hall phrased his predictions as a possibility rather than a certainty. *Daikichi Sushi*, 335 NLRB 622, 624 (2001) (holding that it is no defense that a prediction of adverse consequence is phrased as a possibility). See also *Fleming Companies, Inc.* 336 NLRB 192, 103 (2001) (holding that an employer's statement "if employees voted in the union, their division 'would go in the hole and the place *might* close down or *could* close down" to be an unlawful threat) (emphasis added); *Southern Labor Services, Inc.*, 336 NLRB 710 (2001) (finding that an employer's statement that unionization "could" result in a loss of business was objectionable conduct).

Having concluded that Hall made three statements of reprisal in one captive audience meeting, I now consider whether these statements interfered with employees' free choice in the election. A number of factors are relevant to this determination: (1) the number and severity of violations; (2) the extent of dissemination; (3) the size of the unit; (4) the proximity of the misconduct to the election; (5) the closeness of the election; and (6) the number of unit employees affected. *Bon Appetit Mgmt. Co.*, 334 NLRB 1042, 1044 (2001).

With respect to the first factor, I conclude that Hall made three statements of a severe nature. Hall's predictions that unionization could result in job loss or the contracting out of maintenance work are quite grave. Turning to factors two and six, the statements were made during a captive audience speech at which all seven maintenance employees attended. With respect to factors three and five, the election was relatively close considering the small size of

the unit. Finally, the meeting was held close to the election – exactly one week prior to the election. In light of these factors, I find that Hall’s predictions of job loss and contracting out maintenance work were not based on an objective factual basis and had a tendency to interfere with employees’ free choice in the election. See *Community Action Commission of Fayette County, Inc.*, 338 NLRB 664, 667 (2002) (“[a]n employer’s threat of job loss if a union wins an election is objectionable conduct warranting the setting aside of that election.”); *AP Automotive Systems*, 333 NLRB at 581 (concluding that an employer’s threat that the employer would not agree to the union’s exorbitant demands, a strike would ensue, and the plant would close created an “obvious” potential for interference with employee free choice); *Southern Labor Services*, 336 NLRB at 336 (concluding that the employer’s predictions of loss of employment and contracts were objectionable); *Larson Tool*, 296 NLRB at 896 (concluding that an employer’s unqualified statement that employees could lose their jobs to economic strikers amounts to objectionable conduct). Such statements whether viewed individually or cumulatively are sufficient to warrant setting aside the election.

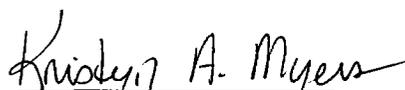
CONCLUSIONS AND RECOMMENDATIONS

In accordance with the foregoing facts, after carefully considering all of the evidence in the record, and based on a fair assessment of the credibility of each witness who testified, I conclude that Petitioner’s Objections 1 and 2 have merit and should be sustained. I therefore recommend that the election be set aside and that a new election be ordered.

Pursuant to Section 102.69 of the Board’s Rules and Regulations, Series 8, as amended, within fourteen (14) days from the date of issuance of this report, any party may file with the National Labor Relations Board, Attn: Executive Secretary, 1099 14th St. NW, Washington, D.C. 20570-0001, an original and eight (8) copies of exceptions to such report with or without

supporting brief. Immediately upon filing of such exceptions, the filing party shall serve a copy, together with any brief filed, upon the other parties and upon the Regional Director and simultaneously submit to the Board a statement of such service. See Section 102.69(f) as to the time limit for filing and answering brief to the exceptions. If no exceptions are filed to the Hearing Officer's Report, the Board may decide the matter forthwith upon the record or make other disposition of the case.¹⁴

ISSUED AT Denver, Colorado this 25th day of July, 2013.


Kristyn A. Myers, Hearing Officer
National Labor Relations Board
Region 27
600 17th Street, 700 N
Denver, CO 80202

¹⁴ Filing exceptions may be accomplished by accessing the Efiling system on the Agency's website electronically. To file such exceptions electronically, go to www.nlr.gov and select the E-File Document tab, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website. A request for an extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the exceptions with the Board.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

DOSS AVIATION, INC.

Employer

and

Case 27-RC-102605

**INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS, AFL-
CIO**

Petitioner

**AFFIDAVIT OF SERVICE OF: HEARING OFFICER'S REPORT AND
RECOMMENDATIONS ON OBJECTIONS TO CONDUCT AFFECTING THE
RESULTS OF THE ELECTION, dated July 25, 2013.**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **July 25, 2013**, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

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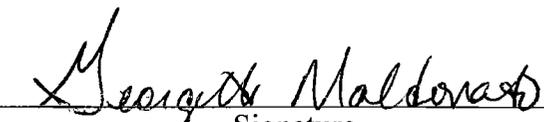
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July 25, 2013

Date

Georgette Maldonado, Designated Agent of NLRB

Name


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