UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HENDRICKSON USA, LLC.,	)	
	)	**PETITION FOR REVIEW OF NATIONAL LABOR**
v.	)	**RELATIONS BOARD DECISION AND ORDER**
	)	
THE NATIONAL LABOR RELATIONS	)	**NLRB CASE NO. 09-CA-159641**
BOARD and MR. GARY PEMBERTON	)	
	)	

Hendrickson USA, LLC hereby petitions this Court for review of the decision and order by The National Labor Relations Board entered on January 25, 2018, a copy of which is attached hereto and incorporated herein by reference.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Petition for Review of The National Labor Relations Board Decision and Order was served via ordinary U.S. mail, the ECF filing system, and electronic mail this 9th day of February, 2018, upon the following:

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Hendrickson USA, LLC *and* Gary Pemberton. Case 09–CA–159641

January 25, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On October 31, 2016, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed exceptions.[1]

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

The Board has considered the decision and the stipulated record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt her recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hendrickson USA, LLC, Lebanon, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a):

"(a) Within 14 days after service by the Region, post at its Lebanon, Kentucky facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 9, 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

[1] The Respondent attempted to file an answering brief, which we rejected as untimely by letter dated December 13, 2016. We have not considered that untimely answering brief or the General Counsel's reply thereto.

[2] In affirming the judge's dismissal of the allegation that the Respondent unlawfully told employees that signing authorization cards or electing the union would negatively impact their ability to individually represent themselves, Members Pearce and McFerran note, without passing on whether it was correctly decided, that the judge correctly applied *Tri-Cast, Inc.*, 274 NLRB 377 (1985), and they decline at this time the General Counsel's invitation to revisit that decision. Member Emanuel finds that the judge correctly applied *Tri-Cast*.

For the reasons stated by the judge, we adopt her finding that the Respondent violated Sec. 8(a)(1) of the Act when it conveyed to employees in a PowerPoint presentation that, if they were to elect the Union, "the culture will definitely change," "relationships suffer," and "flexibility is replaced by inefficiency." Elsewhere in that presentation, the Respondent extolled certain positive aspects of its then-current work environment, asserting that there is an "easy-going atmosphere," employees have the "freedom to do [their] job," and there is "reward/advancement for those that work hard and produce." In this context, employees would reasonably interpret the three challenged statements—"the culture will definitely change," "flexibility is replaced by inefficiency," and "relationships suffer"—as conveying a threat that, if the employees elect the Union, the Respondent would retaliate by changing the easy-going culture and by adopting a less flexible managerial approach in its workplace relationships. Contrary to the dissent, which characterizes the Respondent's comments as lawful expression under Sec. 8(c), we agree with the judge that the Respondent's statements reasonably threatened adverse changes to the existing work culture if employees selected union representation, thereby leading employees to believe that their work environment "would completely deteriorate." That clearly runs afoul of Sec. 8(a)(1).

Contrary to his colleagues, Member Emanuel would find that the three challenged PowerPoint statements are lawful. In his view, the disputed statements lawfully describe a "fact of industrial life"—specifically, the fact that the onset of union representation changes the manner in which employment issues may be addressed in the workplace. *Tri-Cast*, supra at 377–378. Thus, in a newly unionized workplace, employers may no longer implement unilateral changes in employment terms and conditions without giving the union notice and the opportunity for bargaining (unless parties enter into a collective-bargaining agreement that permits certain unilateral changes); employers are prohibited from having direct dealings with employees that unlawfully bypass the union; and these requirements—combined with the potential resort to economic weapons—cause some measure of inefficiency, reduced flexibility, an arguable adverse effect on relationships, and a change in workplace culture. Other bullet points in that same slide (e.g., "You'll be giving up your right to speak for and represent yourself" and "Every change to wages, hours, and working conditions requires negotiations controlled by the union—not you") reinforce the notion that the presentation describes changes based on legal principles in effect at workplaces where employees have union representation. Thus, the comments in Respondent's PowerPoint constitute the lawful expression of "views, argument, or opinion" which, under Sec. 8(c) of the Act, cannot be regarded as "evidence of an unfair labor practice," and Member Emanuel believes the statements cannot reasonably be deemed unlawful threats of reprisal or retaliation by the Respondent based on a potential decision by employees to have union representation.

[3] We have modified paragraph 2(a) of the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), to reflect the fact that the first unfair labor practice was committed on August 24, 2015.

[4] 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."

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 August 24, 2015."

Dated, Washington, D.C. January 25, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Gideon Martin, Esq., for the General Counsel.
Keith L. Pryatel, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. Based on a charge filed by Charging Party Gary Pemberton (Pemberton/the Charging Party) on September 8, 2015, the General Counsel issued a complaint and notice of hearing on February 10, 2016.[1] The complaint alleged that Hendrickson USA, LLC (Respondent/Hendrickson) violated Section 8(a)(1) of the Act when it misrepresented employees' statutory rights under Section 9(a) of the Act, and impliedly threatened employees' access to management and threatened employees with a more onerous work environment if employees became unionized. In its answer, Respondent denied engaging in any unfair labor practices and asserted several affirmative defenses.

On April 20, 2016, the General Counsel[2] and Respondent filed a Joint Motion and Stipulation of Facts (Jt. Stip.), along with final exhibits on the stipulated record, requesting that I approve the stipulated facts in lieu of a hearing, and issue a decision based on them and the complete stipulated record, pursuant to Section 102.35 (a)(9) of the Board's Rules and Regulations. On May 3, 2016, I granted the parties' joint motion.

On the entire record, including the stipulated facts and exhibits,[3] and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS

I. JURISDICTION

The parties stipulated to the following facts as to the nature of Respondent's business and jurisdiction.

Respondent, a Delaware limited liability company, has been engaged in the manufacture and supply of suspension and axle systems at its office and production facility in Lebanon, Kentucky (Respondent's facility). In conducting its business operations during the 12-month period ending on January 31, 2016, Respondent sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky. Therefore, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

This case takes place against the backdrop of the beginning of a union organizing campaign at Respondent's facility, and Respondent's reaction thereto. The specific unfair labor practices alleged in the complaint are as follows:

1. Whether Respondent, by Marlin Smith, in a meeting with employees at its facility on August 21, 2015, violated Section 8(a) (1) of the Act by misrepresenting employees' statutory rights under Section 9(a) of the Act and impliedly threatening employees with loss of access to management if employees became unionized?

2. Whether Respondent, by Randy Lawless, violated Section 8(a) (1) of the Act on August 24, 2015, by sending a letter to employees misrepresenting the negotiation process and employees' access rights to management, including employees' right to individually adjust grievances with Respondent, if employees became unionized?

3. Whether Respondent, by Randy Lawless, Richard Mudd, Richard Lewis and Marlin Smith, violated Section 8(a) (1) of the Act on August 25 and 26, 2015, by misrepresenting employees' statutory rights under Section 9(a) of the Act, and threatening employees with a more difficult or onerous work environment if employees voted in favor of union representation?

[1] On February 19, 2016, the Regional Director issued an Erratum to the complaint and notice of hearing, and attached as an exhibit a letter from Respondent to employees. That letter is discussed further in this decision. (See Joint Exhibits (Jt. Exhs.) F and I).

[2] For brevity purposes, the counsel for the General Counsel is referred to at the General Counsel.

[3] The record in this case consists of the final exhibits in this case, including but not limited to, the stipulated facts and Jt. Exhs. A through L. The stipulated record also references the General Counsel's statement of position (as Jt. Exh. M) and Respondent's Statement of Position (as Jt. Exh. O), but they are not included in the actual final exhibit package filed as a separate attachment to the stipulated record. Rather, the General Counsel's statement of position (GC PS) was filed separately on April 28, 2016, and Respondent's statement of position (R. PS) was filed on May 2, 2016. The joint stipulated facts also reference the Charging Party's position statement as Jt. Exh. O, but there is no evidence that the Charging Party submitted one. In this decision, the General Counsel's brief is referred to as "GC Br.," and Respondent's brief is referred to as "R. Br."

A. Factual Background

1. Respondent's managers

At all material times, the following individuals held the positions opposite their names, and have been supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act:

Randy Lawless (Lawless)—Plant Manager at Respondent's facility
Richard Mudd (Mudd)—Director of Operation, Truck Division
Richard Lewis (Lewis)—Plant Human Resources Manager

2. Organizing campaign at Respondent's facility

At all times material, the United Steel Workers of America (the Union) engaged in a drive to organize the production and maintenance employees at Respondent's facility.[4] Prior to the unfair labor practices alleged in this case, and during the organizing campaign, Respondent and its managers and supervisors described above "had in their possession" a copy of a union authorization card. (See Jt. Exh. K.) Further, during the union's attempt to organize the production and maintenance employees at Respondent's facility, the union and some of Respondent's employees were passing out union authorization cards to other Hendrickson employees. (Id.)

In addition, on August 21, 2015,[5] the following correspondence, addressed to Lawless from the "Union Organizing Committee," was received at Respondent's facility, opened and read at approximately 12 noon:

> The names of people on this letter are members of a union organizing committee. We expect you to treat us the same as any other employee working for you. It is illegal for you to discriminate against us for because of our union sympathies. It is also illegal for you to ask us questions about it.

(Jt. Exh. L.) The letter was signed by six individuals, including Charging Party Pemberton, and the parties agree that it was shown to all of the supervisors/managers set forth above prior to any of the alleged unfair labor practices in this case. (Id.)

3. Alleged unlawful statements and presentations by Respondent[6]

August 21 Meeting

On the same day, August 21, after management officials Lawless, Smith, Mudd and Lewis received and read the letter from the union organizing committee, Smith led a meeting for the employees at Respondent's facility. A recording of this meeting was transcribed, and received as an exhibit. (Jt. Exh. H.) During this meeting, Smith pointed out how great management-employee relationships were at the facility, and extolled the value of management's open door policy and practice of working directly with employees to listen to and address any of their concerns. He also talked about how Respondent's supervisors and managers knew all of their employees in the shop, and knew what was going on with their families. Smith then played a video, lasting about 6-½ minutes, outlining Respondent's philosophy along those lines.[7] Following the video, Smith continued to discuss the positive relationship between Respondent and employees. For example, he mentioned how Respondent valued employee feedback, and how "we've had success in working with our employees in growing the business, satisfying customers, keeping them happy, and bringing in new business for the company and the heavy truck market." (Jt. Exh. H, p. 2.) He also reiterated Respondent's dedication to making sure employees have fair, competitive benefits and wages. This was all said in the context of how great the company was without union involvement.

Then, Smith began to discuss union authorization cards, and warned employees to "be aware be informed if anybody ever asks you to sign anything, be aware of what you're signing . . . [b]ecause in a lot of cases if you sign that, you may be signing away your rights at that point, right." In response to a question by Charging Party Pemberton about what kind of rights Smith was talking about, Smith responded that:

> As an example, there's been times where, if there has been a union drive in a facility, somebody says hey this is a sign-in sheet just so we can all see who's here, right? But sometimes, if you don't read the fine print, there might be some writing on there—it's happened before—where it says, by signing this form I am authorizing XYZ to represent me with my employer. So at that point you no longer have a voice, you've signed that away to some third-party, and that's what Gary's [Pemberton] talking about, where we don't want [a] third-party to have to intervene, we want to talk directly to our employees. That's why I'm saying, anything that you sign, you need to read it, because, they might say, oh it's just a sign-in sheet we're just gonna pass around and sign it, but somewhere on there it says that I'm authorizing XYZ to represent me with my employer.

(Jt. Exh. H at 19:30–20:22.) The General Counsel takes issue with Smith telling employees that by signing a union card, they will "no longer have a voice," or have direct access to their employer.

The union cards that were passed out at Respondent's facility included the following on one side of each card:

YES! I WANT UNITED STEELWORKERS UNION REPRESENTATION!
I HEREBY AUTHORIZE THE
United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied
Industrial and Service Workers International Union, AFL–CIO–CLC
(also known in short as Unite[d] Steelworkers or USW)
TO REPRESENT ME IN COLLECTIVE BARGAINING

[4] No union election was held at any time relevant or with respect to the facts and stipulations set forth in this case.

[5] All dates are in 2015 unless otherwise indicated.

[6] There were three instances where Respondent allegedly made statements through managers and a PowerPoint presentation. Although the contents of the meeting, letter and PowerPoint presentation are set forth fully in the various noted exhibits, I am primarily addressing those particular statements alleged to have been unlawful misrepresentations by Respondent.

[7] The parties did not submit the video into evidence.

The other part or side of the card stated that:

> This card will be used to secure Union recognition and collective bargaining rights. Initiation fees are waived for all current employees and no dues will be paid until your first contract has been accepted.
>
> You have the absolute democratic right, protected by Federal Law, to organize and join the United Steelworkers.
>
> By signing this card, you are taking an important step toward achieving a genuine voice in workplace decisions that affect you and your family.

(Jt. Exh. K.)

August 24 Lawless letter to employees

On August 24, Lawless sent a letter to "Hendrickson employees & family." (Jt. Exh. I.) Lawless pointed out how Respondent's facility was "experiencing an attempt at unionization," and how he wanted to "reaffirm Hendrickson's position on union representation." He praised the employees' contributions to the company, as well as, how well Respondent and employees had achieved many goals by working together. Lawless also expressed Respondent's goal of always providing "a workplace with benefits, opportunity, and freedoms." He went on to highlight and extoll all of the benefits that Respondent provided its employees and their families, and to explain the negative effects of unionizations on those benefits and the employer-employee relationship as follows:

> It has always been our goal as an Employer to provide a workplace with benefits, opportunities, and freedoms. Our existing fringe benefits package provides coverage for the needs of our employees and their families. Employees have the options for medical/dental coverage through Blue Cross Blue Shield; Company paid basic life insurance, optional supplemental insurance options, disability coverage should you become unable to work. Company funded qualified pension plan, as well as a 401K plan with matching company contributions. In addition to the core benefits, employees also are offered a fringe benefit package including: Education Assistance, Adoption Assistance, Safety Shoe Program, Safety Glasses, Uniforms, etc.
>
> We value our employee's contributions and always make the effort to recognize a job well done. Over the past several years we have collectively achieved many goals relative to safety and quality. Together, we have gained new business which has led to adding on to the plant, bringing in new equipment, and hiring more employees. These accomplishments were solely due to the dedication and commitment of our employees working together. We want to keep these achievements going.
>
> Some of you may feel, or have been told that Union representation will preserve job security, lead to greater benefits, or enhanced compensation. We have studied this issue closely and we respectfully disagree. The fact of the matter is that a Union cannot promise you, as a valued employee of Hendrickson, anything. IF our plant were to be unionized, and the collective bargaining process to begin, none of the benefits, compensation, or job security that you currently enjoy would be guaranteed. The Company and any recognized Union would begin the negotiating process from scratch. Which means all of the wages, benefits, and terms and conditions of employment that you currently enjoy at our plant would not be the starting point for negotiations toward a Union contract. While it is true that we, like many other companies, have experienced many ups and downs with the current economic picture, there are no guarantees that union representation will secure your livelihood. We can guarantee we will do everything within our power to provide quality products and service to the industry which in turn will help secure the livelihood for our employees and their families.
>
> We also want you to understand the serious implications of signing a Union card or petition. Under current law, your signature on a card forfeits your right to represent yourself. There is no secret ballot election, where you get to execute your right to vote. In fact, a union could be recognized—and you would be required to join or be represented by it—and you and many of your coworkers might not even know about it until it is too late.
>
> We believe our employees are entitled to the right to represent themselves without third party interference. As a group we enjoy many benefits as a Hendrickson employee, none so precious as the right to bring forth ideas, issues, and concerns that make a difference in our business. This is why I encourage you to understand the choice that is before you. You can make the difference and it is imperative that you are informed and aware of what is happening in our facility.
>
> Hendrickson believes in its employees, and we do not feel that we need any outside parties to help us to work together. We have done so successfully for 100 years, and have continued to grow. We want to stay on that path, and continue to have open discussion with you, our valued employee.

(Jt. Exh. I.) The portions of this letter at issue in this case are where Lawless states how signing a union card will cause employees to forfeit their right to represent themselves due to third party/union interference, and where he states that "the Company and any recognized Union would begin the negotiating process from scratch." (Id.)

August 25 and 26 Power Point presentation

Finally, on August 25 and 26, Lawless, Mudd, Lewis and Smith played a PowerPoint presentation, entitled "A Great Place to Work," for employees at Respondent's facility. This presentation set forth the reasons why employees believed Respondent's facility was a great place to work; highlighted (again) the virtues of Respondent as an employer and value of direct employer-employee relationships (without the union); and related how Respondent and employees benefited from their relationship building experiences. However, Respondent also addressed numerous negative characteristics of unions, and negative consequences for employees and their families if they signed union cards and selected unionization. Respondent

clearly sent a message in this presentation that many of the benefits and the working relationships enjoyed, including Respondent being responsive to many employee ideas, issues and concerns, would end with unionization. In summary, the presentation set forth the following additional examples of what would be lost with a union: "[l]oss of our direct relationship," "you'll be giving up your right to speak for and represent yourself," "the culture will definitely change," "relationships suffer," and "flexibility is replaced by inefficiency." (Jt. Exh. J.)[8]

In the bullet points under "[t]he culture will definitely change," Respondent told employees that: they would lose their right to speak for and represent themselves; every change to wages, hours and working conditions would require negotiations "controlled by the union—not you;" and that it would "cost [them] money." Further, throughout the PowerPoint presentation, Respondent set out numerous ways that bringing in a union would cost employees money, such as the high cost of mandatory union dues, loss of wages and benefits through contract negotiations or strike and potential lay-offs or job loss if there was a strike. (Id.)

III. DISCUSSION AND ANALYSIS

A. Legal Standards

Pursuant to Section 8(c) of the Act, "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." (29 U.S.C. § 158 (c)). The Supreme Court has determined that Section 8(c) "merely implements" an employer's "First Amendment" rights. However, the Court further held that the "precise scope of employer expression . . . must be made in the context of its labor relations setting," and that therefore, "an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [Section] 7 and protected by [Section] 8(a)(1) and the proviso to [Section] 8(c)." See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–618 (1969).

Generally, the Board's standard in assessing whether a remark constitutes a threat is "whether the remark can reasonably be interpreted by the employee as a threat," and therefore, is an objective standard or inquiry under Section 8(a)(1) which examines whether the employer's actions would tend to coerce a reasonable employee. *Smithers Tire & Auto Testing of Texas, Inc.*, 308 NLRB 72 (1992); see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981). Further, the questionable threats "need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). Therefore, the Board considers the totality of the circumstances in assessing an implicit or ambiguous threat to coerce. *KSM Industries, Inc.*, 336 NLRB 133, 133 (2001).

The Supreme Court has also held that an employer may even make predictions regarding the effects that it believes unionization will have on its business and employees. However, in doing so, "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." *NLRB v. Gissel Packing Co.*, supra at 618,[9] citing *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, fn. 20 (1965); see also, *National Propane Partners, L.P.*, 337 NLRB 1006, 1017 (2002). Therefore, an employer need not remain neutral during a union campaign, and may ensure that employees are fully informed about their choice. However, there must be a showing of objective facts on which to support the reasonable belief or prediction of such effects of unionization (beyond the employer's control). Otherwise, it is an impermissible threat of retaliation based on misrepresentation and coercion (and as such, loses the protection of the First Amendment). Id. at 618, 619, citing *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2nd Cir. 1967); see also, *Steam Press Holdings, Inc. v. Hawaii Teamsters*, 302 F.3d 998 (9th Cir. 2002)).

Respondent contends that its talks, letter and Power Point presentation were all protected by Section 8(c), while the General Counsel asserts that Respondent has crossed the line with some of its statements, and interfered with employees' Section 7 rights. The General Counsel argues that Respondent's various messages to employees, issued immediately after Respondent learned of the union organizing campaign, not only misrepresented employees' statutory rights, but did so in a manner such that they became unlawful threats to curtail employees' rights and discontinue their benefits. After a review of the communications alleged to have been objectionable in this case, all issued to employees between August 21 and 26, I find that some, but not all, rose to the level of unlawful threats made in violation of Section 8(a)(1) of the Act. In doing so, I have evaluated the language and alleged misrepresentations, in the context used by Respondent, in order to determine whether they could have reasonably been construed as threatening.

Respondent asserts Section 8(c) as a defense to the unfair labor practice charge of unlawful threats or coercion. Respondent also relies on Board precedent in *Tri-Cast, Inc.*, 274 NLRB 377 (1985), which the Board has since referred to as the *Tri-Cast* doctrine.

In *Tri-Cast*, the employer sent a letter stating in part, "2. 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 regional director determined that these statements misrepresented employee rights under the proviso of Section 9(a) of the

[8] See also PowerPoint presentation slides entitled "How would you be affected?;" "Negative Consequences of card signing;" and "The culture will definitely change." (Jt. Exh. J.)

[9] *Gissel Packing Co.*, supra, involved several underlying cases, one of which involved an employer (Sinclair) threatening employees that it would probably have to close its plant for economic reasons if unionization occurred. The Supreme Court found that Sinclair's communication of its sincere belief to employees, that unionization would or might result in economic decline and plant closing, was an impermissible statement of fact "'unless, which [was] most improbable, the eventuality of closing [was] capable of proof.'" *Gissel Packing Co.*, supra at 618–619, citing (underlying case) *NLRB v. Sinclair Co.*, 397 F.2d 157, 160 (1968).

Act, which allows "any individual employee or group of employees" to "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," provided that the adjustment is consistent with collective-bargaining agreement terms, and provided that "the bargaining representative has been given opportunity to be present at such adjustment." *Tri-Cast*, supra at fn. 3, quoting Section 9(a) of the Act and its proviso.[10] The Board disagreed that the employer "threatened to withdraw rights preserved by Section 9(a)," stating that "the Employer'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." The Board found that there was "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. at 377.) The Board explained that this was especially the case where, "as implied in the Employer's statement here, where a collective-bargaining agreement is negotiated." (Id.) In further explanation of its rationale, the Board pointed to the Ninth Circuit's observation that union representation resulting in a union shop steward dealing directly with the employer is a "'fact of industrial life.'" 274 NLRB at 377, quoting *NLRB v. Sacramento Clinical Laboratory, Inc.*, 623 F.2d 110, 112 (9th Cir. 1980). In determining that the regional director's "objectionable misrepresentation" could not stand, the Board relied on *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), where it previously stated that it would "'no longer probe into the truth or falsity of the parties' campaign statements, and . . . will not set elections aside on the basis of misleading campaign statements."[11] Finally, based on those findings, the Board concluded that it would not reverse the election results even if the employer's message was "read to have misrepresented employee rights." 274 NLRB at 378.

Contrary to Respondent's position, the General Counsel appears to insist that *Tri-Cast* is inapplicable, or in the alternative, that the Board should reverse or somehow restrict its application in these types of cases. In *In Re Dish Network*, the Board affirmed the administrative law judge's decision that the employer did not violate Section 8(a)(1) of the Act when it told its employees that if the workplace became unionized, they would have to go to their union steward with any of their complaints, rather than their employer, and that the union controlled their fate, "not you." *In Re Dish Network Corp.*, 358 NLRB 174, 174–175 (2012). The Board declined to take up the matter of revisiting what it called the *Tri-Cast* doctrine. Member Block concurred (in part) with the doctrine's application, but favored the Board reexamining the *Tri-Cast* doctrine "in an appropriate future case." (Id.)[12]

I have read and considered the parties' arguments for and against reversing or narrowing the *Tri-Cast* doctrine, along with their evaluations of the evolution of Board law leading to the doctrine. However, as the Board still has not revisited and reversed the *Tri-Cast* doctrine, I am bound to adhere to the findings in *Tri-Cast* until either the Board or the Supreme Court specifically overturns them. *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004); *Herbert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed," and "for the Board, not the judge, to determine whether precedent should be varied.") (citation omitted). *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981). Therefore, I will apply *Tri-Cast* as it stands.[13]

B. Respondent's Messages Regarding Loss of Direct Relationship Between Employees and Employers Do Not Violate the Act

There is no doubt in this case that between August 21 and 26, Respondent's managers began its antiunion campaign.[14] The General Counsel first argues that the following statements misrepresented employees' statutory rights: (1) in reference to signing the union authorization cards, Smith told employees in the August 21 meeting that "at that point you no longer have a voice, you've signed that away to some third party;" (2) in the August 24 letter, Lawless informed employees that "under current law, your signature on a card forfeits your right to represent yourself;" and (3) through its August 25 and 26 PowerPoint presentation, Hendrickson management informed employees that by supporting and/or voting for the union, "you'll be giving up your right to speak for and represent yourself," and that supporting the union would result in "loss of our direct employee relationship." The General Counsel further argues that these statements impliedly or otherwise threatened loss of employees' access to management with unionization.[15] (See GC Br.)

The General Counsel argues that the proviso to Section 9(a) of the Act "refutes any claim that an employee loses the right to individually adjust a grievance with an employer as a result of signing an authorization card" because the proviso gives employees "the right at any time to present grievances to their

[10] Sec. 9(a) of the Act mandates that "[r]epresentatives designated or selected . . . by a majority of the employees in a unit appropriate for" collective-bargaining purposes, "shall be the exclusive representatives of all employees in such unit" for such purposes regarding pay rates, wages and other conditions of employment.

[11] The Board in *Midland National Life Insurance Co.* also stated that, "we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice." *Midland National Life Insurance Co.*, 263 NLRB at 133.

[12] See *In Re Dish Network, Corp.*, 358 NLRB 229 (2012) (the Board denied the union's motion to reconsider its initial decision in *In Re Dish Network, Corp.*, 358 NLRB 174, supra, but confirmed its authority to revisit the *Tri-Cast* doctrine in an appropriate future case).

[13] In other words, I will leave it up to the Board to determine if this is an appropriate case in which to revisit and reexamine the *Tri-Cast* doctrine.

[14] Hendrickson managers began bombarding employees with its antiunion messages beginning on Friday, August 21, and resuming on Monday, August 24 through Wednesday, August 26. (See 2015 calendar.)

[15] In its brief, Respondent argues that since the General Counsel failed to specifically mention that each of the allegedly unlawful statements constituted a threat, they are protected by Section 8(c) of the Act, and therefore not in violation of the Act. I reject this argument, and address it later in this decision.

employer and to have such grievances adjusted, without the intervention of the bargaining representative." The General Counsel asserts, therefore, that pursuant to *Gissel*, Respondent did not have sufficient objective facts on which to base its belief that the Union's presence would result in employees' inability to communicate directly with Respondent. (See GC Br. at 5–6.) However, one cannot ignore the remaining part of this proviso, which conditions such right on the employees and/or the employer providing the bargaining representative or union the opportunity to be present during any such adjustment.

As stated above, I agree with Respondent that *Tri-Cast,* 274 NLRB 377 (1985), is controlling on this issue of whether Respondent unlawfully told employees (through various statements) that they would lose their voice and forfeit their right to represent themselves and bring their complaints directly to management if they brought the Union into the plant. See *Gunderson Rail Serv.*, 364 NLRB No. 30 fn. 1 (2016) (Board recently found that *Tri-Cast* is extant law, and affirmed the judge's dismissal of the allegation that the employer unlawfully told employees that if they selected the union they would no longer be able to complain directly to management).

Thus, as the Board pointed out in *Tri-Cast*, when employees are represented, their bargaining representatives deal directly with their employers through a shop steward, and it is simply fact that the direct relationship that existed before unionization no longer exists. I must find, therefore, even considering the General Counsel's argument and reliance on *Gissel*, that Respondent's messages to employees in this regard do not constitute unlawful threats. I also find that the General Counsel's attempt to distinguish this case from *Tri-Cast* fails. The General Counsel argues that unlike the ones in *Tri-Cast*, Respondent's statements in this case, "intimated that *all* employee access to Respondent would be denied in the event that the employee signs a [union] card." (GC Br. at 6.) There is simply no such distinction found as to take this case out of the purview of the *Tri-Cast* doctrine. Accordingly, I dismiss the complaint allegations in paragraphs 4 and 5 that claim that Respondent misrepresented employees' statutory rights under Section 9(a) of the Act and impliedly (or otherwise) threatened them with loss of access to management and loss of the right to individually adjust their grievances with Respondent if the plant became unionized.

C. Respondent Violated the Act When it Told Employees That Voting for the Union Would Result in Bargaining From Scratch

Next, the General Counsel takes issue with the portion of Lawless' August 24 letter to employees that stated that, "[t]he Company and any recognized Union would begin the negotiating process from scratch. Which means all of the wages, benefits, and terms and conditions of employment that you currently enjoy at our plant would not be the starting point for negotiations toward a Union contract." (Jt. Exh. I.)

Although the Board has long considered such statements during the union organizing process, and determined that they are not a per se violation of the Act, it has found that in the proper context, they are in violation of the Act. In *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. mem. 679 F.2d 900 (9th Cir. 1982), the employer explained to employees that with the union, they would have to bargain wages "'from minimum wage up,'" and that they would not have benefits "'until you have a contract signed. So actually you start with nothing until you actually had a contract that was okayed and voted in and the whole bit.'"[16] The Board, overturning the judge's finding of no violation, stated that

> It is well established that 'bargaining from ground zero' or 'bargaining from scratch' statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements do not constitute a violation when the employer's other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

Taylor-Dunn, supra, citing *TRW United Greenfield Division*, 245 NLRB 1135 (1979); *Stumpf Motor Co., Inc.*, 208 NLRB 431 (1974); *BP Amoco Chemical*, 351 NLRB 614, 617–618 (2007) (statements regarding loss of existing benefits are evaluated in terms of whether they are more reasonably construed as a result of union selection versus a "possible outcome of good-faith bargaining"). The Board found that the remarks "clearly conveyed to employees a threat of loss of existing benefits," and that they were not accompanied by any assurances to employees "that such losses, if any, would be the result of the normal give and take of collective bargaining and not of employer retaliation." (Id.)

In *Coach & Equipment Sales Corp.*, 228 NLRB 440, 440–441 (1977), the Board disagreed with the Administrative Law Judge's finding that statements that the employer would bargain from scratch as to wages and benefits, start at the minimum wage level and in no event go above what the employees were earning, were "nonthreatening and privileged under Section 8 (c) and were therefore not violative of Section 8(a)(1) of the Act." In doing so, the Board stated that "'bargaining from scratch' is such a dangerous phrase which carries within it the seed of a threat that the employer will become punitively intransient in the event the union wins the election." It emphasized that when such a statement can be reasonably read in the context of a threat to either end existing benefits prior to bargaining or to "adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees" for selecting the union, it will find a violation. However, the Board pointed out that when the "clearly articulated thrust" of such statement "is that the mere designation of a union will not automatically secure increases in wages and benefits, and that all such items are subject to bargaining, no violation will be found." (Id.) The Board stressed that "presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a

[16] The Administrative Law Judge found that the remarks, "while a technical violation of Section 8(a)(1), were 'so innocuous and so readily comprehended and categorized as such by the leadmen . . . as to warrant no remedial action.'" *Taylor-Dunn*, supra, at 800.

threatening color to the employer's remarks," and concluded that the employer's statements, taken together, constituted a threat in violation of the Act. (Id.) In other words, the Board determined that the objectionable words went beyond a warning, and communicated to employees the employer's intent to make sure that unionization would not result in increased benefits or wages. (Id.)

Here, I find that Respondent, through its message to its employees in Lawless' August 24 letter, conveyed that if employees authorized a union at its facility, they would lose their current wages and benefits. I find it particularly telling that Lawless premised this message with a reminder to employees of all the specific benefits that they and their families enjoyed without the union. He also expressed Respondent's disagreement with any claim that a union would bring job security, better benefits or increased compensation. Rather, he told employees that "[t]he fact of the matter is that a Union cannot promise you, as a valued employee of Hendrickson, anything." (Jt. Exh. I.) He clearly stated that "[t]he Company and any recognized Union would begin the negotiating process from scratch." (Id.) Lawless did not articulate that unionization would not "automatically secure" increased wages and better benefits or that such would require good faith negotiation between Respondent and the Union. Instead, Lawless assured employees that they would begin bargaining with nothing, and guaranteed that Respondent, at the start of any bargaining with a union, would only do what it could to make the best quality products (not bargain in good faith). Moreover, I point out here that there is no rule or obligation that collective-bargaining negotiations must begin from scratch or zero, or that it is beyond an employer's control to start bargaining at any point (from slightly below or even at the current level of benefits and wages).

I find that these questionable statements constituted a threat and essential guarantee by Respondent that by bringing in the Union, all negotiations for wages and benefits would start at zero. There was no promise or assertion that such would come about as a "possible outcome of good-faith bargaining," or would result from the normal give and take of bargaining. *BP Amoco Chemical*, supra at 617; see also, *Pier Sixty, LLC*, 362 NLRB No. 59, 19–20 (2015). Nor do I see evidence or find that employees would have reasonably believed there to have been such an assertion (or interpreted the same). Moreover, these statements, prefaced by all they enjoyed without the Union, essentially promised that employees would lose some of their benefits and earnings as a result of any bargaining between Respondent and the Union. Therefore, I find that such statements could reasonably be understood by employees to be a threat of loss of their existing wages and benefits. See *Taylor-Dunn*, supra at 800; *Capitol EMI Music, Inc.*, 311 NLRB 997, 1008 (1993); *Lear-Siegler Management Service*, 306 NLRB 393 (1992). See also, *Smithers Tire & Auto Testing of Tex.*, supra.

In its brief, Respondent argues that since the General Counsel did not specifically allege any threat in connection with statements made by Lawless in his August 24 letter to employees, the absence of such allegation leaves that letter "subject to the full protection of Section 8(c)." Therefore, Respondent claims that those views in the letter do not violate the Act because there was no "accompanying '. . . threat of reprisal or force or promise of benefit.'" (R. Br. at 18, quoting 29 U.S.C. § 158(c)). Respondent further argues that Board law establishes that during union organizing drives, misstatements or misrepresentations of law and fact are not violative of the Act. Respondent relies on *Midland National Insurance Co.*, supra, and *Furr's Inc.*, 265 NLRB 1300 fn.10 (1982), in support of the latter contention. Finally, in a footnote, Respondent states that "[i]t is highly debatable whether this particular allegation is even part and parcel of Mr. Pemberton's" charge since the charge, "on its face, states that the alleged 'intimidating' and 'threatening' conduct violative of [Section 8(a)(1)] first began on 'August 25, 2015,'" while Lawless' letter was written and sent on August 24. (R. Br. fn. 13; Jt. Stip.; Jt. Exh. A.)

It is true that the charge alleges that the first violation began on August 25. However, the complaint alleges in complaint paragraph 5 that on "[a]bout August 24, 2015, Respondent, by Randy Lawless, sent a letter to employees . . . which misrepresented the negotiation process and employees' access rights to management, including their right to individually adjust their grievances with Respondent, if they became a unionized facility." In addition, the complaint alleges that by the conduct described in paragraph 5 (along with that described in paragraphs 4 and 6 pertaining to Smith's talk on August 21 and the PowerPoint presentations on August 25 and 26) Respondent "has been interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act." (Jt. Exh. C, pars. 4–7.) Further, in the General Counsel's statement of position, he clarified his position that "Respondent misrepresented employees' statutory rights by threatening more difficult or onerous workplace conditions through a series of statements." Those statements included the one set forth in Lawless' August 24 letter that, "the Company and any recognized Union would begin the negotiating process from scratch." Moreover, the General Counsel asserted these allegations (as part of misrepresentations that rose to the level of threats) in his brief, and Respondent, anticipating them, addressed them in its brief.

A complaint is not restricted, however, to the precise allegations of the charge. Rather, it may also allege matters related to and growing out of the charged conduct. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959). I point to the Board's relevant test set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988), that:

> If a charge was filed and served within six months after the violation alleged in the charge, the complaint…, although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within six months before the filing of the charge.

(Id. at 1116), quoting with approval *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2nd Cir. 1952). In evaluating whether allegations are "closely related" under *Redd-I*, the Board considers the following: (1) whether the untimely allegation and timely charge involve the same legal theory; (2) whether the untimely allegation and the timely one arise from the same factual circumstances or sequence of events; and (3) whether the same or similar defenses would be raised in response to both allega-

tions. See *Nickles Bakery of Indiana, Inc.*, 296 NLRB 927, 927–928 (1989). These factors do not require that the allegations involve the same section of the Act, and the relevant question under the third factor is whether both allegations allege the same unlawful object. (Id. at fn. 5 and 6.) In that same vein, and relevant to this case, the Board has found that a sufficient nexus exists when the disputed and existing charges or allegations "occurred within the same general time period and concern conduct which constitutes an overall plan to resist the Union." See *Well-Bred Loaf, Inc.*, 303 NLRB 1016 fn. 1 (1991); *Kentucky Tennessee Clay Co.*, 343 NLRB 931, 932 (2004).

There is no doubt that the "bargaining from scratch allegation," not set out in the charge or specifically mentioned in the complaint, is closely related to the violations named in the charge. Nor is there any dispute that the August 24 letter was sent, or the August 21 speech occurred, within the 6 months before the filing of the charge in this case. The allegations in the General Counsel's position statement and brief involve the same legal theories, arise out of the same factual circumstances and sequence of events around Respondent's antiunion organizing drive and are subject to the same or similar defenses. In other words, the allegations questioned in Respondent's brief—whether or not certain statements in Lawless' August 24 letter not only misrepresented employees' rights under the Act, but also constituted a threat—were sufficiently related to the charge and complaint allegations. Finally, as Respondent claims, in order for me to assess whether or not an alleged remark or misrepresentation constitutes an unlawful threat, I must determine "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire & Auto. Testing of Tex.*, supra. I have determined that the remarks here can be interpreted as such.

Accordingly, I find that Respondent's statement, that bargaining would start from scratch, not only misrepresented the negotiation process, but also constituted a threat in violation of the Act.

D. Respondent Violated the Act When it Threatened a Difficult/Onerous Work Environment

Finally, the General Counsel argues that Respondent further misrepresented employees' statutory rights and threatened more difficult or onerous work conditions through its statements in the PowerPoint presentation. The General Counsel specifically questions the following of Respondent's promised consequences if employees selected the Union: "you'll be giving up your right to speak for and represent yourself," "loss of our direct employee relationship," "the culture will definitely change," "relationships suffer," and "flexibility is replaced by inefficiency." In this regard, the General Counsel believes that taken together, these statements/communications to employees "forecast a more difficult work environment that is neither 'demonstrably probable' nor beyond the Employer's control." (GC PS, citing *Gissel*, supra). I agree, but only as to the last three statements. In doing so, I viewed them in the total context in which they were presented, along with the unlawful "bargaining from scratch" promise, in order to determine whether they would be reasonably interpreted as threats.

I find that Respondent clearly promises that the culture will change, relationships with coworkers will suffer and all flexibility enjoyed by employees will be replaced with inefficiency. In fact, Respondent indicates with certainty that it would no longer respond to employee concerns or issues, no matter what they might be, and that employees would lose control over every aspect of their work lives. This goes beyond the permissible communication that unionization will bring about a change in the direct relationship between management and employees. I agree with the General Counsel that these declarations to employees did not meet the standard set forth in *Gissell*, in that they were not rooted in, or "carefully phrased on the basis of," objective fact in order to get across Respondent's "belief as to demonstrably probable consequences beyond [its] control." *NLRB v. Gissel Packing Co.*, supra at 618.

As stated above, Respondent would have control over how it began contract negotiations with a union. Further, there is no basis in objective fact to believe that the relationship between employees and their coworkers would suffer so greatly such that all flexibility would be lost and the culture would change. Moreover, there is no evidence that potential unionization would sound a death knell for Respondent's ability to be responsive to any of its employees' issues and concerns. This implies that Respondent might not or would not be responsive to these concerns even through negotiations with a union. I find that Respondent ignores the fact that although they may not be at the negotiation table, union members most often have a say in developing bargaining proposals concerning their wages and benefits and other working conditions. In other words, there is no basis on which to believe that employees would have no say, whatsoever, in their working conditions. I find that employees would reasonably believe, based on Respondent's statements, that with the Union, they would lose many of their benefits, experience decreased pay, lose all flexibility they might have in navigating day-to-day work conditions and forfeit any flexibility in terms and conditions of employment they might enjoy (e.g., scheduling flexibility, time and attendance requests, etc.). In other words, they would reasonably believe that all aspects of their work environment would completely deteriorate.

I have considered Respondent's argument that when reviewed in full context, the PowerPoint presentation did not misrepresent employees' statutory rights or constitute a threat. In making these arguments, Respondent points to the following particular slides, or rather bullet points on certain slides, which it "presumes" the General Counsel is concerned about:

Why Direct Relationships? [heading p. 3]

- The need for employees to turn to a third party is eliminated [p. 3]
- We have an open door policy- just come in and talk to anyone, even your GM [p. 7]
- You lose your right to represent yourself [by signing a union card authorizing a union 'to represent me in all negotiations of wages, hours, and working conditions in accordance with the NLRB']. [pp. 17]

How would you be affected [if the union won its campaign]? [p. 18]

- Loss of our Direct Employee Relationship. [p. 18]
- Wages, benefits, and all working conditions are up for negotiation [p. 18]

The culture will definitely change! [p. 40]

- You'll be giving up your right to speak for and represent yourself. [p. 40]
- Every change to wages, hours, and working conditions requires negotiations controlled by the union – not you. [p. 40]

(Jt. Exh. J, pp. 3, 7, 17, 18, 40.) I have already addressed Respondent's statements to employees regarding how unionization will affect the direct relationship between Respondent and employees, and found that they do not violate the Act.

However, as to other statements reflected here and above, I find when taken into overall context, they represent more than a threat of the loss of the employer-employee negotiation relationship. Although I recognize that the PowerPoint presentation truthfully mentions that wages, benefits and working conditions are up for negotiation; I cannot ignore that it also states that "Every change to wages, hours, and working conditions requires negotiations controlled by the union — not you." (Jt. Exh. J, p. 40.) The latter comment, and the other statements discussed above (such as "bargaining from scratch" with the disappearance of all the wages and benefits and working conditions enjoyed without a union), threaten that employees will lose benefits and wages; any voice at all in the bargaining process; and the collapse of their working conditions and relationships with their coworkers. I find that Respondent cannot cherry pick from its representations to its employees, and ignore those comments and statements which I have found, taken together, constitute unlawful threats.

I conclude these statements, along with the message that any negotiations would start from scratch, threaten a more difficult and onerous work environment and loss of wages and benefits, and therefore violate Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

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

2. By threatening its employees with loss of current wages and benefits by informing them that the negotiating process would start from scratch in the event that they authorized the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. By threatening its employees with a more difficult or onerous work environment by telling them that the culture would definitely change, all relationships would suffer and flexibility would be replaced with inefficiency, in the event that they authorize the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. By the conduct described above, the Respondent has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. Respondent has not violated the Act by misrepresenting employees' statutory rights under Section 9(a) of the Act and/or impliedly threatening employees with a loss of access to management and loss of the right to individually adjust their grievances with Respondent if they authorized the union. Therefore, this allegation is dismissed.

REMEDY

Having found that the Respondent has violated the Act by threatening its employees with loss of wages and benefits by informing them that the negotiating process would begin from scratch, and threatening them with a more difficult or onerous work environment by telling them that the culture would definitely change, all relationships would suffer and flexibility would be replaced with inefficiency, in the event that they authorize the Union, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Hendrickson USA, LLC, Lebanon, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with loss of wages and benefits by informing them that the negotiation process would begin from scratch in the event that they authorize the Union.

(b) Threatening its employees with a more difficult or onerous work environment by telling them that the culture would definitely change, all relationships would suffer and flexibility would be replaced with inefficiency, in the event that they authorize the Union.

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

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

(a) Within 14 days after service by the Region, post at its Lebanon, Kentucky facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the

[17] 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.

[18] 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 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 21, 2015.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 31, 2016

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with loss of wages and benefits by informing them that the negotiating process would begin from scratch in the event that they authorize the Union.

WE WILL NOT threaten employees with a more difficult or onerous work environment by telling them that the culture would definitely change, all relationships would suffer and flexibility would be replaced with inefficiency, in the event that they authorize the Union.

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

HENDRICKSON USA, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-159641 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.