

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

HENDRICKSON USA, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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ORAL ARGUMENT STATEMENT

The Board considers oral argument for the immediate case unnecessary, but it requests to participate should the Court decide that oral argument is warranted.

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Hendrickson USA, LLC (“Hendrickson”) for review, and the cross-application of the National Labor

Relations Board (“Board”) for enforcement, of the Board Order issued against Hendrickson on January 25, 2018, reported at 366 NLRB No. 7. The Board had subject-matter jurisdiction over the underlying proceedings pursuant to Section 10(a) of the National Labor Relations Act (“Act”) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce.

This Court has jurisdiction over this appeal because the Board Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper because the unfair labor practices at issue took place in Kentucky. Hendrickson’s petition and the Board’s cross-application were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s finding that Hendrickson violated Section 8(a)(1) of the Act by threatening to bargain “from scratch” if its employees unionized.

2. Whether substantial evidence supports the Board’s finding that Hendrickson violated Section 8(a)(1) of the Act by threatening to implement a more onerous work environment if its employees unionized.

RELEVANT STATUORY PROVISIONS

Relevant statutory provisions are set forth in Hendrickson's brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on a charge filed by employee Gary Pemberton, the Board's General Counsel issued a complaint against Hendrickson, alleging that Hendrickson made several coercive statements to its employees in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). (App. 14-17.)¹ The case was submitted to an administrative law judge, and the parties jointly moved to submit a stipulated record in lieu of a hearing. (App. 1-5.) In accordance with Section 102.35(a)(9) of the Board's Rules and Regulations (29 C.F.R. § 102.35(a)(9)), the judge granted the parties' motion and accepted the stipulated record. (App. 94.)

On October 31, 2016, the judge issued her decision and recommended order. (App. 199-208.) She found merit to the General Counsel's allegations that Hendrickson violated Section 8(a)(1) by: threatening in an August 24 letter to employees to bargain from scratch if they selected union representation, and threatening in an August 25 and 26 PowerPoint presentation to employees to implement a more onerous work environment if they selected union representation.

¹ "App." references are to Hendrickson's Appendix, and "Br." references are to Hendrickson's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

But she dismissed the General Counsel's allegations regarding Hendrickson's contemporaneous warnings that employees would lose their "voice" and direct access to management in the event of unionization, finding those statements to be accurate descriptions of the effects of exclusive union representation. (App. 203-04 (citing *Tri-Cast, Inc.*, 274 NLRB 377 (1985)).)

Both the General Counsel and Hendrickson filed exceptions to the judge's decision. (App. 173-82.) The Board adopted the decision in full and issued a modified Order. (App. 198-208.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: the Union Begins Organizing Hendrickson's Employees; Hendrickson Counters with an Anti-Union Campaign

Hendrickson, a truck suspension and axle manufacturer, operates a plant in Lebanon, Kentucky. (App. 199; App. 2.) At all material times, the United Steel Workers (the "Union") was engaged in an organizing campaign at the Lebanon Plant. (App. 200; App. 3.) On August 21, 2015, pursuant to that organizing campaign, union supporters sent a letter to Hendrickson that provided notice of the Union's organizing efforts. (App. 200; App. 3-4.)

Upon receipt of the letter, Hendrickson management initiated a campaign against the Union. On August 21, the same day that management received the letter, Hendrickson's human resources director held a plant-wide meeting to make clear to employees Hendrickson's opposition to unionization. (App. 200; App. 3,

36-43.) In a presentation combining a speech, video airing, and discussion, the director first discussed generally the benefits of Hendrickson's current policies and terms of employment. (App. 200; App. 36-38.) He then opined on some negative consequences of unionization, pointing out that union-represented employees lose some freedom of expression and their direct relationship with their employer.

(App. 200; App. 39-43.)

B. Hendrickson Asserts that, if the Union Is Elected, Bargaining Will Start “from Scratch” and Existing Benefits Will Not Improve and Cannot Be Guaranteed

On August 24, 2015, Hendrickson distributed a letter to all Lebanon Plant employees. (App. 201; App. 45-46.) The letter began by describing the existing culture at the plant and reminding employees of the various benefits that they and their families currently enjoyed. (App. 201; App. 45.) It specifically pointed to the medical, dental, and life insurance programs, as well as the pension and 401(k) plans upon which Hendrickson employees and their families relied. (App. 201; App. 45.)

The letter then turned to unionization, specifically discussing its effects on employees' terms and conditions of employment. The letter began with a simple assertion: that unionization would not “preserve job security, lead to greater benefits, or enhance compensation.” (App. 201; App. 45.) It then elaborated on that point, warning employees that Hendrickson would bargain “from scratch”:

The fact of the matter is that a [u]nion 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 [u]nion 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 [u]nion contract.

(App. 201; App. 45-46.) Next, the letter reminded employees of the instability of the market, stating that Hendrickson, “like many other companies, ha[s] experienced many ups and downs with the current economic picture.” (App. 201; App. 46.) And it told employees that Hendrickson “will do everything within [its] power to provide quality products and service to the industry which in turn will help secure the livelihood for [its] employees and their families.” (App. 201; App. 46.) Finally, the letter urged employees not to join the union and warned them of “the serious implications of signing a [u]nion [authorization] card, stating that “your signature on a card forfeits your right to represent yourself.” (App. 201; App. 46.)

C. Hendrickson Warns Employees that Unionization Will Have Negative Consequences on Their Working Environment

On August 25 and 26, 2015, Hendrickson management played a PowerPoint presentation for Lebanon Plant employees. (App. 201; App. 3, 48-88.) The presentation had two major themes: defining the existing workplace culture that

employees currently enjoyed and outlining how that culture would change in the event of unionization. (App. 201.)

The presentation painted a very positive picture of Hendrickson's existing workplace culture. For example, it pointed to Hendrickson's dedication to "listen[ing] and follow[ing] through with [employee] ideas, concerns, and suggestions." (App. 201, App. 53-54.) It reminded employees of Lebanon Plant's "easy-going atmosphere" that gave employees the "freedom to do [their] job" and ensured "reward/advancement for those that work hard and produce." (App. 201; App. 53-54.) And it discussed the various ways that Hendrickson engaged in "[r]elationship [b]uilding," citing to such things as its open-door policy, employee surveys, and roundtable discussions. (App. 53-54.)

The presentation's discussion of unionization focused exclusively on the downsides of union representation. It told employees that they would lose their "Direct Employee Relationship" with Hendrickson and that their "[w]ages, benefits, and all working conditions [would be] up for negotiation." (App. 201; App. 65.) It also pointed out various ways that unionization would cost employees money—including union dues, strikes, layoffs, or loss of wages and benefits through contract negotiations. (App. 20; App. 65-76.) In a set of slides entitled "The Real Numbers," Hendrickson displayed tables containing wage-and-benefit data for Hendrickson's Lebanon Plant as well as several local competitors. (App.

79-81). In the slide immediately following those data tables, Hendrickson displayed an image of a newspaper story reporting that workers at Hendrickson's Kendallville plant had received increased wages as the result of unionization. (App. 82.) Superimposed on the image of the article, obscuring the text, was large, bold, rubber-stamp-style text declaring "Only half the story!" (App. 82.) The next two slides displayed additional wage-and-benefit information illustrating how the unionized Kendallville employees were actually worse off than the nonunion Hendrickson employees. (App. 83-84.) Finally, the penultimate slide in the presentation summarized Hendrickson's warnings about what would happen if employees selected union representation. Under a heading promising that "[t]he culture will definitely change," the slide specified that: employees will "be giving up [their] right to speak for and represent [themselves]," "flexibility [will be] replaced by inefficiency," and "relationships [will] suffer." (App. 202; App. 86.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board adopted the judge's decision in full, finding that statements in Hendrickson's August 24 letter and August 25 and 26 PowerPoint presentation violated Section 8(a)(1) of the Act because a reasonable employee would interpret them as threats of retaliation for the selection of a union representative. (App. 198.) To remedy those violations, the Board ordered Hendrickson to cease and desist from: threatening employees with loss of wages and benefits; threatening

employees with a more difficult or onerous work environment; and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7. (App. 198-99.) Affirmatively, the Board ordered Hendrickson to post and distribute remedial notices. (App. 198, 208.)

SUMMARY OF THE ARGUMENT

Employer statements violate Section 8(a)(1) of the Act if a reasonable employee would interpret them as threats to retaliate for unionization; they are protected by Section 8(c) if they are merely expressions of view, argument, or opinion. In determining whether a statement relates an unlawful, retaliatory threat, the Board must consider the totality of the circumstances, including the surrounding statements and conduct; to qualify as protected, a prediction of adverse consequences of unionization must be precisely phrased and objectively supported.

Substantial evidence supports the Board's finding that Hendrickson, in its August 24 letter, unlawfully threatened to retaliate against employees if they unionized by reducing their existing benefits or forcing the Union to bargain to restore them. The Board reached this conclusion by reading Hendrickson's explicit promise to bargain "from scratch" within context of the letter's other statements. Those statements reminded employees of their existing benefits,

asserted that the Union would be unable to improve those benefits, confirmed that Hendrickson would begin negotiations *below* current benefits, and related that it would not allow anything to affect its production. Nothing in the letter or in Hendrickson's other communications promised that Hendrickson would bargain in good faith or conveyed that any reductions in benefits would be the result of the normal give and take of collective bargaining. Accordingly, the Board reasonably concluded that the letter unlawfully threatened to retaliate against the employees in bargaining for their selection of union representation.

Substantial evidence also supports the Board's findings that Hendrickson's August 25 and 26 PowerPoint presentation included unlawful threats to retaliate against employees by creating a more onerous work environment. Hendrickson masked those threats as permissible predictions, but its statements were not carefully phrased to describe probable consequences of unionization, much less supported by objective facts. Instead, viewed in the context of the entire PowerPoint presentation and in light of the preceding retaliatory threat to bargain from scratch, they implied that Hendrickson would reduce its responsiveness to employee concerns, workplace flexibility, and the other freedoms and benefits that defined the existing workplace culture. While Hendrickson argues that its so-called predictions were merely describing facts of industrial life, the details of the presentation contradict that characterization. The phrasing of the "predictions"

goes beyond the necessary consequences of exclusive representation and fails to provide factual support.

STANDARD OF REVIEW

With respect to legal findings, “this Court is deferential to the Board’s interpretation” of the Act and, as “long as the [Board]’s interpretation of the statute is ‘reasonably defensible,’ this Court will not disturb such interpretation.”

Vanguard Fire & Supply Co. v. NLRB, 468 F.3d 952, 957 (6th Cir. 2006) (quoting *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 844 (6th Cir. 2003)). The Court “may not reject the Board’s interpretation ‘merely because the courts might prefer another view of the statute.’” *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552, 559 (6th Cir. 2013) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

The Board’s findings of fact are conclusive if supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Mt. Clemens Gen. Hosp.*, 328 F.3d at 844. That standard is satisfied “if a reasonable mind might accept the evidence as ‘adequate to support a conclusion.’” *Vanguard Fire & Supply Co.*, 468 F.3d at 957 (quoting *Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003)). A reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the

matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488; accord *NLRB v. Galicks, Inc.*, 671 F.3d 602, 607 (6th Cir. 2012).

The same substantial-evidence standard applies to the Board’s application of the Act to the facts of a particular case. *Mt. Clemens Gen. Hosp.*, 328 F.3d at 844 (“[W]e defer to the Board’s application of law to the facts if it is supported by substantial evidence.”). Of particular relevance here, this Court also defers to the Board’s judgment and expertise “[i]n assessing the coercive impact of [an] employer’s statements.” *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 660 (6th Cir. 2005) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969); *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468, 476 (6th Cir. 2002)).²

² There is no merit to Hendrickson’s suggestion (Br. 23-24) that a different standard applies when the coercive statement is written. *See, e.g., ITT Auto. v. NLRB*, 188 F.3d 375, 385-87 (6th Cir. 1999) (holding substantial evidence supported Board’s finding that employer’s speeches *and leaflets* violated Section 8(a)(1)). Hendrickson relies on *NLRB v. Hobart Bros. Co.*, 372 F.2d 203 (6th Cir. 1967), but that case predated the Supreme Court’s *Gissel* decision, which recognized “Board’s competence . . . to judge the impact of utterances made in the context of the employer-employee relationship.” *See generally Gissel Packing Co.*, 395 U.S. at 619-20 (holding the Board “could reasonably conclude” that employer’s “speeches, pamphlets, leaflets, and letters” conveyed unlawful threat). *Heartland Plymouth Court MI, LLC v. NLRB*, 650 F. App’x 11 (D.C. Cir. 2016), which Hendrickson also cites (Br. 23), stands for the unremarkable proposition that a less deferential standard applies when the Board interprets collective-bargaining agreements. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202 (1991) (holding Board is “neither the sole nor the primary source of authority” in matters of contract interpretation).

As the above-described precedent demonstrates, Hendrickson misstates the standard of review; the cases it cites do not support its assertions. First, Hendrickson’s contention (Br. 24) that this Court engages in *de novo* review of the Board’s interpretation of the Act relies on a blatant mischaracterization of the plain language of *Albertson’s Inc. v. NLRB*. 301 F.3d 441, 446 (6th Cir. 2002) (“[W]here the Board’s conclusions of law *do not* interpret the NLRA, we review *those* conclusions *de novo*.”) (emphasis added). Second, Hendrickson’s contention (Br. 23) that the substantial-evidence standard does not apply to the Board’s application of law to the facts misstates the holdings of the out-of-circuit cases it cites. In *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017), and its antecedents, the D.C. Circuit declined to defer to the Board’s application of *common law* agency principles, not the Act. *See FedEx*, 849 F.3d at 1128; *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995); *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75 (D.C. Cir. 1990).

ARGUMENT

Section 7 of the Act gives employees “the right to self-organization, to form, join or assist labor organizations.” 29 U.S.C. § 157. That right is guaranteed by Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). Coercive conduct includes

statements threatening reprisal for union or protected activity. *Henry I. Siegel Co. v. NLRB*, 417 F.2d 1206, 1214 (6th Cir. 1969). By contrast, Section 8(c) of the Act protects an employer’s noncoercive statements of “views, argument, or opinion,” which “shall not constitute or be evidence of an unfair labor practice.” 29 U.S.C. § 158(c); *see also Gissel Packing Co.*, 395 U.S. at 617 (“[Section 8(c)] merely implements the First Amendment by requiring that the expression of ‘any views, argument, or opinion’ shall not be evidence of an unfair labor practice,’ so long as such expression contains ‘no threat of reprisal or force or promise of benefit in violation of [Section] 8(a)(1).”).

The established test for whether an employer’s statement violates Section 8(a)(1) is whether the statement, when “considered from the employees’ point of view, had a reasonable tendency to coerce.” *Dayton Newspapers, Inc.*, 402 F.3d at 659. In determining whether an employer’s statement meets that test, the Board considers the totality of the circumstances. *KSM Indus., Inc.*, 336 NLRB 133, 133 (2001); *see also NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 105 (6th Cir. 1987) (“[T]he Board considers the total context in which the challenged conduct occurs”). That analysis includes consideration of other, contemporaneous unfair labor practices committed by the employer. *Dillon Cos., Inc.*, 340 NLRB 1260, 1272 (2003) (quoting *Coach & Equip. Sales Corp.*, 228 NLRB 440, 441 (1977)). It also entails consideration of the fact that employees, who are

economically dependent on their employers, will more readily perceive subtle threats than a disinterested party. *DTR Indus. v. NLRB*, 297 F. App'x 487, 492 (6th Cir. 2008) (“*DTR II*”) (quoting *Indiana Cal-Pro, Inc. v. NLRB* 863 F.2d 1292, 1299 (6th Cir. 1988)).

For a statement to violate Section 8(a)(1), actual coercion is not necessary. *Dayton Newspapers, Inc.*, 402 F.3d at 659. Nor must the threat or coercion be explicit or intentional. *Pikeville United Methodist Hosp. v. NLRB*, 109 F.3d 1146, 1157 (6th Cir. 1997) (finding employer’s implied threat of retaliation unlawful); *NLRB v. Jag Healthcare, Inc.*, 665 F. App'x 443, 449 (6th Cir. 2016) (“[I]t is the tendency of a statement to coerce that is relevant, not the intent of the statement’s maker.”) (citing *Indiana Cal-Pro, Inc.*, 863 F.2d at 1298-99). Moreover, a statement ostensibly offering predictions about the probable consequences of unionization may constitute unlawful coercion if it lacks objective factual support. *E.g.*, *Gissel Packing Co.*, 395 U.S. at 618. In other words, an employer may not legitimize an otherwise unlawfully coercive statement by “dress[ing] up a threat in the language of opinion.” *Henry I. Siegel Co.*, 417 F.2d at 1214. Finally, employees are not required to “divine a legitimate gloss” to employers’ ambiguous statements. *See Lancaster Care Ctr., LLC*, 338 NLRB 671, 672 (2002).

In the exercise of its expertise in interpreting and applying the Act, the Board has, with court approval, tailored its Section 8(a)(1) analysis more

specifically to address certain types of unlawful threats, including statements of intent to bargain from scratch and predictions of dire consequences in the event of unionization. Hendrickson made unlawfully coercive statements falling into each of those two categories, as demonstrated below.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT HENDRICKSON VIOLATED SECTION 8(a)(1) BY PROMISING TO BARGAIN FROM SCRATCH IF EMPLOYEES UNIONIZED

As the Board found, Hendrickson unlawfully coerced employees in violation of Section 8(a)(1) when it promised to start bargaining “from scratch” if the employees chose to unionize. (App. 204-06.) That statement, when viewed in context, was unlawful because it would give a reasonable employee the impression that Hendrickson would retaliate against its employees for unionizing by reducing existing benefits.

A. A Promise To “Bargain from Scratch” Violates Section 8(a)(1) if it Conveys that the Employer Will Retaliate Against Employees by Reducing Existing Benefits

While not per se violative of Section 8(a)(1), “bargain from scratch” is a “dangerous phrase.” *Coach & Equip. Sales Corp.*, 228 NLRB at 440. It constitutes an unlawful threat if, in context, it reasonably conveys that the employer will “adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees for choosing collective representation.” *Id.* at 440-41; *see also NLRB v. Gen. Fabrications*

Corp., 222 F.3d 218, 231 (6th Cir. 2000). It is also a violation if the statement would reasonably be understood as threatening that employees will lose their existing benefits such that “what they may ultimately receive depends upon what the union can induce the employer to restore.” *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), *enforced*, 679 F.2d 900 (9th Cir. 1982); *Coach & Equip. Sales Corp.*, 228 NLRB at 440-41.

Consistent with the protections of Section 8(c), however, bargain-from-scratch statements “are not violative of the Act when 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 Mfg. Co.*, 252 NLRB at 800. Thus, an important consideration in many bargain-from-scratch cases is whether or not the employer made clear that what employees ultimately received would be the result of good-faith, give-and-take negotiations.³ But because the ultimate

³ Compare *BP Amoco Chem.*, 351 NLRB 614, 618 (2007) (finding bargain-from-scratch statements unlawful in part because employer did not “tie [them] to . . . the give and take of bargaining”); *Lear-Siegler Mgmt. Serv.*, 306 NLRB 393, 393 (1992) (finding bargain-from-scratch statement unlawful in part because no “statements regarding the normal give-and-take of collective-bargaining negotiations were made”); *Taylor-Dunn Mfg. Co.*, 252 NLRB at 800 (finding bargain-from-scratch statements unlawful in part because they were “unaccompanied by assurances that such losses, if any, would be the result of the normal give and take of collective bargaining”), with *Pier Sixty, LLC*, 362 NLRB No. 59, slip op. at 18 (March 31, 2015) (holding employer could lawfully tell employees that they “could end up with *better* or worse wages and benefits as a result of the negotiated process” was permissible) (emphasis added), *enforced on other grounds*, 855 F.3d 115 (2d Cir. 2017); *Stabilus, Inc.*, 355 NLRB 836, 856

question is the statement's reasonable tendency to coerce, considered in light of the totality of the circumstances, even an explicit reference to good-faith bargaining or to the give and take of negotiations will not always cure the coercive effect of a promise to bargain from scratch. *See Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 925-28 (D.C. Cir. 2005) (finding employer's various references to give-and-take bargaining insufficient to overcome reasonable conclusion that its communications "were designed to engender employee fears about potential loss of wages and benefits"); *see also NLRB v. Consol. Biscuit Co.*, 301 F. App'x 411, 434 (6th Cir. 2008) (finding employer's bargain-from-scratch statement unlawful despite fact that it had described bargaining as "give and take situation").

B. Hendrickson's Promise To Bargain from Scratch Reasonably Conveyed a Threat that Employees Would Lose Existing Benefits if They Selected Union Representation

Substantial evidence supports the Board's finding that Hendrickson violated Section 8(a)(1) of the Act when it told employees in its August 24 letter that:

The Company and any recognized [u]nion 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 [u]nion contract.

(2010) (finding "fatal to the General Counsel's case" that the employer told employees it would engage in good-faith bargaining).

(App. 204-06.) As the Board found (App. 205), a reasonable employee reading that statement in the context of the entire August 24 letter would interpret those words to convey a threat to reduce existing benefits.⁴

As the Board explained (App. 205), Hendrickson’s letter first set the stage for the bargain-from-scratch promise by reminding employees of the various benefits upon which they and their families relied. Next, the letter explicitly disagreed with the proposition that representation would “preserve job security, lead to greater benefits, or enhance compensation,” asserting that a union could not promise employees “*anything*.” (App. 45.) To that point, therefore, the letter communicated to a reasonable employee the message that his or her existing benefits would *not* be improved by union representation. The letter then doubled down on that message, strongly implying to the reasonable employee that benefits

⁴ Hendrickson posits (Br. 26 n.21, 33) that the Board improperly labeled Section 8(c) an affirmative defense. *But see ITT Auto.*, 188 F.3d at 385 (“[A]n employer may claim the protections of § 8(c) as a *defense* to an unfair labor practice charge of unlawful coercion in violation of § 8(a)(1).”) (emphasis added). Semantics aside, the Board here followed established law by placing on the General Counsel the burden to prove that the allegedly unlawful statement was coercive under Section 8(a)(1) and thus fell outside the protection of Section 8(c). *See Salon/Spa at Boro, Inc.*, 356 NLRB 444, 464 (2010); *see also NLRB v. Taylor Mach. Products, Inc.*, 136 F.3d 507, 519 n.11 (6th Cir. 1998) (“Because the effect of these statements is reasonably viewed as coercive, they do not fall within [S]ection 8(c)’s safe haven.”). Hendrickson misreads the Board’s decision in asserting (Br. 33) that the Board placed the burden of proving Section 8(c) protection on Hendrickson, much less required subjective witness testimony. The sentence Hendrickson quotes applies the governing, objective Section 8(a)(1) standard.

would decrease, or that the Union would have to work to preserve or restore them. *See Taylor-Dunn Mfg. Co.*, 252 NLRB at 800. Specifically, the letter stated that “none of the benefits, compensation, or job security that [employees] currently enjoy would be guaranteed” and bargaining would begin “from scratch,” defining that term to mean that existing wages and benefits “would not be the starting point for negotiations.” (App. 31-32.)⁵

The remainder of Hendrickson’s letter failed to provide any qualifications to that coercive message or otherwise counter the reasonable inference that it was threatening to retaliate against its employees. For example, Hendrickson did not promise to bargain with the Union in good faith. *See, e.g., Stabilus, Inc.*, 355 NLRB at 856 (finding employer’s bargain-from-scratch statement did not violate Act in part because employer had communicated it would engage in good-faith bargaining). Neither did the letter explain that, through the give and take of

⁵ Without explanation, Hendrickson asserts (Br. 35 n.25) that *Stumpf Motor Co.*, 208 NLRB 431 (1974), a case involving a variety of lawful and unlawful statements regarding unionization, has bearing on the immediate case. That lack of explanation is understandable because *Stumpf* does not support Hendrickson’s cause. In *Stumpf*, the Board found the employer’s bargain-from-scratch statement *was* unlawful. *Id.* at 431-32. The Board then found that a separate statement, which communicated that a number of specifically described benefits could be lost because “all benefits would be negotiable,” was lawful. *Id.* at 432. That lawful statement is distinguishable from the one at hand because it did not contain a promise to bargain from scratch. Moreover, unlike Hendrickson’s August 24 letter, the *Stumpf* employer’s lawful communications did not contain any assertion that the union would be unable to secure job security, greater benefits, or higher wages for the workers.

negotiations, employees' benefits could go up or down. *See Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36, 41 (1st Cir. 1989) (finding employer's bargain-from-scratch statement lawful because employer's communications made clear that any benefit reductions would be the result of "give and take" bargaining); *Pier Sixty, LLC*, 362 NLRB No. 59, slip op. at 18 (finding employer's bargain-from-scratch statement permissible in part because employer told employees that they "could end up with *better* or worse wages and benefits as a result of the negotiated process") (emphasis added); *Histacount Corp.*, 278 NLRB 681, 686, 689 (1986) (finding employer's bargain-from-scratch statement lawful in part because employer's communications indicated that it would bargain in good faith and that bargaining involves mutual agreement "where existing benefits may be *traded* away") (emphasis added); *Campbell Soup Co.*, 225 NLRB 222, 225, 229 (1976) (finding employer's bargain-from-zero statement lawful in part because employer explained that "unions sometimes traded other benefits to secure union-shop and checkoff provision"); *Computer Peripherals, Inc.*, 215 NLRB 293, 293-94 (1974) (finding employer's bargain-from-scratch statement lawful because reasonable employee would understand employer's communications to mean that "the eventual outcome of employee benefits depended on the give and take of bargaining, wherein certain benefits might be reduced or taken away but other benefits could be increased or initiated in exchange").

Instead, the letter invoked the difficult economic climate—reiterating that “there are no guarantees that union representation will secure [employees’] livelihood”—and assured employees that Hendrickson would do “everything in [its] power to provide quality products,” so as to preserve employees’ jobs. (App. 45-46.) That context suggests to a reasonable employee—whose livelihood is dependent on the benefits being discussed—that Hendrickson was threatening to reduce existing benefits. Such a threat constitutes a coercive statement in violation of Section 8(a)(1).

Hendrickson ineffectually argues that its promise to bargain from scratch was protected by Section 8(c), contending that the statement could not have been construed as a coercive threat because Hendrickson made clear to employees that the wages and benefits they ultimately received would be the result of good-faith, give-and-take negotiations. (Br. 21-22, 31-33.) That argument fails where it begins because, as the Board found (App. 205), Hendrickson never provided such assurances. And while the Board did not specifically discuss the so-called assurances that Hendrickson identifies in its opening brief, that omission is well justified. As discussed below, a reasonable employee would not understand that Hendrickson intended to bargain with the Union in good faith.⁶

⁶ Hendrickson also argues (Br. 35) that the Board violated First Amendment principles by requiring Hendrickson to present the “other side of the [bargain-from-scratch] coin.” Hendrickson’s forced-speech argument relies solely on the

Hendrickson appears to contend that the letter's use of the phrase "bargaining process" clearly communicated to employees that good-faith, give-and-take bargaining would occur. (Br. 21.) But that argument falls flat, as calling bargaining a "process" does not shed any light on whether an employer will approach the bargaining table in good faith or whether it will "adopt a regressive bargaining posture designed to force a reduction of existing benefits." *Coach & Equip. Sales Corp.*, 228 NLRB at 440-41. Certainly, it does not counter the concerns that a reasonable employee would harbor given the letter's use of the "dangerous" bargain-from-scratch phrase and insistence that benefits would not increase should employees unionize.

Hendrickson then reaches beyond the four corners of the August 24 letter and asserts that two statements from the August 25 and 26 PowerPoint presentation cured any threatening implication stemming from the bargain-from-scratch

Board's statement "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." (*Id.* (quoting App. 205).) But Hendrickson's interpretation of the Board's statement is misguided. The statement is not a directive. Instead, it is merely an observation that Hendrickson's promise to bargain from scratch is not protected on the basis that it describes a "fact of industrial life" or on the basis that Hendrickson lacks control over the starting point of negotiations. See *Tri-Cast, Inc.*, 274 NLRB at 377 (holding an employer's statement may be protected if it described a "fact of industrial life"); *Okun Bros. Shoe Store, Inc.*, 825 F.2d at 107 (holding an employer's prediction about the consequences of unionization cannot constitute a threat if the predicted change falls outside the employer's control).

statement. (Br. 31-32.) But the first statement, that “[w]ages, benefits and all working conditions are up for negotiation” (App. 65), is analogous to “bargaining process” in that it adds nothing to the bare acknowledgement that there will be bargaining. The same is true of the second statement, that “every change . . . requires negotiations controlled by the union.” (App. 86.) Neither supports an inference that what employees ultimately received would be the result of normal give-and-take negotiations. In fact, if any inference about those statements were to be drawn, it would be to the contrary, given that both statements appear in slides that explicitly push anti-union messages.

In a final frisking of the record, Hendrickson also contends (Br. 39-40) that it advised its employees, in two sets of PowerPoint slides, that their wages and benefits might improve as a result of bargaining. Located near the end of the presentation, the first set of slides is composed entirely of tables of wage-and-benefit data for employees at several plants, including Hendrickson’s Lebanon Plant, with one plant being unionized and the others not. (App. 80-81.) The next set of slides begins with an image calling into question the veracity of a news article stating that employees at Hendrickson’s recently unionized Kendallville plant secured higher wages. It is followed by two slides of bullet points about how those employees are actually worse off than the Lebanon Plant employees. (App. 82-84.)

Neither set of slides contains an explicit acknowledgement that terms of employment may go up or down in bargaining. Nor do they imply as much: with the arguable exception of the obscured newspaper article, they do not provide any information, much less a before-and-after snapshot, of how employees' wages and benefits changed through collective bargaining. Hendrickson argues that the Kendallville wage-increase slide was a "very candid campaign statement[] that unions can . . . achieve wage and benefit increases." (Br. 39.) But Hendrickson's search "for bits and pieces of positive language" is merely an "attempt to lose us in the trees." *See Federated Logistics & Operations*, 400 F.3d at 926. Its argument completely ignores the fact that the slide in question defaced that Kendallville article, and that the next two slides were designed to demonstrate why Kendallville employees were actually worse off.

Ironically, even as it argues that the Board erred in not considering isolated statements in the PowerPoint presentation to interpret the letter's bargain-from-scratch promise, Hendrickson insists (Br. 34-35) that the Board erred in considering statements *within* the very same letter to interpret the promise. As an initial matter, this Court is jurisdictionally barred from considering that argument because it was not first presented to the Board. 29 U.S.C. § 160(e); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (Section 10(e) precludes courts of appeals from reviewing claims not raised before the Board).

Hendrickson’s exceptions to the Board asserted that its bargain-from-scratch statement was protected by Section 8(c). But they did not make the very different assertion that Section 8(c) barred consideration of the surrounding portions of the letter to assess the statement’s coerciveness.

In any event, there is no merit to Hendrickson’s challenge. While Section 8(c) instructs that noncoercive “views, argument, [and] opinion . . . shall not . . . be evidence of an unfair labor practice,” 29 U.S.C. § 158(c), the Board must consider the “total context” in which a statement occurs to assess coerciveness. *E.g.*, *Okun Bros. Shoe Store, Inc.*, 825 F.2d at 105. It is well established that an employer’s noncoercive speech may be used as “background evidence” for contextualizing conduct to determining whether the employer has committed an unfair labor practice. *See, e.g.*, *Galicks, Inc.*, 671 F.3d at 609 (“We do not need to decide whether the statements qualify as protected speech because even protected speech may serve as ‘background evidence of anti-union animus.’”) (quoting *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1474 (6th Cir. 1993)). Moreover, the legislative history suggests that Congress’s primary intent in incorporating Section 8(c) was protecting *unrelated* noncoercive speech from being used as evidence of an unfair

labor practice. *See Smith's Transfer Corp.*, 162 NLRB 143, 162 (1966) (detailing Section 8(c)'s legislative history).⁷

Indeed, this Court consistently uses *related*, noncoercive statements to determine whether a disputed statement is a coercive threat in violation of Section 8(a)(1). *See, e.g., Consol. Biscuit Co.*, 301 F. App'x at 434 (finding employer's bargain-from-scratch statement unlawful in part because of accompanying comments that criticized union); *Cooper Tire & Rubber Co. v. NLRB*, 156 F. App'x 760, 762, 766-67 (6th Cir. 2005) (finding employer's statement about loss of employee bonus coercive in part because it was accompanied by a reminder that unionized employees at employer's other facilities did not receive that particular type of bonus). In line with the above-stated, well-established principles, the Board evaluated whether the August 24 letter's bargain-from-scratch promise constituted a coercive threat in violation of Section 8(a)(1) by considering the entire context. That necessarily included consideration of the promise itself, as well as the statements in the rest of the letter containing the promise, which are *inarguably* related to the bargain-from scratch statement.

⁷ Even *Pittsburgh S.S. Co. v. NLRB*, the case that Hendrickson primarily relies on to support its argument that the Board was barred from considering the entire August 24 letter to interpret the bargain-from-scratch statement, supports the notion that the Board is only barred from considering unrelated speech. (Br. 22 n.20, 26-27 (citing *Pittsburgh S.S. Co. v. NLRB*, 180 F.2d 731, 735 (6th Cir. 1950) (“[Section 8(c)] was specifically intended to prevent the Board from using *unrelated* non-coercive expressions . . . as evidence”) (emphasis added)).)

II. Substantial Evidence Supports the Board’s Finding that Hendrickson Violated Section 8(a)(1) by Threatening To Introduce More Onerous Working Conditions in the Event of Unionization

Substantial evidence supports the Board’s finding that Hendrickson unlawfully coerced employees in violation of Section 8(a)(1) by predicting that, in the event of unionization, “the culture will definitely change,” “relationships will suffer,” and “flexibility [will be] replaced by inefficiency.” (App. 206-07.) Those statements were unlawful because they were not carefully phrased predictions based on objective facts but instead conveyed the message that Hendrickson would take retaliatory action against its employees for unionizing in the form of a more onerous work environment.

A. A Statement Warning of Negative Consequences of Unionization Will Constitute a Violation of Section 8(a)(1) if It Reasonably Conveys that the Employer Will Retaliate Against Employees

As noted above, an employer violates Section 8(a)(1) of the Act by threatening adverse changes in working conditions as retaliation for unionization. While Section 8(c) protects factual predictions respecting negative consequences of unionization, employers must tread carefully when making such statements so as to avoid conveying instead a retaliatory message. As the Supreme Court has held, “an employer’s [expression] rights cannot outweigh the equal rights of the employees to associate freely” and engage in other Section 7 activity. *Gissel Packing Co.*, 395 U.S. at 617. Accordingly, an employer’s prediction about the

negative consequences of unionization is unlawfully coercive if it reasonably conveys that those negative consequences will occur as a result of employer retaliation against its employees for their decision to unionize. *Id.* at 618.

Such an unlawful, retaliatory message may flow from misleading language, *Counter Const. Co. v. NLRB*, 482 F.3d 425, 439 (6th Cir. 2007), overstated language, *Gissel Packing Co.*, 395 U.S. at 620, or lack of adequate factual support. *DTR II*, 297 F. App'x 487; *Nat'l Propane Partners*, 337 NLRB 1006, 1018 (2002). In determining whether a prediction constitutes a threat, the Board considers the totality of the circumstances to determine how a reasonable employee may have interpreted the statement. *ITT Auto.*, 188 F.3d at 384. The unlawfully threatened consequences are often layoffs or facility closures. *Id.* at 386. But this Court and the Board have observed that predictions communicating “a simple threat to diminish, however slightly, the quality of employee working conditions should the employees” unionize are equally unlawful. *See Gen. Fabrications Corp.*, 222 F.3d at 231 (quoting *United Artists Theatre Circuit, Inc.*, 277 NLRB 115, 121 (1985)). Thus, even predictions implying the retaliatory institution of less flexible or friendly work environments are unlawful. Of course, a statement warning of adverse consequences can only constitute an unlawful threat if the forecasted change falls at least partially within the employer’s control. *See Okun Bros. Shoe Store, Inc.*, 825 F.2d at 107.

By contrast, a lawful prediction “must be carefully phrased on the basis of objective fact to convey an employer’s belief as to the demonstrably probable consequences beyond his control” *Gissel Packing Co.*, 395 U.S. at 618. To meet that standard, an employer must provide “*precise objective facts.*” *ITT Auto.*, 188 F.3d at 386 n.8 (emphasis added). The importance of both precision and an objective basis are illustrated by this Court’s decision in *DTR II*. Leading up to that decision, the Court had held in *DTR Industries v. NLRB* (“*DTR I*”) that an employer’s prediction that unionization would cause the company to lose more than half its business was lawful in part because, in the Court’s view, it was based on the objective evidence that current customers who sole-sourced product from the company would “likely split their business in order to have an alternative supply source in the event of a strike.” 39 F.3d 106, 114 (6th Cir. 1994). Subsequently, in *DTR II*, that same employer made additional predictions about the effects of unionization, telling employees that job loss, plant closures, and a change to the employer’s layoff policy would occur. The Court found those predictions unlawful because the employer had gone beyond its original prediction of significant lost business but “provided no objective facts to explain why layoffs, rather than alternative measures, would be a necessary.” *DTR II*, 297 F. App’x at 496. Such close examination of both the phrasing, and underlying support for, employer statements regarding the effects of unionization appropriately

implements the language of Sections 8(a)(1) and 8(c) in the particular context of the employer-employee relationship. *See, e.g., Indiana Cal-Pro, Inc.*, 863 F.2d at 1299 (holding employees, whose livelihoods are dependent on their employers, will more readily perceive an employer’s threat than would a disinterested party). Moreover, it heeds the Supreme Court’s counsel that employers should avoid “conscious overstatements” because such brinksmanship has a tendency to coerce employees. *Gissel Packing Co.*, 395 U.S. at 620.

B. Hendrickson’s Statements about Changes to Culture, Relationships, and Flexibility Constituted Unlawful Threats Because, in Context, They Conveyed that Hendrickson Would Retaliate Against Employees with More Onerous Terms and Conditions of Employment

Substantial evidence supports the Board’s finding that statements in Hendrickson’s August 25 and 26 PowerPoint presentation about adverse changes to workplace culture and relationships, as well as a shift from flexibility to inefficiency, constituted unlawful threats in violation of Section 8(a)(1). Given the surrounding context, both in the presentation and in the August 24 letter, those statements would be understood by reasonable employees as conveying the message that if they chose union representation, Hendrickson would retaliate by “changing [its] easy-going culture and by adopting a less flexible managerial approach in its workplace relationships,” such that employees’ working conditions would worsen significantly. (App. 198). While the presentation contained some

truthful statements regarding the consequences of unionization, broad phrasing carried it past any description of objectively based fact or probability within the meaning of Section 8(c) to deliver a coercive, retaliatory message.

As the Board described (App. 198 n.2, 206-07), the presentation (like the August 24 letter) began by extolling the benefits of Hendrickson’s then-existing workplace culture and relationship with its employees. The presentation described the plant as an “[e]asy-going” place where employees have the “[f]reedom to do [their] job” and opportunity for “[r]eward/advancement.” (App. 53, 55.) It also emphasized management’s “open door policy” and “[r]egular communications” with employees, asserting that “[w]e listen and follow through with [employees’] ideas, concerns, and suggestions.” (App. 53-54.) Given that description, a reasonable employee would understand Hendrickson’s warnings—that “flexibility [will be] replaced by inefficiency,” and “[t]he culture will definitely change” and “relationships suffer” if employees unionized—as threats to retaliate by eliminating the policies described to create a more onerous work environment, i.e., one more restrictive of employees’ autonomy and less responsive to their concerns and input. That retaliatory message was reinforced by the fact that the presentation so firmly linked Hendrickson’s existing flexibility and sensitivity to employee concerns to a cultural desire for positive, “direct” manager-employee relations. (App. 49-50, 54-55.)

As described, Hendrickson’s prediction of a loss of flexibility—when made in the same presentation that invoked existing employee freedoms—would lead employees to reasonably understand that Hendrickson was threatening to curtail employee autonomy after unionization. That message is analogous to those in myriad cases where the Board has found unlawful employer threats to reduce workplace freedoms and flexibility in the event of unionization. *See Action Carting Env’t Servs., Inc.*, 354 NLRB 732, 745 (2009) (holding employer’s statements that it would “no longer give leeway to employee’s personal situations” constituted unlawful threats); *Aero Tec Labs.*, 269 NLRB 705, 706 (1984) (holding employer unlawfully threatened employees by predicting that “things are pretty easygoing but that might have to change if the [u]nion comes in” and that the employer “would have to be stricter so that the employees will have to follow the rules more closely”).⁸

Hendrickson now claims that its flexibility prediction was solely referencing “the Company’s ability to maintain *its* efficiency.” (Pet’r Br. 43-45). But the prediction, as made to employees, was not so narrowly stated. Indeed, unlike

⁸ *See also Allegheny Ludlum Corp.*, 320 NLRB 484, 484, 488 (1995) (holding employer threatened more onerous terms of employment by promising less flexibility in its leave policy should the employees elect for union representation), *enforced in relevant part*, 104 F.3d 1354 (D.C. Cir. 1997); *Vinyl-Fab Indus.*, 265 NLRB 1097, 1108-09 (1983) (holding employer threatened more onerous terms of employment by, *inter alia*, stating that unionization would lead to the regimentation of work rules).

Kawasaki Motors Manufacturing, where the lawful statement about flexibility was inseparably tied to objective statements about management’s operational prerogatives, Hendrickson’s communication about a reduction in flexibility had no direct link to managerial efficiency. 280 NLRB 491, 496 (1986), *enforced*, 834 F.2d 816 (9th Cir. 1987) (“[W]e need versatility. We need to be able to use people in jobs where they are needed. Most contracts restrict employees in job classifications.”). And to the extent Hendrickson may have *intended* to communicate that unionization would undermine its ability to maintain efficiency, “it is the tendency of a statement to coerce that is relevant, not the intent of the statement’s maker.” *Jag Healthcare, Inc.*, 665 F. App’x at 449.

Hendrickson’s retaliatory warnings that relationships and culture would suffer were not cured by its truthful statements, acknowledged by the Board (App. 207), that it would negotiate all terms of employment with the Union. Instead, as the Board found, a reasonable employee would understand that Hendrickson “might not or would not be responsive to [employee] concerns even through negotiations with a union.” (App. 206.) As described above, the primary inference—that Hendrickson would no longer be responsive to employee concerns—flows from the presentation’s description of the existing relationships and culture to be changed or lost with unionization. The secondary inference—that Hendrickson would not commit to the same responsiveness in collective

bargaining as it had displayed in direct relationships, perhaps because it would not consider concerns relayed by the Union on behalf of employees to be genuine employee concerns—is drawn in part from the presentation’s warning that Hendrickson would deal with “the union—not [employees].” (App. 86.) But, as the Board found (App. 206), reasonable employees were also more likely to understand the presentation’s message of non-responsiveness as extending to collective bargaining because they saw the presentation only a day or two after receiving Hendrickson’s letter unlawfully threatening to approach the bargaining table with a bad-faith, regressive posture. *See, e.g., Coach & Equip. Sales Corp.*, 228 NLRB at 441 (holding that contemporaneous threats or unfair labor practices are relevant in determining “whether there is a threatening color to the employer’s remarks”).

For the same reasons, the Board reasonably found that Hendrickson’s broadly stated predictions went “beyond the permissible communication that unionization will bring about a change in the direct relationship between management and employees.” (App. 206.) As demonstrated, the Board found that Hendrickson not only communicated that unionization would reduce employees’ ability to air concerns, but also communicated “that potential unionization would sound a death knell for [Hendrickson’s] ability to be responsive to any of its employees’ issues and concerns.” (App. 206.) The Board’s finding that

Hendrickson's overstatements were unlawful is analogous to this Court's holding in *General Fabrications Corp.*, that the loss of a direct management-employee relationship did not entail a limitation on handling personal requests on an "informal" basis, and thus did not support the employer's threat that it would. 222 F.3d at 231. It is also similar to the Court's holding in *DTR II*, that objective evidence that unionization would result in a significant loss of business could not support the employer's threat of layoffs and plant closures. *DTR II*, 297 F. App'x at 496. Those rulings reaffirm that employers cannot shield their retaliatory threats by simply pointing out that the same speech or communication included some permissible or protected statements.⁹

Finally, Hendrickson exercised control over the threatened adverse consequences of unionization. For example, the Board found that Hendrickson threatened to "adopt[] a less flexible managerial approach in its workplace relationships." (App. 198 n.2.) Hendrickson could carry out that threat by taking measures such as ending its open-door policy, changing the "easy-going atmosphere," or reducing employees' "freedom to do [their] job." (App. 53-54.) Hendrickson contests the Board's finding that Hendrickson threatened to take a

⁹ Hendrickson argues (Br. 44-45) that the Board erred in using other statements scattered throughout the presentation to determine whether the predictions about culture, relationships, and flexibility constituted unlawful threats. Those arguments are without merit for the same reasons the Board properly read the bargain-from-scratch statement within context of the entire August 24 letter. *See supra* pages 25-27.

hard managerial approach to workplace relationships, arguing that its “relationships will suffer” statement was only predicting, as mentioned by the judge, that “relationships with coworkers will suffer.” (Br. 41 n.29 (citing App. 198 n.2, 206).) It further argues that such a prediction could not be unlawful because an employer cannot affect inter-employee relationships. (Br. 41). To the contrary, substantial evidence supports the Board’s finding that Hendrickson’s threat involved *management*. The presentation had two slides titled “Relationship Building,” and those slides focused almost exclusively on aspects of the *manager-employee* relationship. (App. 54-55). Indeed, they described how managers listened to employees, maintained an open-door policy such that employees could “just come in and talk to anyone, even [the] GM,” and “care[d] about [employee] safety, including ergonomics.” *Id.* Clearly, a reasonable employee would consider those aspects of the manager-employee relationship to be at risk when told by Hendrickson that their “relationships [would] suffer.” (App. 86.)¹⁰

¹⁰ Moreover, to the extent that Hendrickson’s argues it lacks control over inter-employee relationships, that argument is clearly meritless. An employer need only exercise *some* control over the threatened consequence in order to violate Section 8(a)(1). *See Okun Bros. Shoe Store, Inc.*, 825 F.2d at 107. Surely, to some degree, Hendrickson could harm its employees’ interpersonal relationships by changing, reducing, or altogether ending programs or workflows that encourage, develop, and maintain interpersonal relationships. For instance, it could devalue its commitment to “teamwork,” dismantle its “product teams,” or discontinue its “roundtable discussions.” (App. 51, 53-54.)

CONCLUSION

For the above stated reasons, Hendrickson violated Section 8(a)(1) of the Act by warning employees that it would bargain from scratch and that culture, flexibility, and relationships would suffer if they decided to unionize.

Accordingly, the Board respectfully requests that the Court deny Hendrickson's petition and enforce the Board's Order in full.

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June 2018

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FOR THE SIXTH CIRCUIT**

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v.)	Board Case No.
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NATIONAL LABOR RELATIONS BOARD)	
)	
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)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this final brief contains 8,774 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 20th day of June 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, I electronically filed the foregoing document with the Clerk for the Court of the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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