

CASE NOS. 18-1144 & 18-1315

**IN THE 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 OF A DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD,
CASE NO. 09-CA-159641***

**REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT
HENDRICKSON USA, LLC**

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INTRODUCTION

The NLRB’s enforcement-seeking brief seeks to fly under the Circuit-review radar by: (1) not announcing that the legal test that it hopes to apply¹ to Hendrickson’s “bargaining from scratch” electioneering is *not* the circuit-sanctioned legal test²; (2) claiming one of this Court’s bothersome standard-of-review precedents has been

¹ “[There must be] an [accompanying] explicit acknowledgment that the terms of employment may go up or down in bargaining” (NLRB Br.p.25; Doc.20,p.33). “Hendrickson did not promise to bargain with the Union in good faith” (*Id.* at p.20). “Neither did the [Hendrickson] letter explain that, through the give and take of negotiations, employees’ benefits could go up or down” (*Id.* at pp.20-21).

² *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34,37-41(1st Cir. 1989)(Breyer, J.)(sanctioning “bargaining from scratch” because it “did not indicate that the employer would ‘unilaterally discontinue existing benefits if the employees selected union representation’” and there must be “evidence that the employer would itself reduce benefits upon a union victory”), *reversing*, 289 NLRB 844(1988); *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945,957(6th Cir. 2000)(prohibited “bargaining from scratch” must “threaten to *reduce* or *eliminate* benefits before bargaining”), *reversing*, 325 NLRB 905(1998)(emphasis in original); *UNF West, Inc. v. NLRB*, 884 F.3d 451,458(5th Cir. 2016)(prohibited bargaining from scratch “statements [must] carry ‘an implication that the employer may or may not take action solely on his own initiative...’”); *Webco Indus. v. NLRB*, 47 F.3d 1306,1317(10th Cir. 2000)(prohibited “bargaining from scratch” must connote “‘that benefits will be [unilaterally] taken away and the union will have to bargain to get them back’”)(quoting, *Bi Lo*, 303 NLRB 749,750(1991)).

overruled *sub silentio*,³ even though sister circuits continued to cite⁴ and apply its holding;⁵ and (3) allowing the First Amendment merely a cameo appearance.⁶

Succinctly stated, the Board’s brief is “...a sort of interpretative triple bank shot, and just stating the theory is enough to raise a judicial eyebrow”. *Epic Sys. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612, ___, slip.op. p.15 (May 21, 2018) (rejecting NLRB’s over-reaching interpretation of the NLRA).

³ “[*NLRB v. Hobart Bros. Co.*, 372 F.2d 203 (6th Cir. 1967)]...predated the Supreme Court’s *Gissel* decision” (NLRB Br.n.2).

⁴ *AI Orphan v. Furnco Const. Corp.*, 461 F.2d 795, 799 (7th Cir. 1972); *Moore v. Sunbeam Corp.*, 459 F.2d 811, n.10 (7th Cir. 1972).

⁵ Where the NLRB appellate issue is one of “‘application of the law...to established and undisputed findings of fact’ we do not accord the Board such [deferential] breathing room”. *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1128 (D.C. Cir. 2017), *reversing*, 361 NLRB No.55 (2014). “Our review is *de novo* because ‘[t]his court owes no deference to the Board’s interpretation of a disputed collective bargaining agreement’”. *Spectrum Health-Kent Comm. Campus v. NLRB*, 647 F.3d 341, 345 (D.C. Cir. 2011).

⁶ The Board mentions, but makes no effort to apply the First Amendment-limiting principals: “[Section 8(c)] merely implements the First Amendment” (NLRB Br.p.14). But see, *NLRB v. Hobart Bros. Co.*, 372 F.2d 203, 206-207 (6th Cir. 1967), *reversing*, 150 NLRB 956 (1965) (“The employer’s constitutional right to free speech, also guaranteed under Section 8(c), should not be so easily restricted”).

ARGUMENT

A. Accurate Standard of Review Principles.

The NLRB asserts that it – and it alone – is uniquely qualified and best suited to determine whether printed text in a document *could* be construed by a reader as coercively violative of §8(a)(1) of the National Labor Relations Act. This Circuit, and others, have held that no such extraordinary deference is due and owing to the NLRB under these circumstances, and most assuredly is not due and owing to the Board in the particular setting of this case.

This Court has stated that “...the NLRB’s findings can be set aside if, ‘the record demonstrates that the Board’s decision is not “justified...by the Board’s ‘informed judgment on matters within its special competence’””. *Dayton Newspaper, Inc. v. NLRB*, 402 F.3d 651,659(6th Cir. 2005).⁷ The Labor Board, of course, has no superior or special expertise in interpreting written text. This Court has recognized this obvious and undeniable fact:

[T]he Board’s construction of a writing is not sacrosanct and...we have the right, if not the duty, to correct an impermissible and unfounded inference drawn therefrom.

In this case, where the only question is whether or not the letter contained a threat within the meaning of the Act, the Court should be free to reject an improper inference drawn by the Board, particularly

⁷ *Dayton Newspaper* was approvingly cited multiple times by the NLRB in its enforcement brief, but not for this standard of review proposition (NLRB Br. 12,14,15).

since what is actually involved is the legal application of the “threat” to the letter.

NLRB v. Hobart Bros. Co., 372 F.2d 203,206(6th Cir. 1967), reversing, 150 NLRB 956(1965). The NLRB’s footnoted claim that *Hobart* has been overruled, *sub silentio*, by the subsequently-occurring Supreme Court decision in *NLRB v. Gissel Packing*, 395 U.S. 575(1969)(NLRB Br. at n.2) is not accurate. Circuits have continued to approvingly cite *Hobart* for this very proposition of law, after the Supreme Court’s 1969 *Gissel* decision. See, *AI Orphan v. Furnco Const. Corp.*, 461 F.2d 795,799(7th Cir. 1972)(“[W]e decline to follow a National Labor Relations Board trial examiner’s...characterization of this...[written] clause,” citing *Hobart*); *Moore v. Sunbeam Corp.*, 459 F.2d 811,n.10(7th Cir. 1972)(“[W]e are not bound to follow the Board’s construction of written instruments”, citing *Hobart*). And the Board’s characterization of *FedEx Home Delivery v. NLRB*, 849 F.3d 1123(D.C. Cir. 2017) as just an unremarkable appellate opinion where the reviewing court opted not “...to defer to the Board’s application of *common law* agency principles”⁸ is, once again, inaccurate. Rather, *FedEx Home Delivery* held that because the issue before the NLRB was one “involving no special administrative expertise that a court does not possess”, the agency would not receive the benefit of a deferential standard of judicial review. *FedEx Home Delivery v. NLRB*, 849 F.3d 1123,1128(D.C. Cir.

⁸ NLRB Br. p. 13.

2017)(quoting, *NLRB v. United Ins. Co. of America*,390 U.S. 254, 88 S.Ct. 988(1968)). *Hobart*, then, is alive and well and stands squarely in the way of the Board’s quest for a forgiving, deferential standard of review in this text-based workplace dispute.

Even setting aside the Labor Board’s lack of expertise in linguistics, deferential judicial review is not called for in this particular employment dispute and the setting in which it arises. As the Board’s appellate counsels confess, its ALJ (and the full Board which adopted the ALJ’s “bargaining from scratch” decision without comment) “...did not specifically discuss the so-called [employee] assurances that Hendrickson identifies in its opening brief” (NLRB Br.p.22). What the NLRB’s appellate lawyers offer this Court in their briefing is *post hoc* back-fill. The Board as a fact-finding agency never considered, much less discussed or explained away, the following undisputed facts that appear in the stipulated evidentiary record:

- In its PowerPoint® presentation, Hendrickson apprised the Kentucky workforce: “Wages, benefits and all working conditions are up for negotiation”(Appx.65).
- In that same PowerPoint®, Hendrickson informed its workforce: “Every change to wages, hours, and conditions requires negotiations controlled by the union – not you.(Appx.86).⁹

⁹ Through the vehicle of ellipses, the Board’s Circuit brief seeks to blunt the assurances provided by this Hendrickson (arguably pro-union) statement (NLRB Br.p.24).

- Another PowerPoint® slide showed the Hendrickson Kentucky workforce how the very Steelworkers Local Union attempting to organize its plant had, through the collective bargaining process, managed to achieve hourly wage rates for certain work classifications that exceeded those then being paid by Hendrickson(Appx.80).¹⁰
- Yet another PowerPoint® screenshot informed the gathered Kentucky workforce that Hendrickson’s Kendallville, Indiana unionized facility had managed to extract wage increases through the collective bargaining process(Appx.82).
- In one of the group communicative meetings, a worker asked if the Kentucky plant would close if it became unionized, and Hendrickson management, without hesitation, assured the gathered workers that would not happen(Appx.42).

In its plea for judicial deference, the Board loses sight of why circuit review deference is even afforded to that administrative agency: “The waiver rule of Sec. 160(e) ‘affords the Board the opportunity to bring its labor relations expertise to bear on the problem so that we may have the benefit of its opinion when we review its determinations’”. *Kitchen Fresh v. NLRB*, 716 F.2d 351,358(6th Cir. 1983)(citing, *NLRB v. Allied Products*, 548 F.2d 644,653(6th Cir. 1977)). Where, as here, the NLRB and its ALJ never bothered to engage in a serious and credible application of the law to a series of jointly-stipulated facts (ignoring all the evidence that detracted from a desired result), judicial deference is not in order. “[T]he NLRB’s findings can be set aside if ‘the record demonstrates that the Board’s decision is not “justified

¹⁰ In its Circuit brief, the NLRB doesn’t even mention, let alone explain away, this uncontested fact(NLRB Br., *passim*).

by a fair estimate of the worth of the [evidence]...””. *Dayton Newspaper, Inc. v. NLRB*, 402 F.3d 651,659(6th Cir. 2005). ““The Board may not distort the fair import of the record by ignoring whole segments of uncontroverted evidence””. *Good Samaritan Med Ctr. v. NLRB*, 858 F.3d 617,628(1st Cir. 2017). The NLRB in this case made no estimate of a vast array of outcome-determinative evidence (NLRB Br.p.22). Even if the review standard were one of “substantial evidence in the record as a whole”, reversal of the Board’s determination is warranted. *Allentown Mack Sales & Srv. v. NLRB*, 522 U.S. 359,375, 118 S.Ct. 818(1998) (“[The NLRB cannot engage in ‘systematic under evaluation of certain evidence’”, reversing NLRB under “substantial evidence” review standard). The Board’s decision here simply is not “honest and legitimate adjudication”. *Id.*

The National Labor Relations Act itself requires “...findings of fact of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive”. 29 U.S.C. §160(e). The Act does not state, however, that *non-findings of fact* should receive the same “hands-off” circuit deference when they are manufactured by the Board’s appellate counsels in a circuit-review brief.

Additionally: “[W]e review the NLRB’s legal conclusions *de novo*”. *NLRB v. Alternative Ent.*, 858 F.3d 393,400(6th Cir. 2017). “This Court reviews the NLRB’s ‘legal conclusions *de novo* and its factual findings under a substantial evidence

standard’”. *Harborside Healthcare v. NLRB*, 230 F.3d 206, 208 (6th Cir. 2000) (quoting, *Ky. River Cmty. Care, Inc. v NLRB*, 193 F.3d 444 (6th Cir. 1999)). “We do not, however, defer to NLRB’s legal conclusions interpreting agreements”. *Staffco of Brooklyn v. NLRB*, 888 F.2d 1297, 1302 (D.C. Cir. 2018).

Finally, when it comes to trying to reconcile the NLRB’s decision with the no-less important Section 8(c) NLRA right of Hendrickson to guarantees of the First Amendment to the United States Constitution, the Board does not receive circuit acquiescence. “[T]his Court has ‘never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA’”. *Epic Systems v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612, ___, slip.op. p.20 (May 21, 2018) (rejecting NLRB’s advocated position of how to interpret the NLRA) (quoting, *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 144 (2002)). Instead, “courts must exercise independent interpretative judgment” where the NLRB seeks to “‘bootstrap itself into an area in which it has no jurisdiction’”. Slip.op. at p.20 (quoting, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)). This is the position of the Sixth Circuit as well. “[T]he instant case deeply implicates the First Amendment right to bring suit, and courts, more than agencies, have expertise in determining the scope of that right”. *NLRB v. Allied Mech. Svcs.*, 734 F.3d 486, 491 (6th Cir. 2013), *reversing*, 357 NLRB 1223 (2011). “Congress has of course largely delegated labor policy to the NLRB, but not

necessarily policy regarding First Amendment freedoms”. *Id.* at 492. “Thus, in determining whether substantial evidence supports the Board’s decision in this case, our deference is limited by the realization that the purposes for the deference to a large extent do not apply in this case” *Id.*

These circuit review principles are the legally correct ones that should shape this Court’s analysis of this case.

B. “Bargaining from Scratch” – The NLRA Prohibition of an Employer’s Coercive Threat to Unilaterally Act.

The most thorough, and most exacting analysis of the NLRB’s and federal circuit court treatment of “bargaining from scratch” union campaigning by employers is now-sitting Supreme Court Justice Breyer’s opinion in *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34(1st Cir. 1989), *reversing*, 289 NLRB 844(1988), yet the Board deems *Shaw* no more worthy than a simple, passing reference (NLRB Br.p.21). *Shaw*’s memorandum opinion header was: “*The Board’s Departure from Precedent*”, so it is little wonder why the NLRB would prefer to sidestep *Shaw*’s analysis and holding. Summarizing, and at times quoting from Board decision to Board decision, *Shaw* reasoned that the relevant “bargaining from scratch” legal inquiry is whether that phrase, in its overall delivered context, communicated the notion that the employer would “unilaterally discontinue existing benefits if the employees selected union representation...rather [than the idea that] existing benefits may be lost as a result of bargaining”. *Id.* at 38. *Shaw*

carefully traced when “bargaining from scratch” will or will not be properly construed as a prohibited §8(a)(1) act of coercion: “The Board [in *Campbell Soup Co.*, 225 NLRB 222(1976)] found no violation because there was no evidence that the employer would itself reduce benefits upon a union victory, but only that through bargaining the union might decide to trade existing benefits for other benefits”. *Id.* This threat to unilaterally act so as to reduce wages, benefits and terms and conditions of employment for a workforce in the event of unionization was exactly what *Shaw* found to be the “...boundary between the lawful and unlawful”. *Id.* at 41.

Shaw's threat-to-unilaterally-act is the unanimous circuit test. “If the statement in its context ‘fail[s] to include any reference to the collective-bargaining process or to any economic necessities or other objective facts as a basis for its prediction that wages might be reduced’, then it is impermissible, *because it implies that the employer may act on its own initiative, unilaterally, and for its own reasons.*” *UNF West, Inc. v. NLRB*, 844 F.3d 451,458(5th Cir. 2016)(emphasis added); *Webco Indus. v. NLRB*, 47 F.3d 1306,1317(10th Cir. 2000)(prohibited “bargaining from scratch” must connote ““that the benefits will be [unilaterally] taken away and the union will have to bargain to get them back””); *International UAW v. NLRB*, 1988 WL 138930,*3(6th Cir. Dec. 28, 1988)(““If there is any implication that an employer may or may not take action solely on his own initiative...the statement is no longer a

reasonable prediction based on available facts but a threat of retaliation...”) (quoting, *NLRB v. Gissel Packing*, 395 U.S. 575, 618 (1969)).

In *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945 (6th Cir. 2000), reversing, 325 NLRB 905 (1998), this Court undertook its most thorough analysis of “bargaining from scratch” and also reversed the NLRB’s “coercive” legal determination. The *St. Francis Healthcare Ctr.* panel overruled the NLRB precisely because the inference that its ALJ drew from the evidence did not meet the uniform Circuit test: “[T]he testimony of Rose and Kimmet does not support a finding that Stover threatened to *reduce* or *eliminate* benefits before bargaining began”. *Id.* at 957 (emphasis in original). In fact, *St. Francis Healthcare* not only towed the circuit line on this point of law, it established the following burdens that the Board *must* meet in order to establish the requisite coercion:

In assessing such [bargaining from scratch] representation, the Board must consider the timing of the statement, the opportunity to respond, and the content of the union’s response.

Id. at 956. The Board and its ALJ never met these burdens because they were ones they could not possibly meet given the stipulated evidentiary record. The “bargaining from scratch” phrase was used just once by Hendrickson, in a letter distributed before the Steelworkers Union could even garner the statutory 30% needed to petition for a NLRB-supervised election. Campaign statements are more likely to correctly be found coercive where they are made on the eve, or close to the

scheduled election when voting occurs. “[T]he Board must engage in closer scrutiny when the alleged unlawful actions occurred ‘on the doorstep of the election’”. *Cooper Tire & Rubber v. NLRB*, 156 F.App’x. 760,*767(6th Cir. 2006)(quoting, *V&S Schuler Eng’g. v. NLRB*, 309 F.3d 362,373(6th Cir. 2002)). Mr. Pemberton, the announced leader of the so-called “union organizing committee,” never responded to Hendrickson’s communiqué. But see, *NLRB v. Hobart Bros.*, 372 F.2d 203,207(6th Cir. 1967)(“[I]t is up to the participants in a union campaign to find and counteract any statement that they deem inaccurate or misleading”). As *St. Francis Healthcare* correctly held: “[T]he reference in one piece of literature to bargaining ‘from zero’ was entirely permissible and was not coercive.” *Id.* at 957.

That Hendrickson would not act unilaterally if the Steelworkers were so fortunate as to be voted in as the workers’ majority representative, and instead would negotiate any and all changes to its workforce’s then-existing wages, hours, and terms and conditions of employment is both undeniable and undisputable here. That fact was made perfectly clear through a factual stipulation:

- Every change to wages, hours, and conditions, requires negotiations controlled by the union – not you.

(Appx.86). The NLRB even confesses to this Court the transparency of this Hendrickson promise: “[Hendrickson delivered] truthful statements, acknowledged by the Board (Appx.207) that it would negotiate all terms of employment with the Union” (NLRB Br.p.34).

The NLRB hopes to lessen the destructive blow of this unfair labor practice-defeating statement by Hendrickson by labelling it as nothing more than a description of the “bargaining process” (NLRB Br.p.24). But even that unfair and inaccurate characterization will not do: “But if the statement in its context ‘fail[s]’ to include any reference to *the collective bargaining process*...then it is impermissible...”. *UNF West, Inc. v. NLRB*,844 F.3d at 458. The truthful, accurate, employee-educating statement that collective bargaining “begins from scratch” cannot be “transmuted by the magic of semantic labels into threats”. *Hecla Min. Co. v. NLRB*,564 F.2d 309,316(9th Cir. 1977).

Instead of invoking and applying the employer threat to take unilateral action circuit test, the NLRB champions a different test for deciphering hypothetical Section 8(a)(1) coercion, and it is one involving magic words and magic phrases:

Hendrickson did not promise to bargain with the Union in good faith.

* * *

Neither did the letter explain that, through the give and take of negotiations, employees’ benefits could go up or down.

* * *

Neither set of [PowerPoint®] slides contains an *explicit acknowledgment*¹¹ that terms of employment may go up or down in bargaining.

¹¹ Hendrickson assumes that the Board wants an “explicit acknowledgment” that wages and benefits may go up in the event of unionization because the implication that such could occur is clearly present in this record (Appx.80,82).

(NLRB Br.pp.20,23,25). The NLRB's chosen test not only compels Hendrickson to speak where it would prefer to remain silent, it compels Hendrickson to espouse pro-union messages in order for it to articulate what is a truthful fact of federal labor law.

That what the NLRB wishes the test to be is not what the circuit test in fact is, is perhaps best evidenced by what was judicially sanctioned in *Shaw* by now-Justice Breyer, where the employer told its workers “‘if they were to turn their affairs over to’ the union, they would be guaranteed ‘minimum wages and workmen’s comp and that’s where [the] collective bargaining process would begin’”. *Cooper Tire & Rubber Co. v. NLRB*, 156 F.Appx. 760,*764(6th Cir. 2005)(citing, quoting, and analyzing *Shaw*).

Hendrickson clearly met the settled, workable circuit legal test for “bargaining from scratch” campaigning -- that any reductions to workers’ wages and conditions of employment would only occur through the collective bargaining process, not unilaterally: “*Every change to wages, hours, and conditions requires negotiations controlled by the union*” (Appx.86).

The Board’s reliance on *NLRB v. Gen. Fabricators*, 222 F.3d 218(6th Cir. 2000), *NLRB v. Consolid. Biscuit Co.*, 301 F.Appx. 411(6th Cir. 2008), and *Cooper Tire & Rubber Co. v. NLRB*, 156 F.Appx. 760(6th Cir. 2005)(NLRB Br.pp.27,29,36) is inapposite. In *Gen. Fab.*, the employer “...told the employees that negotiations would start from ground zero, and employees would work under the rate [the owner]

set”. *Id.* at 224. That sort of statement clearly connoted that General Fabricators intended to unilaterally act, without going through the collective bargaining process. In *Consolidated Biscuit*, the employer set upon a scorched-earth anti-union campaign, terminating numerous employees who supported the union. *Id.* at **422-433. The at-issue §8(a)(1) statement was:

When you begin to bargain you start from zero, you don’t start from where you’re at and bargain forward. It’s a give and take situation. That [the boss] ain’t going to just give something and just give it away. Like he said that we got the turkeys, the ham, and our cookie box, and if the Union comes in there, a lot of that stuff we won’t even have because they put it all on the table. And he said that we won’t get probably none of that after it’s all over with.

Id. at *434. This Court held that the owner’s promise “that other benefits would be lost, such as holiday hams and turkeys” was its undoing. “[The] comment that employees would probably ultimately lose specific benefits negated this [‘you start from zero’] lawful aspect of [the owner’s] speech”. *Id.* *Cooper Tire*¹² involved a union campaigner’s question “[i]f the IBEW gets in here, will we still be eligible for the ROAM bonus?” to which the employer responded: “I don’t know” *Id.* at *762 even though the at-issue bonus had already been earned and vested by the employees. *Id.* This Court correctly held: “[I]t is the uncertainty cast upon the employee’s receipt of a bonus to which they were already fully entitled that makes the statement coercive”. *Id.* at * 766.

¹² Judge Batchelder dissented from this decision affirming the NLRB.

This Court, then, should reject the NLRB's call for a new, and more burdensome legal litmus test. "We review the NLRB's legal conclusions *de novo*". *NLRB v. Alternative Ent.*, 858 F.3d 393, 400 (6th Cir. 2017).

C. First Amendment Balancing.

The NLRB's enforcement-seeking brief is remarkable for its complete absence of any discussion over whether that administrative agency's suggested legal test for "bargaining from scratch" union campaigning would run afoul of the First Amendment to the United States Constitution (NLRB Br.p.14, *passim*). The Board does not even make an effort to balance its proffered §8(a)(1) analytical approach with the National Labor Relations Act's First Amendment guarantees through §8(c) of the Act, 29 U.S.C. §160(c).

The employer's constitutional right to free speech, also guaranteed under §8(c), should not be so easily restricted. Rather, it is up to the participants [in] a [union] campaign to find and counteract any statement that they deem inaccurate or misleading.

NLRB v. Hobart Bros., 372 F.2d 203, 206-207 (6th Cir. 1967), *reversing*, 150 NLRB 956 (1965).

Content-based regulation of speech is "...presumptively unconstitutional and may be justified only if the government proves [its restrictions] are narrowly tailored to serve compelling state interests". *Reed v. Town of Gilbert*, 576 U.S. ___, ___, 135 S.Ct. 2218, 2226 (2015). "This stringent standard reflects the fundamental principle that governments have "no power to restrict expression because of its message, its

ideas, its subject matter, or its content””” *Id.*(quoting, *Police Dept. of Chicago v. Mosley*, 408 U.S. 92,95(1972)).

Suggesting that Hendrickson could only inform (truthfully) its employees that the collective bargaining process “begins from scratch” if it simultaneously “...promised to bargain with the union in good faith,”¹³ and “explicit[ly] acknowledged that the terms of employment may go up or down in bargaining”¹⁴ unquestionably runs headlong into the First Amendment. “Compelling individuals to mouth support for views they find objectionable violates the cardinal constitutional command, and in most contexts, any such effort would be universally condemned”. *Janus v. State, County & Municipal Employees Council 31*,__ U.S. __, slip.op. at p.8(June 27, 2018). So would the Board’s requirement that “bargaining from scratch” must “...explain that, through the give and take of negotiations benefits could go up or down”(NLRB Br. pp.20-21). “Because the government cannot compel speech, it also cannot ‘require speakers to affirm in one breath that which they deny in the next’”. *Masterpiece Cakeshop v. Colorado Civil Rights Comm.*,__ U.S. __, slip.op. p.10(Thomas, J., *concurring*)(June 4, 2018)(quoting, *Pacific Gas & Elec.*,475 U.S. 1,16, 106 S.Ct. 903(1986)). “The government...may not...‘be an instrument for fostering public adherence to an ideological point of view

¹³ NLRB Br.p.20.

¹⁴ NLRB Br.pp.23,25.

[a speaker] finds unacceptable’”. *New Doe Child No. 1 v. Congress of the United States*, 891 F.3d 578, ___ (6th Cir. May 29, 2018). “[W]here the [sovereign’s] interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message”. *Id.* (quoting, *Wooley v. Maynard*, 430 U.S. at 705, 715 (1977)). “By compelling individuals to speak a particular message, such [a law] ‘alter[s] the content of [that] speech’”. *Nat’l. Inst. of Family and Life Advocates v. Becerra*, ___ U.S. ___, slip.op. p.7 (June 26, 2018) (quoting, *Riley v. Nat’l. Fed. of Blind, N.C.*, 487 U.S. 781, 795 (1988)). “When speech is compelled...individuals are coerced into betraying their convictions”. *Janus v. State, County & Municipal Employees Council 31*, ___ U.S. ___, slip.op. p.9 (June 27, 2018).

Hendrickson wishes to inform its workers under the siege of a union organizing campaign that the collective bargaining process “begins from scratch”, not the pro-union statement that “...through the give and take of negotiations, benefits *could go up* or down” (NLRB Br.pp.20-21). Section 8(c) of the National Labor Relations Act affords Hendrickson that unalienable right. “For corporations as for individuals, the choice to speak includes within it the choice of what not to say”. *Pacific Gas & Elec. Co. v. Pub. Utilities Comm. of Cal*, 475 U.S. 1, 16 (1986).

D. The NLRB’s Raised-Below “Waiver” Claim.

The NLRB states that Hendrickson waived its right to inform the Court about the legislative history, and precipitating causes for Section 8(c) of the Act, which statutorily guarantees Hendrickson’s First Amendment speech rights (NLRB Br.pp.25-26). This is an inaccurate distraction. Hendrickson’s briefing below, both to the Administrative Law Judge, and the full NLRB, repeatedly argued in detail that Section 8(c) protected the select statements that the Board plucked from total context and targeted as being illegal (Appx.118,127 n.17,183--NLRB Exception No.3). Hendrickson even went so far as to argue Congress’ intent under Section 8(c)(Appx. 118). That Hendrickson has now cited additional Section 8(c) legislative history to support its arguments in this Court does not pose a 29 U.S.C. §160(e) waiver issue. “The crucial question in a Section 160(e) analysis is whether the Board ‘received adequate notice of the basis for the objection’”. *NLRB v. FedEx Freight*,832 F.3d 432,437(D.C. Cir. 2010).

E. “Flexibility”, “Relationships Suffer”, and “The Culture Will Definitely Change”.

1. Principles of NLRA “Robust, Wide-Open Debate”.

While the Board’s brief relies heavily on the Supreme Court’s decision in *NLRB v. Gissel Packing*,395 U.S. 575(1969),¹⁵ it remains strangely silent on the

¹⁵ NLRB Br.12,14,28,29,30,31.

concurrently issued Supreme Court decision in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S.Ct. 257(1966). *Linn* defined the interaction between Section 8(a)(1) and Section 8(c) of the Act:

We acknowledge that the enactment of §8(c) manifests a Congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered “against the background of a profound...commitment to the principle that debate...should be uninhibited, robust, and wide-open, that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.

Linn v. United Plant Guard Workers of America, 383 U.S. 53, 62, 86 S.Ct. 657(1966)(quoting, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 84 S.Ct. 710(1964)). Furthermore, consistent with the First Amendment, Section 8(c) must be read with the following precept in mind:

[T]he basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda [and] free debate of ideas will result in the wisest government policies.

Dennis v. United States, 341 U.S. 494, 503(1951).

Citing *Linn*, this Court has stated: “The Board itself has long held that these [union campaign] situations are similar to political campaigns, where wide latitude must be allowed to participants to air charges and countercharges”. *NLRB v. Hobart Bros. Co.*, 372 F.2d 203, 206(6th Cir. 1967). Accordingly: “[O]ur review [under §8(c)] must include consideration of any record evidence that runs contrary to the Board’s findings”. *DTR Indus. v. NLRB*, 395 F.3d 106, 110(6th Cir. 1994), *reversing*, 311

NLRB 833(1993). And: “Utterances on either side in an election campaign ought not to receive a narrow or strained construction”. *Union Carbide Corp. v. NLRB*, 310 F.2d 844,845(6th Cir. 1962), *reversing*, 136 NLRB 95(1962).

Union Carbide Corp. is where the Board stumbles out of the gate in its effort to taint with illegality the three truthful expressions contained in Hendrickson’s PowerPoint® presentation.

2. **“Flexibility is Replaced by Inefficiency”**.

The Board contends that Hendrickson’s mere use of the word “flexibility”, made in the context of union electioneering that touted the employment benefits that its workers currently enjoyed, “...would lead employees to reasonably understand that Hendrickson was threatening to curtail employee autonomy after unionization” (NLRB Br.p.33). Indeed, the NLRB’s parade of horrors posits that, in fact, Hendrickson’s sinister implications are much worse:

For instance, [Hendrickson] could devalue its commitment to “teamwork”, dismantle its “product teams”, or discontinue its “roundtable discussions”.

(NLRB Br.n.10). After offering up these mere hypotheticals concerning what Hendrickson “could”, “might”, or “possibly” would do, the Board accuses Hendrickson of unfairly re-packaging its “flexibility” electioneering on review here.

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.

* * *

Hendrickson's communication about a reduction in flexibility had no direct link to managerial efficiency.

(NLRB Br.33-34)(emphasis in original).

But Hendrickson's PowerPoint® slide on this "flexibility" point was completely transparent, *and it said exactly what the NLRB now accuses its counsel of repackaging:*

Flexibility is replaced by inefficiency.

(Appx.88). "Inefficiency" has to do with Hendrickson, not worker wages or fringe benefits. And if that were not unambiguous enough, two slides prior thereto the PowerPoint® presentation stated:

- Flexibility to protect employee jobs during downturn [is at risk in the event of unionization].

(Appx.86). No neutral, reasonable reader of these two truthful, facially innocuous statements could credibly suggest that they were secret code for a sinister, unannounced plan by Hendrickson to unilaterally take away its workers' wages or benefits. For the NLRB to argue that the Company was not referencing its own, internal flexibility to maintain its corporate efficiency, when the black and white print on the PowerPoint® slide said precisely "[f]lexibility is replaced by inefficiency" on the heels of another slide that stated "[f]lexibility to protect employee jobs during downturn [is at risk]" is the exact sort of "nonsense" that

leaves the NLRB's decisional inferences arbitrary and capricious. *Allentown Mack Sales & Srv. v. NLRB*, 522 U.S. 359, 376, 118 S.Ct. 818 (1998), *reversing*, 316 NLRB 1199 (1995). As the statements themselves make perfectly clear, Hendrickson was not talking at all about the "flexibility" to retaliate against employees, and instead was communicating about the "flexibility" that the text clearly and unambiguously stated: "*Flexibility to protect employees' jobs* [is at risk with unions]" (Appx.86)(emphasis added). The "[f]lexibility to protect employees jobs" is the exact opposite of the Board's musings about the flexibility to retaliate against workers. The Board completely ignored this "[f]lexibility to protect employees jobs" evidence (Appx.198-208). "The Board...may not distort the fair import of the record by ignoring whole segments of uncontroverted evidence". *Good Samaritan Med. Ctr. v. NLRB*, 858 F.3d 617, 628 (1st Cir. 2017)(quoting, *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133 (1st Cir. 1999)).

Hendrickson's "flexibility" statement, when viewed in its stated context, and when read so as "...not to receive a narrow or strained construction"¹⁶ did not run afoul of permissible union campaigning under the NLRA. See, *Kawasaki Motors Mfg.*, 280 NLRB 491 (1986), *aff'd*, 834 F.2d 816 (9th Cir. 1987) ("He [the plant manager] didn't think the company would stay open with a restrictive UAW

¹⁶ *Union Carbide Corp. v. NLRB*, 310 F.2d 844, 845 (6th Cir. 1962), *reversing*, 136 NLRB 95 (1962).

contract” and stated “with the union that they couldn’t...operate with the union like they wanted to operate, and we feel that it would be difficult, we need versatility” and “[with a union] we couldn’t put a welder on an assembly line to build heaters, if we had a UAW contract” were all “...speech, protected by section 8(c) of the Act”. *Kawasaki Motors Mfg.*, 280 NLRB 491, 491-493 (1986).

The Board’s comparing and contrasting this Court’s decisions in *DTR Indus. v. NLRB*, 39 F.3d 106 (6th Cir. 1994) (*DTR I*) and *DTR Indus. v. NLRB*, 295 F.App’x 487 (6th Cir. 2008) (*DTR II*) for the sweeping proposition that “an employer must provide ‘precise objective facts’” in order for its union campaign statements to pass muster under Section 8(a)(1) of the NLRA is a mischaracterization of what those twin decisions in fact held (NLRB Br.pp.30-31). Both *DTR I* and *DTR II* had to do with the most egregious form of union campaigning – threats to close the plant in the event of unionization:

Statements threatening plant closure or layoffs are particularly suspect because “threats of plant closure are ‘among the most flagrant’ of unfair labor practices”.

DTR Indus., Inc. v. NLRB, 297 F.App’x 487, *492 (6th Cir. 2008). This case is the exact opposite of the issues at stake in *DTR I* and *DTR II* because when asked in a group employee setting Hendrickson assured its workers that the plant would not close in the event of unionization (Appx.42).¹⁷ Moreover, the outcomes in *DTR I* and

¹⁷ The question posed, and answer given were:

DTR II were altogether different because in *DTR I* the auto supply company owner did not state that employee layoffs were the inevitable byproduct of the business that would be lost if the United Autoworkers Union won its campaign, whereas the Human Resources Officer of that same company in *DTR II* “explicitly stated that a decrease in business as a result of unionization would be dealt with through layoffs at DTR”. *DTR Indus. v. NLRB*, 297 F.App’x. at *495. As Judge Moore wrote for the split-panel decision¹⁸: “King [the Human Resources Manager] explicitly raised the specter of DTR layoffs while Kobawashi [the owner] did not”. *Id.* at *495.

With the “flexibility to protect employee jobs” and “flexibility is replaced by inefficiency” context placed in its proper light, this determination of unlawfulness by the NLRB should be reversed.

Q. Some salary [employees] have been out on the floor saying that if the union moves into this plant you will close it and move it to Mexico, is that true?

A. That’s not true. *** We want this plant to stay here in Lebanon, Kentucky.

(Appx.42).

¹⁸ Judge Sutton wrote a lengthy dissent from the majority panel’s conclusion on this very point in *DTR II*: “I respectfully disagree with [the panel’s] conclusion that King’s speeches at the pre-election employee meetings did not constitute protected employer speech under §8(c) of the NLRA”. *DTR Indus. v. NLRB*, 297 F.App’x. 487, *498(6th Cir. 2008)(Sutton, *dissenting*).

3. “Relationships Suffer”.

Addressing the Board’s “relationships suffer” union campaign prohibition determination requires another context-correcting exercise. The Board’s Administrative Law Judge correctly read this facially non-threatening statement as one of Hendrickson expressing that during a union organizing campaign, employee-on-employee relationships typically become strained, and sometimes even combative:

[T]here 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.

(Appx.165)(emphasis added). The ALJ’s placing in-context the “relationships suffer” communication posed an insurmountable problem for the Board under the developed law, because as the NLRB itself concedes to this Court: “[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”(NLRB Br. p.29). This is why the business owner in *DTR I* was able to inform its workforce that the company “...probably would lose 50 percent of Honda’s business, and probably wouldn’t get new business from Ford Motor Company” if the UAW were successful in its organizing. *DTR Indus., Inc. v. NLRB*,39 F.3d at 114. Just as whether Honda or Ford chose to take their business elsewhere was out of the employer’s control, whether Hendrickson’s workers chose to remain cordial or disinterested to

coworkers desiring unionization was out of Hendrickson's control. The Board, realizing that its ALJ's correct contextual reading of the "relationships suffer" quip would render her unfair labor practice finding irreconcilable with the established law, decided to change the context without any stated rationale or announced fact-finding for doing so:

[E]mployees would reasonably interpret the three challenged statements...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 management approach in its workplace relationships.

(Appx.198). Since Hendrickson could control the relationship that *it* maintains with its Kentucky workforce, this subtle re-casting of context allowed two of the three members of the Board to find that "relationships suffer" necessarily violated the Act(Appx.198).

This unilateral, unexplained re-positioning of context found by the Board's own ALJ violated two cardinal principles under Section 8(c) of the Act. First, "utterances on either side in an election campaign ought not to receive a narrow or strained construction". *Union Carbide Corp. v. NLRB*,310 F.2d 844,845(6th Cir. 1962),*reversing*,136 NLRB 95(1962). Second, "our review [under §8(c)] must include consideration of any record evidence that runs contrary to the Board's findings". *DTR Indus. v. NLRB*,395 F.3d 106,110(6th Cir. 1994),*reversing*,311 NLRB 833(1993).

While the Board chose not to state at all why or how it could possibly read “relationships will suffer” in a totally different context than its own appointed ALJ, this reviewing Court can because it is “...record evidence that runs contrary to the Board’s findings”. *DTR Indus. v. NLRB*, 395 F.3d at 110. “When we review the NLRB’s decision, ‘the ALJ’s decision (including his findings of fact) is as much a part of the record as the evidence put before the ALJ’”. *Local 65-B Graphic Comm. Conf. v. NLRB*, 572 F.3d 342, 343 (7th Cir. 2009).

This secondary unfair labor practice finding by the NLRB should, then, also be reversed.

4. Cultural Change.

The Board’s attack on the singular Hendrickson union campaign statement that: “The culture will definitely change” is a mere bootstrapping argument (NLRB Br.pp.34-35). As the Board surmises, because Hendrickson unlawfully instructed its employees that the collective bargaining process “begins from scratch”, employees would necessarily read a “culture will definitely change” statement as secret code “...that Hendrickson would not commit to the same responsiveness in collective bargaining as it had displayed in direct [employee] relationships, perhaps because it would not consider concerns relayed by the Union on behalf of employees to be genuine employee concerns” (NLRB Br.pp.34-35). The significant problem the Board has with its argument and analysis is, as demonstrated *supra*, Hendrickson’s

“bargaining from scratch” communication was perfectly permissible and lawful, and therefore it cuts the legs completely out from under the Board’s mere bootstrapping. If the action predicated a bootstrapping argument proves to be erroneous, then the boot itself falls off. Moreover, the Board’s supposition of what “...would be understood by reasonable employees”¹⁹ seemingly denigrates NLRB Member Emanuel as a completely unreasonable human being.(Appx.198 at 366 NLRB No.7,n. 2).

An employer’s communication to its workforce that the culture of its plant environment may change in the event of unionization is precisely the sort of “robust, wide-open” electioneering permitted under the National Labor Relations Act. *Linn, supra*. This legal conclusion of the NLRB’s decision should also be reversed.

CONCLUSION

For the reasons detailed *supra*, as well as those set forth in Hendrickson’s opening brief to this Court, the National Labor Relations Board’s decision should be reversed, and the Board’s cross-petition for enforcement denied.

¹⁹ NLRB Br.p.31.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to F.R.A.P. R. 32(a)(7), the undersigned certifies that this Brief complies with the type-volume limitations of F.R.A.P. 32(a)(7)(B).

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s/Keith L. Pryatel

Dated 7/3/2018

CERTIFICATE OF SERVICE

I certify that the foregoing Reply Brief of Petitioners/Cross-Respondent was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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