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Didlake, Inc. and Public Service Employees Local Union 572, affiliated with Laborers' International Union of North America. Case 05–RC–179494

May 10, 2019

DECISION ON REVIEW AND CERTIFICATION

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

On March 24, 2017, the Regional Director for Region 5 issued a supplemental Decision and Direction of a Second Election (pertinent portions of which are attached), in which he set aside the election held on October 18, 2016, and ordered a new election. The Regional Director adopted the hearing officer's recommendations to sustain Objections 1 and 3 asserted by Public Service Employees Local Union 572, affiliated with Laborers' International Union of North America (the Petitioner or Union). The objections at issue alleged that Didlake, Inc. (the Employer), through its Vice President Michael Payne and Operations Manager Jimmy Vickers, improperly threatened

¹ Objection 1 alleged that “[o]n or about October 17, 2016, Didlake, Inc., by its officers, agents, and supervisors, during one-on-one conversations between Vice President Michael Payne and employees, improperly threatened employees with discharge in the event that the Union prevailed in the election and imposed a union security requirement at the bargaining unit.” Objection 3 alleged that Operations Manager Jimmy Vickers subjected employee Elizabeth Facemire to anti-union campaigning. The evidence establishes, however, that the alleged “anti-union campaigning” to which Facemire was subjected consisted of Vickers’ statement to Facemire about union dues and membership as a condition of employment. Thus, we agree with the Regional Director’s decision to analyze the two objections together because they are closely related. *Fiber Industries*, 267 NLRB 840, 840 fn. 2 (1983) (Board will consider allegations of objectionable conduct that do not exactly coincide with the precise wording of objections so long as the allegations are “sufficiently related” to the objections); accord *Hollingsworth Management Service*, 342 NLRB 556, 557 fn. 3 (2004).

No exceptions were filed to the hearing officer’s recommendations to approve the Petitioner’s withdrawal of Objection 2 or to her recommendation to overrule Objection 4.

² The tally of ballots in the October 18, 2016 election showed 9 voting for and 10 against the Petitioner. There was one void ballot and there were no challenged ballots. Based on our decision to certify the results of that election, which the Union lost, it is not necessary to pass on whether the Regional Director correctly found that the Employer does not have a primarily rehabilitative relationship with the employees in the petitioned-for unit and that they are employees under Sec. 2(3) of the Act. See *Brevard Achievement Center*, 342 NLRB 982 (2004) (disabled individuals are employees entitled to collectively bargain, provided the relationship between the employer and the disabled individuals is “typical industrial” and not “primarily rehabilitative”). It is also unnecessary to pass on whether the Regional Director correctly found that the petitioned-for unit is presumptively appropriate. For the same reason, we

employees with discharge if the Union “prevailed in the election and imposed a union security requirement on the bargaining unit.”¹ Thereafter, in accordance with Section 102.67 of the Board’s Rules and Regulations, on June 9, 2017, the Employer filed the instant timely request for review of the Regional Director’s Decision and Direction of Election, Decision and Direction of Second Election, and Certification of Representative. The Petitioner filed an opposition to the request.

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

For the reasons stated below, the Employer’s request for review is granted as it raises substantial issues warranting review. Upon review, we reverse the Regional Director’s supplemental Decision and Direction of Second Election and overrule the Petitioner’s objections. We find that the Employer’s statements to employees respecting their dues obligation are not coercive and do not constitute objectionable conduct even if they contain misstatements of the law. See *Midland National Life Insurance Co.*, 263 NLRB 127 (1982) (mere misstatements of the law are not objectionable). Accordingly, we vacate the results of the second election held on April 27, 2017, and the certification of representative issued on May 5, 2017, and we certify the election results of October 18, 2016.²

find it unnecessary to pass on whether the Board should exercise its discretion to decline to assert jurisdiction over the Employer, and on whether the Board’s procedures improperly require the disclosure of employee health information insofar as they required the Employer to disclose employees’ disabilities.

Finally, we do not pass on the Employer’s June 13, 2017 Motion for Stay of Certification of Representative, or on the Employer’s July 8, 2016 Emergency Motion to Stay Proceedings, which the Regional Director denied in his July 25, 2016 Order. In light of our decision to certify the results of the October 18, 2016 election, which the Union lost, those motions are moot. Nonetheless, Chairman Ring and Member Kaplan would make the following observations. Both before and after the Board’s 2014 Election Rule revisions, the Board’s rules have permitted regional directors to issue a final decision certifying a union’s representative status before contested issues in the representation case are raised to the Board on a timely request for review, as happened here. See Sec. 102.69(c)(2) of the Board’s Rules and Regulations. And the employer’s duty to bargain on request attaches with the issuance of the certification of representative. See, e.g., *Allstate Insurance Co.*, 234 NLRB 193, 193 (1978); *Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 365 NLRB No. 84, slip op. at 2 (2017). In other words, the union may be certified, and the duty to bargain may attach, before the Board has made a final determination affecting the outcome of the election. Prior to 2014, this situation rarely arose because the parties could, and most often did, reserve the right for the Board to make a final decision on postelection issues, and ballots were often impounded pending final determination of preelection requests for review. The 2014 Election Rule eliminated the postelection right to a Board final decision and substantially minimized the possibility of impounding ballots pending Board consideration of requests for review. This has greatly increased the number of requests for review pending before the Board after a regional director’s issuance of a certification of representative obligated a requesting employer to bargain immediately upon demand. Chairman Ring and

I. FACTS

On July 6, 2016, the Union filed a petition seeking to represent the Employer's janitorial employees and floor techs working at the Army National Guard Readiness Center in Arlington, Virginia (the Guard).³ The unit includes 20 individuals, 15 of whom are severely disabled. The election was scheduled for October 18, 2016.

On October 17, 2016, Vice President Michael Payne and Contract Operations Director Jimmy Vickers had conversations with a majority of the voting unit employees similar to the following recorded conversation Payne had with employee Samantha Ulloa.

Payne: So if the Union wins, I want to let you know a few things that will probably happen, okay, because we have the same Union at the Pentagon, okay.

Ulloa: Yes.

Payne: First thing they will require you to do is join the Union.

Ulloa: Yes.

Payne: And if you don't, you will not be able to work here. Have they told you that?

Ulloa: No.

Payne: Okay, so if you don't join, you can't work here. Part of that agreement, then, is we will take \$37 a month out of your paycheck, and we will give it to the Union on your behalf. They will require us to do that. They will also take 5 cents an hour for every hour that you work, and we will pay that to them as well, okay? So if they win, then we have what's called a collective bargaining agreement. The Union and Didlake will sit down and negotiate the terms and conditions of that contract.

Ulloa: Yes.

Payne: And those terms and conditions are wages, benefits, work rules for the workplace, and those sort of things, so all of that is an unknown. It will have to be negotiated, okay?

Ulloa: Okay.

Payne: Everything may just stay the same, they may go up, or they may go down. It's a gamble. We don't know where all that goes until we sit down and negotiate with the Union, so we want to make sure that you're aware of it. If they win, you have to join as a condition of your employment to be here, and you will be paying the union dues. Those are the three things that we know for sure. All the other things will become negotiation.

Ulloa: Okay.^[4]

II. DISCUSSION

Under Section 8(a)(3) of the Act, an employee cannot be compelled to pay dues absent an agreement between an employer and a labor organization requiring union dues as a condition of employment. Therefore, the Regional Director correctly found that Vice President Payne and Contract Operations Director Vickers misstated the law when they characterized union membership and the payment of dues as a "condition of employment" if the Union won the election. However, contrary to our dissenting colleague and the Regional Director, we find that the Employer's mere misstatement of the law does not constitute objectionable conduct.

As the Board held in *Midland National Life Insurance Co.*, unless a party has acted in a "deceptive manner" that renders employees unable to recognize campaign propaganda, the Board will not "probe into the truth or falsity of the parties' campaign statements" and "will not set elections aside on the basis of misleading campaign statements." 263 NLRB at 133. Here, the statements at issue were made in the context of conversations with employees during an organizing campaign. In those conversations, the Employer discussed in a straightforward manner a variety of issues, including a union shop, union membership, and the collective-bargaining process. Significantly, there are no allegations or evidence that the Employer acted in a deceptive manner. Accordingly, viewing the statements at issue in the overall context of the organizing campaign, we find that the Employer's mere misrepresentations regarding the Union's ability to compel membership or enforce the payment of dues do not rise to the level of objectionable conduct. See *Metropolitan Life Insurance Co.*, 266 NLRB 507, 508 (1983) (finding that employer's misrepresentation during a pre-election campaign

Member Kaplan believe this state of affairs warrants reconsideration in a future rulemaking.

³ The petitioned-for unit is: "All full-time and regular part-time janitorial employees and floor techs employed by Didlake at the Army National Guard Readiness Center located in Arlington, Virginia, including those participating in the AbilityOne Program under the Javits-Wagner-O'Day Act, and those who do not, excluding all office clericals,

professionals, managerial and confidential employees, guards, and supervisors as defined in the Act."

⁴ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

presentation was not objectionable where there was no evidence of deceptive conduct).

Moreover, we reject the dissent's view, in accord with the Regional Director, finding that the Employer's statements exceeded mere misrepresentation and constituted threats of the loss of employment that interfered with employee free choice. Although the Board has cautioned that *Midland* "do[es] not immunize coercive statements[.]" it has never found statements similar to those at issue here—i.e., that employees would have to join the union and that they would not be able to work if they were no longer part of the union—to rise to the level of a threat. See *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988) (employer's statement that employees would lose their job if they were expelled from the union and there was a union shop clause could not reasonably be construed as a threat that the employer "would, or even could, unilaterally take action against employees under a union-security provision"); *New Process Co.*, 290 NLRB 704, 707, 736 (1988) (employer's statements to employees that they would have to join the union and that they would lose their jobs if they were "suspended, expelled" and a union shop clause had been negotiated were "an inaccurate account of the law, but they did not amount to a threat that the employees would be fired if they voted for the Union or that unionization would result in the employees' losing their jobs"), *enfd.* 872 F.2d 413 (3d Cir. 1989).

Our colleague and the Regional Director fail to acknowledge and give due weight both to the conditional nature of the Employer's statements and the context in which they occurred. Vice President Payne specifically acknowledged the Respondent's bargaining obligation if the Union won the election. Although he predicted that employees would have to join the Union as a condition of their employment and would be paying the union dues, these comments were preceded by and implicitly based on Payne's references to the Employer's experience with the Union at another nearby facility.⁵ Therefore, this case is distinguishable from the cases relied on by the dissent and the Regional Director, in which the employers' statements were unconditional and not based on any objective facts. See *Schaumberg Hyundai, Inc.*, 318 NLRB 449 (1995) (finding employer's statement that it would sign a standard union contract if union won election and that the contract would result in "more onerous working conditions, stricter

enforcement of work rules, and the loss of earnings" to be a coercive threat); *Mead Nursing Home, Inc.*, 265 NLRB 1115 (1982) (finding that the employer's statement about the consequences of striking "implicitly threatened to sever permanently" the strikers' employment); see also *Systems West, LLC*, 342 NLRB 851 (2004) (in context devoid of any reference to the collective-bargaining process, employer's statement that unionization would limit employees' job territory and most of the employees would be replaced was threat of retaliation where, on its face, it indicated that the employer would inflict adverse consequences of its own volition).

Accordingly, we reverse the Regional Director's supplemental Decision and Direction of Second Election, and we vacate the results of the second election held on April 27, 2017, and the certification of representative issued on May 5, 2017. We hereby overrule the Union's objections, and we shall certify the results of the first election held on October 18, 2016.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Public Service Employees Local Union 572, affiliated with Laborers' International Union of North America, and that it is not the exclusive representative of the bargaining-unit employees in the unit below:

All full-time and regular part-time janitorial employees and floor techs employed by Didlake at the Army National Guard Readiness Center located in Arlington, Virginia, including those participating in the AbilityOne Program under the Javits-Wagner-O'Day Act, and those who do not, excluding all office clericals, professionals, managerial and confidential employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C. May 10, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁵ Contrary to the dissent, the Employer was justified in relying on its experience with the Union at another facility. See *Atlantic Forest Products*, 282 NLRB 855, 861 (1987) (explaining that Sec. 8(c) permits an employer to rely on previous experience with a union when making predictions); see also *P. R. Mallory & Co. v. NLRB*, 389 F.2d 704, 707 (7th Cir. 1967) (finding that "the company had the right to support its opinions by citing past experiences with the same union in other plants which the company operated"). Further, the dissent cannot reasonably claim

that the Employer's statement was not based on "objective facts." The uncontroverted testimony of numerous witnesses establishes that the Union represented employees at the Employer's Pentagon facility and that joining the Union was a condition of employment there. See *TNT Logistics North America, Inc.*, 345 NLRB 290, 291 (2005) (finding that uncontroverted testimony constituted objective facts supporting the employer's predictions).

MEMBER MCFERRAN, dissenting.

Sometimes it is hard to decide whether an employer's preelection campaign statements to employees crossed the line separating unobjectionable misstatements of law from objectionable threats—but not here. In this case, the Employer told employees that if they unionized, they would have to join the Union and pay dues, or the Employer would fire them. As the Employer starkly put it, “[i]f they win, you have to join as a condition of your employment to be here, and you will be paying the union dues” and “if you don’t join, you can’t work here.” The Employer presented this prediction as a certainty, as something “we know for sure,” in contrast to other matters, which were dependent on negotiations with the Union. These statements were not just false as a matter of law,¹ they were also coercive. Board precedent, and the Supreme Court’s *Gissel* decision,² demonstrate that employers are not permitted to make such threats, which prevent employees from exercising their free choice. Unlike my colleagues, then, I would affirm the Regional Director’s common-sense finding that the Employer’s statements required setting aside the first election here.³

I.

There is no dispute about what the Employer’s officials told employees would certainly happen if they chose to be represented by the Union. As detailed below, they would be required to join the Union and to pay dues—or the Employer would fire them.

The day before the election the Employer’s Vice President Michael Payne and Contracts Operations Director Jimmy Vickers had conversations with a majority of unit employees. The credited evidence establishes that those conversations generally tracked the following conversation between Payne and employee Samantha Ulloa, which was recorded:

¹ Employees can only be required to pay agency fees if the employer and the union agree to a lawful union-security provision in a collective-bargaining agreement, and employees can never be required to become full union members. See *Communications Workers v. Beck*, 487 U.S. 735 (1988).

² *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

³ Unlike my colleagues, I would have denied the Employer’s request for review in its entirety. For the reasons explained below, I would affirm the Regional Director’s finding that the Employer’s preelection statements regarding union membership and dues were objectionable and warranted a second election. My colleagues instead reinstate the results of the first election here, which the Union lost.

I also agree with the Regional Director’s finding that the employees in the petitioned-for unit are employees under Sec. 2(3) of the Act; that they do not have a “primarily rehabilitative” relationship with the Employer that would exclude them from coverage under the National Labor

Payne: So if the Union wins, I want to let you know a few things that will probably happen, okay, because we have the same Union at the Pentagon, okay.

Ulloa: Yes

Payne: *First thing they will require you to do is join the Union.*

Ulloa: Yes

Payne: *And if you don’t, you will not be able to work here. Have they told you that?*

Ulloa: No.

Payne: *Okay, so if you don’t join, you can’t work here. Part of that agreement, then, is we will take \$37 a month out of your paycheck, and we will give it to the Union on your behalf. They will require us to do that. They will also take 5 cents an hour for every hour that you work, and we will pay that to them as well, okay? So if they win, then we have what’s called a collective bargaining agreement. The Union and Didlake will sit down and negotiate the terms and conditions of that contract.*

Ulloa: Yes.

Payne: *And those terms and conditions are wages, benefits, work rules for the workplace, and those sort of things, so all of that is an unknown. It will have to be negotiated, okay?*

Ulloa: Okay.

Payne: Everything may just stay the same, they may go up, or they may go down. It’s a gamble. We don’t know where all that goes until we sit down and negotiate with the Union, so we want to make sure that you’re aware of it. *If they win, you have to join as a condition of your employment to be here, and you will be paying the union*

Relations Act. On that point, I emphasize that I did not participate in *Brevard Achievement Center*, 342 NLRB 982 (2004) (finding that individuals with disabilities are employees entitled to collectively bargain only if the relationship between the employer and the individual is “typical industrial” and not “primarily rehabilitative”), and I apply it here only for institutional reasons. I have serious doubts about the correctness of that divided decision, particularly in light of the arguments raised by the dissent there. See *id.* at 988 (dissenting opinion of Member Liebman and Member Walsh). Relatedly, I see no reason to decline to assert jurisdiction here, and I disagree with the Employer’s suggestion that the Board’s procedures improperly compromise employees’ private health information.

Last, in accordance with the Board’s 2014 Election Rule, I would deny the Employer’s June 13, 2017 Motion for Stay of Certification of Representative, as well as its July 8, 2016 Emergency Motion to Stay Proceedings, which the Regional Director previously denied.

dues. Those are the three things that we know for sure. All the other things will become negotiation.

Ulloa: Okay

Tr. at 451–452 (Emphasis added).

Similarly, Payne and Vickers told other unit employees they would have to join the Union and pay dues as a “condition of employment,” as this was something that was “know[n] for sure.” The Union subsequently lost the election by a one-vote margin, 10 to 9.

II.

On these facts, the Regional Director properly found that the Employer’s statements, considered from the perspective of employees, were objectionable threats that required setting aside the election. Contrary to the majority, the statements were not mere misstatements of law, which an employer is permitted to make. The Board’s cases make this distinction clear, and the Supreme Court has told us how employer statements of this sort are to be evaluated.

A.

All agree that *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), holds that misstatements of law, as such, are not objectionable. But it is equally clear that *Midland* “do[es] not immunize statements from rising to the level of being coercive.” *John W. Galbreath*, 288 NLRB 876, 877 (1988). In distinguishing between misstatements and threats we must bear in mind the Supreme Court’s instruction in *Gissel Packing* that “[a]ny assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting” and must “take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.”⁴ For similar reasons, the Board appropriately “will construe any ambiguity in a threatening statement against the employer making the statement.” *Labriola Baking*, 361 NLRB 412, 413 fn. 6 (2014). The Board has made clear that the “*Midland* rule . . . does not apply where . . . here, the campaign statement contains a ‘threat of reprisal or force or promise of benefit.’” *Hogan Transports*, 363 NLRB No. 196, slip op. at 5 fn. 14 (2016), quoting *Gissel*, 395 U.S. at 618.

Applying these basic principles here, the Regional Director correctly found that the Employer’s statements threatened employees that if they chose the Union, the Employer certainly would require them to join the Union and pay dues or be fired. As explained by the Regional

Director, the vice in those statements lies in the certainty with which Payne and Vickers told employees that they would be taking on the risk of discharge if they selected union representation yet wanted to refrain from joining the Union or paying dues. Board precedent establishes that an employer may not tell employees that it will impose adverse consequences on them if they engage in protected activity, including choosing union representation. The following cases illustrate the point.

In *Mead Nursing Home, Inc.*, 265 NLRB 1115 (1982), the Board found objectionable an employer’s misstatements regarding the reinstatement rights of economic strikers where the misstatements threatened that employees would no longer have jobs if the union called a strike. The employer’s campaign literature presented the employees’ dilemma as follows:

Question: Can I lose my job if the Union calls me out on strike?

Answer: If the Union calls you out on strike to try to force Mead Nursing Home to agree to union promises, Mead Nursing Home is free to replace economic strikers. *This means that when the strike is over, you may no longer have a job, and the law does not force Mead Nursing Home to rehire you.* 265 NLRB at 1115 (emphasis added).

The employer’s misstatements were objectionable because they went beyond a mere announcement of its right to replace striking employees and threatened that it would sever permanently its employment relationship with employees who struck.

Similarly, in *Systems West LLC*, 342 NLRB 851 (2004), the Board found coercive an employer’s prediction, based on the union’s existing master labor agreement with other employers, that current employees would lose their jobs because they would not qualify for the union’s hiring hall. In fact, it was the collective-bargaining process that would determine the applicability of that agreement and its referral standards. As the Board explained, the employer’s warning “ignored the reality that such provisions are neither inevitable nor immutable, but are merely terms that *may* result from collective bargaining, and thus are at least partly within the [employer]’s control.” 342 NLRB at 852 (emphasis in original).

Meanwhile, in *Schaumburg Hyundai, Inc.*, 318 NLRB 449 (1995), the Board found that an employer unlawfully threatened employees when, during an election campaign, it told them that it would sign a union contract if they selected the union to represent them—but that the contract (waved in front of employees) would provide for lower

⁴ *Gissel Packing Co.*, supra, 395 U.S. at 617.

wage rates and harsher working conditions. “[E]ven assuming the Union’s standard contract provided for the wages and working conditions that [the employer] had predicted,” observed the Board, “this does not mean that the bargaining unit members would automatically be covered by such a collective-bargaining agreement following negotiations.” *Id.* at 450.

Employers may make predictions about the possible adverse consequences of unionization, if the prediction is phrased properly to avoid the implication that the employer will certainly impose those consequences itself, if employees choose the union. As the *Gissel* Court pointed out, an employer:

cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in “brinkmanship” At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

395 U.S. at 620.

Thus, in *New Process Co.*, 290 NLRB 704 (1988), the Board found that the following preelection employer statements were not objectionable:

. . . there’s some things that they [the Union] want first that right away they want a union shop and that simply means that’s a closed shop, a union shop. That means that all employees in the bargaining unit, in the voting unit, would have to, would have to join the union whether they wanted to or now [sic] . . .

Now *if* you’re suspended, expelled—particularly *if* you’re expelled—that means also that you lose your job, *if, in the contract, a union shop clause is negotiated*. And we don’t know of a contract that we’ve seen that does not have a union shop clause in it. *Id.* at 736 (emphasis added).

The Board reasoned that these statements were not objectionable because, although they were an inaccurate account of the law, “they did not amount to a threat that the employees would be fired if they voted for the Union or that unionization would result in the employees’ losing their jobs.” *Id.* at 707. The employer’s statements made clear that the applicability of a union-security clause depended on the collective-bargaining process, and “the possibility of job loss was predicated on the Union’s first terminating the employees’ union membership, an event beyond the control of [the employer].” *Id.* In short, the employer did not present the risk of job loss as an inevitable consequence of unionization beyond its control.

The Board found similar statements not objectionable in *John W. Galbreath & Co.*, 288 NLRB 876 (1988),

where the employer posed the following question and answer to employees:

Q. What could I lose if the union gets in?

A. Most union constitutions call for dues, assessments, fines and even special assessments. *If* (members) violate any provision of that union constitution or bylaws they’re subject to discipline by the union. It could be a fine, a suspension, or expulsion. *If* any employee is expelled from the union *and* there’s a union shop clause in the contract, then the employee has just lost his job. *Id.* (emphasis added).

These statements did not threaten discharge, but merely presented the employer’s views of penalties *the union* might impose on those who violated its constitution or bylaws, and “could not reasonably be construed as a threat by the Employer that it would, or even could, unilaterally take action against employees under a union-security provision.” *Id.* at 877.

As a careful reading of the Employer’s statements here reveal, this case is far closer to *Mead Nursing Home and Systems West* than it is to *New Process* and *Galbreath*. Here, an adverse consequence for employees, imposed *by the employer*, was presented as the certain result of choosing the union. As described, the Employer starkly warned employees that if they voted for the Union, then it was “know[n] for sure” that they would have to join the Union and pay dues, “[a]nd if you don’t, you will not be able to work here.” That was not merely a misstatement of the law, but a threat that employees necessarily risked losing their jobs by selecting union representation and refraining from paying dues. The Employer falsely—and coercively—presented the imposition of union-security obligations, and the attendant risk of discharge, as inevitable consequences of union representation beyond its control. Tellingly, the Employer contrasted the certainty of this adverse consequence with the *uncertainty* that the Union could win positive changes in working conditions for employees: “those [uncertain] terms and conditions are wages, benefits, work rules for the workplace, and those sort of things, so all of that is an unknown. It will have to be negotiated.”

On these facts, there is no substantial basis for questioning, let alone reversing, the Regional Director’s conclusion that employees reasonably would perceive the Employer’s statements as threatening.

B.

To that point, there is no merit to my colleagues’ insistence that the Employer’s threats of job loss constituted no more than unobjectionable misstatements of law. As explained above, the manner and context in which those statements were made would reasonably have led

employees to conclude that they inevitably were taking on the risk of discharge by voting for the Union. Only a “disinterested ear,” as the *Gissel* Court put it, could fail to hear the coercive meaning of the Employer’s statements. *Gissel*, above, 395 U.S. at 617.

Relatedly, my colleagues’ attempt to shoehorn this case into the *New Process* and *Galbreath* line of cases is wholly unpersuasive. As described, those cases turned on the conditional nature of the employers’ statements. Again, in *New Process*, the employer explained that, “if you’re suspended, expelled—particularly if you’re expelled—that means also that you lose your job, if, in the contract, a union shop clause is negotiated.” Similarly, in *Galbreath*, the employer’s statements regarding potential job loss were conditioned on several levels: “If (members) violate any provision of that union constitution or bylaws they’re subject to discipline by the union . . . If any employee is expelled from the union and there’s a union shop clause in the contract, then the employee has just lost his job.” By contrast, there was nothing conditional about the Employer’s statements here: “If they win, you have to join as a condition of your employment to be here, and you will be paying the union dues,” “if you don’t, you will not be able to work here,” and “we know for sure.”

Nor is there any merit to the majority’s assertion that the Employer’s statements were based on objective facts. The Employer’s vague, single reference to the other facility was far outweighed by the rest of the statement, which falsely conveyed in no uncertain terms that the imposition of union-security obligations and the attendant risks to employees’ continued employment were matters beyond its control.⁵ If anything, the Employer’s previous collective-bargaining experience with the Union at another facility further demonstrates not only the objective falsity of its comments, but also that the Employer knew or reasonably should have known that a union-security clause is a term and condition of employment that can only be imposed upon employees as a result of collective bargaining.

III.

The Employer warned employees in no uncertain terms that union representation necessarily would result in union-membership and dues obligations that the Employer would have no choice but to enforce by discharging

⁵ See *DHL Express, Inc.*, 355 NLRB 1399, 1400 (2010) (Under *Gissel*, “lawful predictions of the effects of unionization must be based on objective fact and address consequences beyond an employer’s control.”). Compare *Systems West LLC*, 342 NLRB at 852 (The employer “ignored the reality that such provisions are neither inevitable nor immutable, but are merely terms that may result from collective bargaining[.]”) (emphasis in original), with *New Process Co.*, 290 NLRB at 707 (employer’s statements explicitly stated that a union shop clause was subject to negotiation during collective bargaining).

employees who wanted to refrain from joining the union and paying dues (even though they might well have wanted union representation). That warning was not just a clear misstatement of a basic principle of modern labor law, it was a threat equating a vote for representation by the Union with the risk of job loss. *Midland* was never intended to shield such threats from sanction. Indeed, any unlawful threat can be dressed up—whether by the employer at the time or by the Board afterwards—as a misstatement of the law. Imagine an employer who bluntly says to workers: “If the union wins the election, the National Labor Relations Act requires me to fire all current employees and hire union members in their place.” Of course, this is a complete misstatement of the law, but it is no less obviously a threat. The threat made here is less direct, but just as coercive. The majority’s failure to find it objectionable is unsupportable. Accordingly, I dissent.

Dated, Washington, D.C. May 10, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

DECISION AND DIRECTION OF SECOND ELECTION

On July 6, 2016,¹ Public Service Employees Local Union 572, affiliated with Laborers’ International Union of North America (hereinafter the “Petitioner”) filed a petition in this matter seeking to represent certain employees of Didlake, Inc. (hereinafter the “Employer”). Pursuant to a Decision and Direction of Election issued by the Regional Director on October 5, an election by secret-ballot was conducted on October 18, among certain employees of the Employer,² with the following results:

Approximate number of eligible voters	20
Number of Void Ballots	1

¹ All dates herein are in 2016, unless specified otherwise.

² Included: All full-time and regular part-time janitorial employees and floor techs employed by Didlake at the Army National Guard Readiness Center located in Arlington, Virginia, including those participating in the AbilityOne Program under the Javits-Wagner-O’Day Act, and those who do not, excluding all office clericals, professionals, managerial and confidential employees, guards, and supervisors as defined in the Act.

Number of Votes cast for Petitioner	9
Number of Votes cast against Participating labor organizations	10
Number of Valid Votes counted	19
Number of Challenged Ballots	0
Number of Valid Votes counted plus challenged ballots	19

Challenges were not sufficient in number to affect the results of the election. On October 25, the Petitioner timely filed objections to conduct affecting the results of the election. On November 4, the Regional Director ordered a hearing be conducted regarding the Petitioner's Objections 1 through 5. The hearing took place November 18, 21, and 29 in Washington, D.C. and the Hearing Officer designated to conduct the hearing heard testimony and received into evidence relevant documents. The parties were permitted to file briefs, subsequent to the hearing, and both timely did so. Thereafter, on January 6, 2017, the Hearing Officer issued a Report in which she recommended: 1) sustaining Petitioner's Objections 1 and 3 and, thus, setting aside the results of the October 18 election and conducting a new election; 2) approving Petitioner's withdrawal of Objection 2; and 3) overruling in their entirety Petitioner's Objections 4 and 5.³

On January 20, 2017, the Employer and Petitioner each filed timely exceptions to the Hearing Officer's Report and Recommendations, as well as briefs in support of their exceptions. Thereafter, on January 27, 2017 the Employer and Petitioner each filed responsive briefs with the undersigned opposing the other party's exceptions.

I have reviewed the record in light of the exceptions and briefs, and I adopt the Hearing Officer's findings and recommendations to the extent consistent with this Decision. I find the Hearing Officer's rulings made at hearing are free from prejudicial error and are hereby affirmed. I have considered the evidence and arguments presented by the parties and, as discussed below, I agree with the Hearing Officer that Petitioner's Objections 1 and 3 should be sustained. Accordingly, I am ordering the results of the October 18 election be set aside and a new election be conducted. I further agree with the Hearing Officer that Petitioner's withdrawal of Objection 2 be approved and that Petitioner's Objections 4 and 5 be overruled in their entirety.

I. THE PETITIONER'S OBJECTIONS

³ No exceptions were filed to the Hearing Officer's recommendations to approve Petitioner's withdrawal of Objection 2 or to her recommendation to overrule Objection 4.

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| Objection 1 | On or about October 17, 2016, Didlake, Inc., by its officers, agents, and supervisors, during one-on-one conversations between Vice President Michael Payne and employees, improperly threatened employees with discharge in the event that the Union prevailed in the election and imposed a union security requirement at the bargaining unit. |
| Objection 2 | On or about October 17, 2016, Didlake, Inc., by its officers, agents, and supervisors, improperly promised benefits to a determinative number of employees by telling employees that they would receive sick leave next year without the Union. |
| Objection 3 | On or about October 18, 2016, Didlake, Inc., by its officers, agents and supervisors, improperly called employee Elizabeth Facemire into the office where she was subjected to anti-union campaigning by statutory supervisors, including her job coach Donna Clements. |
| Objection 4 | On or about October 18, 2016, Didlake, Inc., by its officers, agents, and supervisors, improperly threatened employee Elizabeth Facemire with the loss of Social Security benefits in the event that the Union prevailed in the election. |
| Objection 5 | On or about October 18, 2016, Didlake, Inc., by its officers, agents and supervisors, immediately after subjecting her to anti-union campaigning, improperly escorted Elizabeth Facemire to the polling place and waited outside the polling place until she finished voting. |

II. THE PARTIES' EXCEPTIONS

The parties filed exceptions to the Hearing Officer's recommendations concerning Objections 1, 3, and 5. I will first describe Petitioner's exceptions with regard to

Objection 5 and then the Employer's exceptions with regard to Objections 1 and 3.

A. Objection 5

Petitioner takes exception to the Hearing Officer's recommendation to overrule Petitioner's Objection 5. The objection concerns the conduct of Donna Clements, the Employer's job coach, whom the Hearing Officer found to be a Section 2(13) agent of the Employer with apparent authority, on the day of the election, in: walking with employees, including one of her clients, to the voting area; waiting in the hallway, at an undetermined distance from the voting place, for her client, an employee, to vote; and making some comments to employees while waiting in the hallway.⁴ The Hearing Officer recommended overruling this objection because Petitioner failed to present sufficient evidence that: any employees were forced to pass by Clements to vote; Clements made any comments while in Building 2 related to the Union or the election; or that Clements, while standing at an indeterminate distance from the voting area, directed any comments to employees waiting in line to vote or made anything more than innocuous comments. The Hearing Officer reasoned that Clements' presence alone, at an indeterminate distance from the voting area, is insufficient to support the objection and that none of Clements' comments were anything more than innocuous and insufficient to substantially impair the free choice of voters.

Petitioner argues Clements disturbed the election's laboratory conditions because she made herself a "continuing presence" in the near vicinity of the voting place and compares this case to *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982), where the Board found such conduct to be objectionable. Petitioner further argues that the only fact in dispute is how far away from the voting place Clements was standing while she waited outside the voting place and that, based on the Hearing Officer's credibility findings, the Hearing Officer should have found that Clements stood no less than thirty feet from the voting place. Petitioner takes issue with the Hearing Officer's analysis and states the issue is not whether employees could have taken paths to the voting place that did not

require them to pass by Clements, but rather, that Clements' continued presence is objectionable surveillance of the voting place. Finally, Petitioner argues the Hearing Officer misapplied *J.P. Mascaro and Sons*, 345 NLRB 637, 639 (2005). Petitioner distinguishes that case from the facts here because the president of Mascaro could not conduct effective surveillance from where he positioned himself, whereas, here, Clements' surveillance was uninhibited.

In response, the Employer states that Petitioner incorrectly summarized the rulings of *Electric Hose & Rubber Co.*, supra, and *ITT Automotive*, 324 NLRB 609 (1997). The Employer points out that in *Electric Hose & Rubber Co.*, the Board noted the supervisor had not testified to explain his presence near the voting site during the voting and that, without any explanation, it could only be concluded that his purpose in observing was to effectively survey the union activities of the employees and to convey to those employees the impression that they were being watched. The Employer argues that, here, Clements testified she was in the hallway on the day of the election to assist her longtime client, at her request, to find the voting site. The Employer also states that *ITT Automotive* does not support the Petitioner's argument because, in that case, the employees had to pass by at least four supervisors and managers on their way to vote and the supervisors and managers could see the employees standing in line to vote. The Employer disagrees with Petitioner's argument that the Hearing Officer misapplied *J.P. Mascaro and Sons*, supra, and notes that she cited it for the proposition that where there is insufficient evidence that employees had to pass by the employer's representative in order to vote, the Board has found that even a continued presence by an employer representative outside a voting place does not constitute objectionable surveillance.

B. Objections 1 and 3

The Employer takes exception to the Hearing Officer's recommendation to sustain Petitioner's Objections 1 and 3. The two objections are factually related and were jointly considered by the Hearing Officer.⁵ On October 17, the day before the election, the Employer's Vice

⁴ In its exceptions, the Employer argues the Hearing Officer erroneously found Clements to be an apparent agent of the Employer and that, because the Hearing Officer ultimately recommended overruling Objection 5 and found no objectionable conduct attributed to Clements, the finding is *dicta* and the issue of agency need not be decided. The Hearing Officer appropriately analyzed and made findings on the Section 2(11) and 2(13) statuses of Clements, as those findings will allow the Board to reach a full decision if, upon review, it disagrees with the Hearing Officer's recommendations or my decision herein.

⁵ The Hearing Officer also analyzed Petitioner's Objection 4 in conjunction with Objections 1 and 3, but, as previously noted, no exceptions were filed to the Hearing Officer's recommendation to overrule

Petitioner's Objection 4. With respect to Objection 3, the Hearing Officer noted that Petitioner conceded that the evidence in the record does not support its objections based on anti-union campaigning by Clements to Facemire and requested that the Hearing Officer consider a new allegation in support of Objections 3 and 4: that Clements threatened three employees with loss of rehabilitative support by Clements if the Union won the election. The Hearing Officer viewed the conduct as closely related to Objection 3 and considered it, but concluded the evidence showed Clements had not made such a threat. No exceptions were filed to that recommendation and I agree with the Hearing Officer's conclusion. The Hearing Officer then considered another allegation that she found to be closely related to Objection 3 and supported by the record:

President of Contract Operations, Michael Payne, and Contract Operations Director, Jimmy Vickers engaged in a series of conversations with employees about the upcoming election. In particular, Payne told employee Samantha Ulloa, three separate times in one conversation, that if the Union won the election, she would be required to join the Union or she would not be able to continue working at the Guard location.⁶ The Hearing Officer found that Payne and Vickers told the majority of the voting unit employees that they would have to join the Union and pay union dues as a condition of employment if the Union was elected. The Hearing Officer found they stated the condition of employment as a fact rather than a possible outcome of collective bargaining and that, as evidenced by the recording of the conversation between Payne and Ulloa, they threatened job loss by telling employees that if they do not join the Union, they could not work at the Guard location.

The Employer contends the Hearing Officer based her recommendation to sustain Petitioner's Objections 1 and 3 on erroneous findings of fact and application of law. With respect to the factual issues, the Employer disputes the Hearing Officer's credibility findings, the weight she gave to the recording of the conversation between Payne and Ulloa, and her conclusion that the statements of Payne and Vickers had been widely disseminated to the voting unit employees. The Employer further argues that the statements attributed to Payne and Vickers concerning union membership and dues being a mandatory condition of employment are fully in line with statements found lawful in the cases of *New Process Co.*, 290 NLRB 704 (1988), *Daniel Construction Co.*, 257 NLRB 1276 (1981), and *Edward A. Utlaut Mem'l Hosp.*, 249 NLRB 1153 (1980).

III. ANALYSIS

First, I agree with the Hearing Officer's recommendation that the conduct of Clements did not substantially impair the free choice of voters and that Petitioner's Objection 5 should be overruled. The Hearing Officer did not find, nor do I, that Clements made herself a "continuing presence" in the near vicinity of the voting place. Rather, the Hearing Officer found that Clements walked with her client, an employee, and two other employees who joined them to within an indeterminate distance⁷ from the voting

place, waited for her client to vote, and then left the area. The Hearing Officer first looked at whether Clements' presence was objectionable conduct and then whether any of her comments to employees, while in the vicinity of the voting place, was objectionable conduct.

In *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982), one supervisor was "stationed" within ten to fifteen feet from the entrance to the voting area and another two supervisors were standing in an area where employees had to walk past them in order get from their work stations to the voting area. The Board noted, as the Employer mentioned in its reply brief, that the supervisors did not provide any explanation for their presence and it could only be concluded that they were engaged in surveillance or creating the impression of surveillance and such conduct destroyed the laboratory conditions necessary for the conduct of a free and fair election. *Id.* at 216. *Electric Hose & Rubber Co.* is distinguishable from the facts presented here because: 1) Clements was present at an indeterminate distance from the voting area only while waiting for her client to vote; 2) her presence was explained by the fact that she was assisting her client, a task that was most likely within the scope of her job coach duties, particularly here, where the client requested her assistance; and 3) the evidence did not show employees had to pass by Clements to vote.

I find that the Hearing Officer did not misapply *J.P. Mascaro and Sons*, 345 NLRB 637 (2005). In that case, the Board concluded that the conduct of the employer's president, by standing in front of the facility where the election was being conducted for most of the day at a distance of thirty feet or, on some occasions, as far away as fifty-four feet from the entrance of the facility, was not objectionable conduct. The Board noted that the front entrance was separated from the voting place by a ten-foot-wide hallway and the president never entered the designated no-electioneering zone. *Id.* at 639. There was insufficient evidence that employees had to pass by the president to vote and the president had no direct view of the voting area. *Id.* The Hearing Officer properly cited to this case when she concluded that, because Petitioner had failed to present sufficient evidence that any employees were forced to pass by Clements to vote, the presence of Clements, without more, at an indeterminate distance

the Employer, through Contract Operations Director Jimmy Vickers, spoke with Facemire on October 17 about union dues and membership as a condition of employment. The Employer argues, in its exceptions, that the Hearing Officer erroneously considered this new allegation because it was not closely-related to Objection 3, as written by Petitioner. I agree with the Hearing Officer's conclusion that this new allegation is closely related to Objection 3 and I also find that it is closely-related to Objection 1. This new allegation involves the same kind of conduct set forth in both Petitioner's Objections 1 and 3.

⁶ The Hearing Officer considered the testimony of Payne and Ulloa, as well as Employer Exhibit 7, the talking points that Payne and Vickers referred to during their October 17 conversations with voting unit employees, and Petitioner's Exhibit 5, a recording of Payne's conversation with Ulloa on October 17.

⁷ The Hearing Officer's finding that Clements' was an indeterminate distance from the polling area was appropriate and within her credibility resolutions.

from the voting area is not objectionable conduct. In addition, the Hearing Officer correctly found that Clements' comments to employees, which were not related to Petitioner or the election, were innocuous and not objectionable conduct.⁸

Next, I agree with the Hearing Officer's recommendation to sustain Petitioner's Objections 1 and 3. The record shows that Payne spoke to a majority of the voting unit employees, including Ulloa, and Vickers spoke to three other voting unit employees the day before the election, on an individual basis, with the assistance of job coaches or interpreters, as needed. I find that the Hearing Officer's credibility resolutions were well reasoned and appropriate and, to the extent there was a factual dispute about what Payne said to Ulloa on October 17, the Hearing Officer appropriately put greater emphasis on the recording. The recording shows that Payne said the following to Ulloa:

Payne: So if the Union wins, I want to let you know a few things that will probably happen, okay, because we have the same Union at the Pentagon, okay.

Ulloa: Yes

Payne: First thing they will require you to do is join the Union.

Ulloa: Yes

Payne: And if you don't, you will not be able to work here. Have they told you that?

Ulloa: No.

Payne: Okay, so if you don't join, you can't work here. Part of that agreement, then, is we will take \$37 a month out of your paycheck, and we will give it to the Union on your behalf. They will require us to do that. They will also take 5 cents an hour for every hour that you work, and we will pay that to them as well, okay? So if they win, then we have what's called a collective bargaining agreement. The Union and Didlake will sit down and negotiate the terms and conditions of that contract.

Ulloa: Yes.

Payne: And those terms and conditions are wages, benefits, work rules for the workplace, and those sort of

things, so all of that is an unknown. It will have to be negotiated, okay?

Ulloa: Okay.

Payne: Everything may just stay the same, they may go up, or they may go down. It's a gamble. We don't know where all that goes until we sit down and negotiate with the Union, so we want to make sure that you're aware of it. If they win, you have to join as a condition of your employment to be here, and you will be paying the union dues. Those are the three things that we know for sure. All the other things will become negotiation. (TR. 451-452).

The record shows Payne and Vickers had similar conversations with a majority of the voting unit employees.⁹ The Hearing Officer, for valid reasons, credited the testimony of Campusano and Clements, over the testimony of Payne and Vickers on the subject of these conversations. A review of Campusano's and Clements' testimony, regarding the conversations that Payne and Vickers had with voting unit employees on October 17, shows that, in each of these conversations, Payne and Vickers told employees they would have to pay union dues and join the Union as a "condition of employment"¹⁰. Payne and Vickers further said they knew this to be true because of the Employer's history with the Union at another job site. In these conversations, they said the subjects of wages and benefits were an unknown and would be subject to bargaining between the Employer and Union. They did not include the payment of union dues or joining the Union as a "condition of employment" among the subjects that were, like wages and benefits, an unknown and subject to bargaining.

The Hearing Officer concluded, and I agree, that the Payne and Vickers' statements about joining the Union and paying union dues as a condition of employment were widely disseminated, particularly here, where the voting unit is small and where Payne and Vickers testified that, between the two of them, they spoke to all voting unit employees and generally told all of them the same thing. The Hearing Officer's Report shows that she carefully weighed the evidence and I do not believe she made any conclusions not supported by the evidence.

⁸ In addition to the reasons cited by the Hearing Officer, I would also find that Clements' conduct was not objectionable based on the limited scope of her Section 2(13) agency status. The Hearing Officer found that Clements was an apparent agent of the Employer with respect to the three employees who were her clients because she served as a conduit of information between the Employer and those employees. As the Hearing Officer did not find that Clements made objectionable statements to any employee, let alone to her clients, I agree there is insufficient evidence to sustain Petitioner's Objection No. 5.

⁹ For example, Clements' testimony of Payne's conversation with employee Steiner appears at pages 104-107 of the transcript and her testimony of Vickers' conversation with Facemire appears at pages 108-113 of the transcript. Campusano's testimony of Payne's conversation with approximately thirteen voting unit employees is at pages 301-313 of the transcript.

¹⁰ The term "condition of employment" appears in quotes because it was repeated in much of the testimony on the topic of these conversations and also appears in the recording of the conversation between Payne and Ulloa.

With respect to the legal analysis for Petitioner’s Objections 1 and 3, I note that the issue of when misstatements of the law regarding employee and contractual union security obligations are objectionable conduct is not well-defined and it is difficult to identify a consistent rule in the Board’s case law on this subject. In her analysis, the Hearing Officer began by citing *Midland National Life Insurance Co.*, 263 NLRB 127 (1982) for the proposition that the Board will not probe into the truth or falsity of parties’ campaign statements and will not set aside an election on the basis of misleading statements unless “a party has used forged documents which render the voters unable to recognize propaganda for what it is.” 263 NLRB at 133. Thus, mere misstatements of law are not objectionable. However, in a later case, the Board ruled that a misstatement of law may be objectionable conduct if the misstatement has a coercive impact and is an impermissible threat. In *Mead Nursing Home, Inc.*, 265 NLRB 1115 (1982), the Board considered whether the following misstatement of the law, appearing in campaign literature sent by the employer to its employees, was objectionable conduct:

Question: Can I lose my job if the Union calls me out on strike?

Answer: If the Union calls you out on strike to try to force Mead Nursing Home to agree to union promises, Mead Nursing Home is free to replace economic strikers. *This means that when the strike is over, you may no longer have a job*, and the law does not force Mead Nursing Home to rehire you. 265 NLRB at 1115.

The Board concluded that the misstatement of law was objectionable conduct because it “has a coercive impact on employee participation in protected concerted activity and constitutes an impermissible threat to the right of employees to engage in protected concerted activity.” *Id.* The Board reasoned that the employer went beyond a mere announcement of its right to replace striking employees and elaborated on the phrase “to replace economic strikers” by, through the use of the term “rehire” and the phrase “you may no longer have a job,” implicitly threatening to sever permanently the employment relationship. *Id.*

¹¹ The Hearing Officer cited to *Edward A. Utlaut Mem’l Hosp.*, 249 NLRB 1153 (1980) and *Daniel Construction Co.*, 257 NLRB 1276 (1981). I do not rely on these cases because they pre-date *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). Moreover, *Daniel Construction Co.* did not involve objections to an election, but rather, whether an employer’s misstatement of law violated Section 8(a)(1). The Board applies a different standard when determining whether a misstatement of law is objectionable conduct rather than a violation of Section 8(a)(1) of the Act. The issue presented here is not whether the Employer has violated Section 8(a)(1). In her analysis, the Hearing Officer also cited to *SMI of Worcester, Inc.*, 271 NLRB 1508 (1984) and *Pier Sixty, LLC*, 362 NLRB No. 59 (2015). I likewise do not rely on those cases because they did not involve objections to an election, but rather,

In three later cases, all post-dating *Midland*, the Board found employer’s misstatements of law to not be objectionable conduct.¹¹ First, in *New Process Co.*, 290 NLRB 704 (1988), the Board reversed the Administrative Law Judge and found the following statements, said by the employer’s vice-president to employees at a captive audience meeting the week of the election, to not be objectionable:

. . . there’s some things that they [the Union] want first that right away they want a union shop and that simply means that’s a closed shop, a union shop. That means that all employees in the bargaining unit, in the voting unit, would have to, would have to join the union whether they wanted to or now [sic]. . .

Now if you’re suspended, expelled—particularly if you’re expelled—that means also that you lose your job, if, in the contract, a union shop clause is negotiated. And we don’t know of a contract that we’ve seen that does not have a union shop clause in it. And the Company can have nothing to do with getting your job back. *Id.* at 736.

The Board reasoned that the statements were not objectionable because, while they were an inaccurate account of the law, “they did not amount to a threat that the employees would be fired if they voted for the Union or that unionization would result in the employees’ losing their jobs.” *Id.* at 707. The Board further noted that “the possibility of job loss was predicted on the Union’s first terminating the employees’ union membership, an event beyond the control of [the employer].” *Id.*

Next, in *John W. Galbreath & Co.*, 288 NLRB 876 (1988), the Board found that the following statement, printed in a pamphlet distributed by the employer in the weeks immediately preceding the election, was not objectionable conduct:

Q. What could I lose if the union gets in?

A. Most union constitutions call for dues, assessments, fines and even special assessments. If (members) violate any provision of that union constitution or bylaws they’re subject to discipline by the union. It could be a fine, a suspension, or expulsion. If any employee is

reviewed the alleged misstatements of law in the context of a violation of Section 8(a)(1) of the Act.

The Hearing Officer also cited to *Overnite Transportation Co.*, 334 NLRB 1074, 1112 (2001). I believe that case is not analogous to the facts presented here because the decision appears limited to “right to work” states. The Administrative Law Judge concluded, and the Board affirmed, the Respondent’s threat had no factual basis because it took place in a “right to work” state where union-security provisions are unenforceable. Here, the conduct took place at a Federal enclave where union-security provisions are enforceable. Nevertheless, for the reasons set forth in this Decision, I agree with the Hearing Officers’ conclusion that the statements of Payne and Vickers were objectionable conduct.

expelled from the union and there's a union shop clause in the contract, then the employee has just lost his job. Id.

The misstatement was not objectionable conduct, the Board held, because it did not, as the Administrative Law Judge had concluded, “rise to the level of a threat by the Employer to discharge employees on the basis of union considerations.” Id. at 877. The Board further explained: “[a]lthough an employer has a role to play in the administration of a contractual union-security provision, the Employer’s statement at issue here, setting forth its views of penalties the Union might, if elected, impose on those who violated its constitution or by-laws, could not reasonably be construed as a threat by the Employer that it would, or even could, unilaterally take action against employees under a union-security provision.” Id.

Finally, in *Virginia Concrete Corp.*, 338 NLRB 1182 (2003), the Board considered whether an employer engaged in objectionable conduct when it stated, in campaign literature, that an unfair labor practice charge the union had filed against the employer, alleging a fifty-cent wage increase violated the Act, would result in employees losing the wage increase and characterized the charge as an “attempt[] to take away” the increase. Id. at 1186. The Board reversed the Administrative Law Judge and found no objectionable conduct because, “[a]t most, the employer misstated Board law and possible future Board action” and “mere misstatements of law or Board action are not objectionable under *Midland*.” Id.

The three latter Board cases illustrate the *Midland* standard that misstatements of law are not objectionable conduct. However, it can be objectionable conduct if the misstatement is coercive and communicates, with certainty, an action that the Employer will take to affect the employment relationship. Thus, whereas in *New Process Co.*, the statements at issue referenced collective-bargaining and intervening action by the Union—to suspend or expel union membership—here, the statement of Payne and Vickers did not refer to collective-bargaining or any intervening action by the Union. As previously noted, Payne and Vickers presented other issues, such as wages and benefits, as things that were unknown and would be negotiated. By contrast, they presented the payment of union dues and joining the Union as a condition of employment as “things that we know for sure.” (Tr. 452).¹² The statements of Payne and Vickers also implied that unionization would result in loss of job because they

repeatedly used the phrase “condition of employment.” Unlike in *John W. Galbreath & Co.*, where the statements at issue referenced the penalties that the union could take against employees and the resulting consequences to the employment relationship, the statements at issue here, by not referring to any intervening action by the Union or enforcement of a contractual union-security clause, suggest the Employer would unilaterally take action to terminate the employment relationship. The statements of Payne and Vickers about paying union dues and joining the Union as a condition of employment go beyond misstatement of law that were found to not be objectionable conduct in *Virginia Concrete Corp.* The statements are coercive because they communicate a change to the employment relationship as a result of the Union winning the election. Moreover, as in *Mead Nursing Home, Inc.*, the statement of Payne and Vickers are an implicit threat to sever the employment relationship.

In sum, I find the Employer’s conduct, with respect to Petitioner’s Objections 1 and 3 had a reasonable tendency to influence the outcome of the election. I therefore adopt the Hearing Officer’s recommendation that the Employer engaged in objectionable conduct warranting setting aside the results of the election.

IV. DECISION ON EXCEPTIONS

Based on the above and having carefully reviewed the entire record, the Hearing Officer’s Report and Recommendations, the exceptions and arguments made by the parties, I sustain Petitioner’s Objections 1 and 3, and I shall set aside the results of the October 18, 2016 election and order a new representation election. I further approve Petitioner’s withdrawal of Objection 2 and overrule Petitioner’s Objections 4 and 5 in their entirety.¹³

IT IS HEREBY ORDERED that the election held on October 18, 2016, is set aside and a new election shall be conducted.

¹² The quote comes from the recorded conversation of Payne and Uloa. However, the testimony of Campusano and Clements shows that the statements Payne and Vickers made to other voting unit employees also presented the payment of union dues and joining the Union as a condition of employment with certainty based on the Employer’s relationship with

the Union at another job site and by the fact that they did not include these topics within the issues that were unknown and to be negotiated.

¹³ Although no party specifically excepted to such findings, I do not adopt any findings by the Hearing Officer that the Employer committed any unfair labor practice under Section 8 of the Act, or any characterization of a parties’ conduct as “lawful” or “unlawful.”