UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

OPTUM MEDICAL CARE

Employer

and **Case 02-RC-313526**

1199SEIU UNITED HEALTHCARE WORKERS EAST

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

This report contains my findings and recommendations regarding the Petitioner's Objections concerning conduct affecting results of the *Sonotone* election in the above matter. As described more fully below, a Board-conducted election was held on April 12, 2023,[1] among professional and non-professional employees of Optum Medical Care (the Employer). Based upon the first tally of ballots from this election, a majority of professional employees voted to be included in a bargaining unit with non-professional employees, but according to the second tally of ballots, a majority of professional and non-professional employees did not vote to be represented by 1199SEIU United Healthcare Workers East (the Petitioner or the Union).

The Petitioner objects to the results of the election, asserting that the Employer engaged in conduct warranting setting aside the election and conducting a rerun election. Specifically, the Petitioner raises 15 Objections.

Based upon the record in this case, my observation of the witnesses, examination of all exhibits, resolution of the credibility of the witnesses and findings of facts, I conclude that Petitioner's Objections 6 and 10 should be overruled, but that Objections 1-5, 7-9, and 11-15 should be sustained. The Petitioner has met its burden in Objections 1-5, 7-9, and 11-15 of establishing that the Employer has engaged in objectionable conduct affecting the results of the election. Accordingly, I recommend the results of the election be set aside and a new election be ordered.

II. PROCEDURAL HISTORY

The Petitioner filed the representation petition on March 7 for a wall-to-wall unit of professional and non-professional employees. The parties agreed to the terms of a *Sonotone* election, and the Region approved their stipulated election agreement on March 27. The election was held on April 12. The employees in the following units voted on whether they wished to be represented by the Petitioner for the purposes of collective-bargaining:

[1] All dates are in 2023, unless otherwise specified.

VOTING GROUP – UNIT A (PROFESSIONAL UNIT): **Included:** All full-time, regular part-time, and per diem* Medical Technologists working for the Employer at its facility located at 2 International Boulevard, Brewster, New York, 10509. **Excluded:** All non-professional employees, confidential employees, guards, managerial and supervisory employees as defined in the Act.

VOTING GROUP – UNIT B (NON - PROFESSIONAL UNIT): **Included:** All full-time, regular part-time, and per diem* employees, working for the Employer at its facility located at 2 International Boulevard, Brewster, New York, 10509, including Bio-Med Assistant, Bio-Med Technicians, Clerical Support, Clinical Lab Assistants, Clinical Lab Technicians, Couriers, IT Lab Administrators, Lab QA Analysts, Microbiology Lab Assistant, Point of Care Coordinator, Purchasing Assistant, Receiving Clerks, Specimen Processors, and Warehouse Clerks. **Excluded:** All professional employees, confidential employees, guards, managerial and supervisory employees as defined in the Act.

* Per Diem employees eligible to vote were those who averaged 4 hours or more during the 13-week period preceding March 19, per *Davison-Paxon*, 185 NLRB 21 (1970).

Pursuant to 29 U.S.C. § 159(b)(1), the election further determined whether professional employees wished to be included in a collective bargaining unit with non-professional employees. *Sonotone Corp.,* 90 NLRB 1236 (1950).

Since the election involved a question of self-determination, the ballots of professional employees were opened and counted first, to determine whether they wished to be included with the non-professionals in a unit for the purposes of collective bargaining. Although a Tally of Ballots concerning inclusion was prepared at the conclusion of the election on April 12, a Corrected Tally of Ballots issued to the parties on April 14, showing that of approximately 25 eligible voters, 18 professionals cast ballots, of which 16 were for, and 2 against inclusion in a single unit with non-professionals. There were no void ballots or challenged ballots.

A second Tally of Ballots concerning overall representation was prepared at the conclusion of the election on April 12, showing that of approximately 82 eligible voters, 72 professionals and non-professionals combined cast ballots, of which 36 were for, and 36 against being represented for purposes of collective bargaining by the Petitioner. There were no void ballots or challenged ballots.

Objections were timely filed by the Petitioner on April 19. On August 4, the Regional Director for Region 2 ordered that a hearing be conducted via the Zoom for Government platform to give the parties an opportunity to present evidence regarding the objections. As the Hearing Officer designated to conduct the hearing and to recommend to the Board whether the Petitioner's objections are warranted, I heard testimony and received into evidence relevant documents on August 15 and 16. Both the Petitioner and Employer timely filed post-hearing briefs on September 7, which were fully considered.

III. THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc*., 174 NLRB 282, 282 (1969), *enfd*. 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

IV. THE EMPLOYER'S OPERATION AND OTHER RECORD EVIDENCE

The Employer is a New York corporation engaged in the collection, transportation, and processing of medical specimens, and reporting the results to healthcare providers with a facility located at 2 International Boulevard, Brewster, NY, 10509—a partial two-story building consisting of office space, laboratories, and a stock warehouse for about 90 employees who work there, not including couriers. (Tr. 227-32; 248).

The Employer also has an operating company, UnitedHealth Group, based elsewhere, whose Senior Director of Labor Relations is Andrew Stanley (Stanley). (Tr. 211-12). Stanley immediately retained labor consulting firm Vindex Group to help lead the Employer's anti-Union response to the representation petition filed March 7, and Labor Consultants Lio Arias (Arias), Aaron, Casey, and Alexis (surnames unknown) began working the next day. (Tr. 188-89; 191; 214-15).[2] The Employer's animus is undisputed. (Tr. 155; 214-16; P-1 at 21:08-11). On March 9, Stanely was sent by the Employer to the Brewster facility to help convince employees that the Union was not in their best interest and to oversee the Employer's own countervailing campaign led by Arias and his team. (Tr. 214-16).

Between approximately March 10 and April 10, the Employer scheduled three waves of meetings, holding multiple repeat sessions of each to cover the different shifts and maximize employee attendance. (Tr. 192; 217). The first wave involved smaller group meetings, the second wave involved larger group meetings, and the third involved one-on-one meetings with employees. *Id*. The majority of the Union's Objections involve or stem from conduct or statements made by Arias during group meetings, some of which were recorded.[3]

V. THE PETITIONER'S OBJECTIONS AND MY RECOMMENDATIONS

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony.[4]

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[2] Arias had previously been retained by the Employer at the beginning of the year, but not at this facility. (Tr. 191).

[3] The recordings themselves were entered into evidence during the hearing without transcriptions. (P-1 through 4b).

[4] The absence of a statement of resolution of a conflict in specific testimony or of an analysis of such testimony does not mean that such analysis did not occur. See *Walker's,* 159 NLRB 1159 (1966); *ABC Specialty Foods, Inc.,* 234 NLRB 475 (1978). The Board has long held that the failure of a trier of fact to detail completely all conflicts in the evidence does not mean that this conflicting evidence was not considered, and the hearing officer is not compelled to annotate each such finding. Where any witness has testified in contradiction to the findings of fact, such testimony is discredited and found unreliable as being either in and of itself not worth credence or because it conflicts with the weight of other credible evidence. Finally, a trier of fact is not required to discount all of a witness's testimony because he or she is not persuaded by some of it. *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. *1950); Sam's Club,* 322 NLRB 8 (1996).

Objection 1: During the critical, pre-election period, the Employer, through its agents and representatives, threatened employees with stricter enforcement of work rules and policies if they voted for the Union in the election.

Record Evidence

The record shows that Arias made the following statements to employees during a captive audience meeting held on March 13: "Right now you have attendance and tardy polic[ies] that are not enforced…once a union is in place, the company by law would has to enforce all of their policies." (P-1 at 34:08-35:24). And then reiterating, "Once a union is in place, you gotta enforce the policy. . . with the Union, if the policy was violated, like two minutes, right, you can get disciplined, and if you acquire enough points under that policy, you can still get discharged even if you have a union. Unions don't stop people from getting fired, by the way." (*Id*. at 35:04-29).

Board Law

The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), stated:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n.20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

Although the strictures of the first amendment must still be considered in representation cases, the Board has definitively stated that Section 8(c) is specifically limited to the adversary proceedings involved in unfair labor practice cases. *Dal-Tex Optical*, 137 NLRB 1782, 1787 n.11 (1962) (reversing several decisions which suggested the contrary); see also *Hahn Property Management Corp*., 263 NLRB 586 (1982); *Rosewood Mfg. Co.*, 263 NLRB 420 (1982). Consistent with that tenet, the Board has held that Section 8(c) does not apply in representation cases. See *Student Transportation of America, Inc.*, 362 NLRB 1276, 1278 (2015); *Kalin Construction Co.*, 321 NLRB 649, 652 (1996). Moreover, because Section 8(c) does not apply to representation cases, employer statements that would not necessarily constitute unfair labor practices may also warrant setting an election aside if they disrupt "laboratory conditions." See *General Shoe Corp*., 77 NLRB 124, 127 n.10 (1948).

Furthermore, Board and other courts have repeatedly found employer statements threatening to more rigidly enforce work rules and policies in response to union organizing to be unlawful. See, e.g., *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 25 (2019) (employer statement to employees that "if the Union came in the Company would not be as generous in permitting employees to take sick days without doctor's notes" unlawful); *Gen. Fabrications Corp*., 328 NLRB 1114, 1130 (1999), *enfd. NLRB v. Gen. Fabrications Corp*., 222 F.3d 218, 231 (6th Cir. 2000) (statement to employees that if they unionized, employer would require them to obey its policies "to the letter" unlawful threat); *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 495-96 (1995) (employer's "statement to [employee] that there would be stricter enforcement of the rules if the Union came in" was unlawful); *Allegheny Ludlum Corp.,* 320 NLRB 484, 488 (1995) (unlawful for employer to tell employees it "would not continue its current policies regarding flexibility and would install timeclocks if the Union were voted in"); *United Artists Theatre*, 277 NLRB 115, 121 (1985) (unlawful threats to enforce work rules more harshly if employees unionize "cannot but effect employee sentiment regarding the decision to support or oppose the Union.").

Recommendation: Sustain Objection 1 (Threatening Stricter Enforcement)

I find Arias' March 13 statement—that if employees unionized, the company would start enforcing its currently unenforced time and attendance policies, violation of which would result in discipline or discharge—objectionable, as it reasonably tends to restrain and coerce employees if they continue to support a union or engage in other concerted activities. *See Remington Lodging & Hospitality LLC*, 363 NLRB 987, 987 n.1, 1004 (2016) (employer statement that the flexibilities employees currently enjoyed "would go away" and "rules would have to be enforced *very* rigidly" if "the Union is voted in" unlawful threat); *DHL Express, Inc.*, 355 NLRB 1399, 1400 (2010) (statement that employer might not retain flexibility to forego write-ups and overlook minor tardiness if employees selected the Union, made immediately after excusing an employee's tardy, unlawful).

The Employer defends in its post-hearing brief that Arias' representations were permissible under Section 8(c) of the Act, and because they were predictions based on his 21 years of experience in labor relations and he merely recounted "a description of the 'just cause' discipline standard that is nearly universally required in unionized workplaces," citing the following cases: *Didlake, Inc.*, 367 NLRB No. 125, slip op. at 3 (2019); *Atlantic Forest Products*, 282 NLRB 855, 861 (1987); and *Sara Lee d/b/a International Baking & Earthgrains*, 348 NLRB 1133, 1135 (2006). However, these arguments fail.

First, Section 8(c) does not apply in representation cases. *Student Transportation of America, Inc.*, 362 NLRB at 1278. Nevertheless, employers may still truthfully describe their experiences with unions, so long as the communications "do not contain a 'threat of reprisal or force or promise of benefit.'" *Gissel Packing Co.*, 395 U.S. at 618.

Second, lawful predictions concerning the precise effects of unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Id*. The Supreme Court cautioned that

if there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment." *Id.* Notably, time and attendance policies and disciplinary policies are mandatory subjects of bargaining, and thus ultimately within the Employer's control.

The cases cited by the Employer are distinguishable from the instant case. For example, Arias' representations were not based on his specific personal experiences with this Union, unlike in *Didlake, Inc.*, where the Board held that an employer's misrepresentation to employees —*i.e.*, that joining the union and paying dues would become a term and condition of their employment if the Union prevailed in the election—did not amount to a threat of discharge because the misstatement was preceded by, and implicitly based on the employer's specific experience with the same union at another nearby facility where there was a union security clause. 367 NLRB slip op. at 3. Moreover, the Board stressed the significance of there being "no [other] allegations or evidence that the [e]mployer acted in a deceptive manner," the same of which cannot be said here as discussed further in the sections below. *Id*.

Similarly, Arias' representations were not based on the Employer's factually accurate experiences with unions at its other facilities, unlike in *Atlantic Forest Products*, where the Board found that the employer's factually accurate statements about its international parent corporation's bad experiences with a different union at eight of its operations that had closed or were expected to close due to profitability issues, did not arise to a threat of plant closure. 282 NLRB at 861. The Board also noted that the employer had expressly assured employees that it was "not an anti-union company" and pointed to its many excellent, profitable experiences with unions at its other operations around the world. *Id*. Again, the same cannot be said here.

Furthermore, Arias' representations were not carefully crafted, unlike in *International Baking & Earthgrains*, where the Board found the employer's statement "that *if* there were a union contract calling for a certain *procedure*, and *if* the Respondent deviated from it, there *might* be a union grievance" to be lawful. 348 NLRB at 1135 n.14. Instead, Arias' statement carried with it the threat of reprisal, cautioning that even two minutes late would result in a discipline.

Thus, contrary to the Employer's contentions, Arias' statement concerning stricter enforcement of time and attendance policies was not "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control" and fails to meet the *Gissel* requirements of a lawful prediction. 395 U.S. at 618.

Accordingly, I recommend sustaining Petitioner's Objection 1.

Objection 2: During the critical, pre-election period, the Employer, through its agents and representatives, threatened employees with more onerous working conditions if they voted for the Union in the election.

Record Evidence

The record shows that Arias made the following statements to employees during captive audience meetings held on March 13 and 14, respectively:

> A lot of the employees. . . did not know that if the union was voted in that managers and supervisors could no longer help out on the bench. . . . And it's not because that's a form of punishment, it's just because under the law once a union is voted in, the work that's being performed by all of you is considered what they call, "bargaining unit work." And managers and supervisors can no longer perform that work once it's union. So a lot of the employees didn't know that, so I wanted to make sure I point out all the details, okay? (P-1, 12:25 – 13:00).

> [I]n a Union environment, managers and supervisors can no longer help out on the floor, so to speak, or it would be a violation of the contract. I put that out there because a lot of the employees have been sharing that with me. I guess a lot of the managers help out like when it's short staffed…[I]f a Union should come in, the managers cannot perform any of that work anymore. . . . (P-4a at 17:05-35).

Board Law

The Board has found threats to withhold assistance, thereby making employees' working conditions more onerous, in response to union organizing, unlawful. See, e.g., *Cemex Constr. Materials Pac*., LLC, 372 NLRB No. 130, slip op. at 8 (2023) (statement to employee that manager would no longer be able to provide help as he had done in the past if employees selected the union unlawful); *Abouris, Inc*., 244 NLRB 980, 982-83 (1979) (supervisors' statements that if the union won the election, they would not be able to continue to help the employees in meeting their production requirements unlawful).

Recommendation: Sustain Objection 2 (Threatening to Withhold Help)

I find Arias' March 13 and 14 statements—that if the Union were to be elected, managers and supervisors could no longer help them with their work—objectionable as they would reasonably tend to restrain and coerce employees in their Union or other protected concerted activities. See *Portola Packaging, Inc*., 361 NLRB 1316, 1337 (2014) (supervisor statement that "if the Union came into the plant, the supervisors would no longer be able to help the production team members on the plant floor, as they did currently" unlawful).

In its post-hearing brief, the Employer defends that that Arias' representations were permissible under Section 8(c) of the Act, and were reasonable predictions based on his 21 years of experience in labor relations, citing *Didlake, Inc.*, 367 NLRB No. 125, slip op. at 3. However, these arguments fail.

As discussed above, Section 8(c) does not apply in representation cases, and although an employer may still truthfully describe their experiences with unions, its communications may "not contain a 'threat of reprisal or force or promise of benefit.'" *Dal-Tex Optical*, 137 NLRB at 1787; Further, predictions will only be found lawful instead if they are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control," otherwise, it will be found to be a "a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment." *Gissel Packing Co.*, 395 U.S. at 618.

Again, *Didlake, Inc.*, is distinguishable because the employer's misstatement to employees had been preceded by and based on the employer's specific experience with the same union at another nearby facility, whereas here, Arias' purported prediction was based on his general labor background rather than on any experience he, or the Employer, personally had with this or other unions. 367 NLRB slip op. at 3; *Systems West, LLC*, 342 NLRB 851, 851-52 (2004) (failure to satisfy all *Gissel* elements results in a statement being found an unlawful threat, rather than a lawful prediction). In addition to not being based on objective fact, Arias' statements were not carefully phrased, nor did they address consequences beyond the Employer's control. See *Systems West, LLC*, 342 NLRB at 851-52 (adverse consequences predicted involved choices over which the employer would have at least partial control during bargaining).

Based on the foregoing, Arias' March 13 and 14 statements concerning the withholding of help from managers and supervisors failed to meet the *Gissel* requirements of a lawful prediction, and reasonably employees would tend to conclude they were threats of more onerous working conditions.

Accordingly, I recommend sustaining Petitioner's Objection 2.

Objections 3 & 4: During the critical, pre-election period, the Employer, through its agents and representatives, solicited employees' grievances. During the critical, pre-election period, the Employer, through its agents and representatives, promised to remedy employees' grievances if they decided against unionization.

Record Evidence

The record shows that employee Judith Moretti (Moretti) was on extended medical leave from February 16-May 27, and was not present at the facility for any of the meetings held by the Employer between March 10 and April 10. (Tr. 18, 192-94, 217). However, on Saturday, March 25, Moretti received an unscheduled phone call from Arias, who claimed to be from the Employer's "People Team," which is what the Employer refers to as its Human Resources (HR) Department, wanting to speak to her about the Employer's countervailing campaign. (Tr. 19, 109, Stipulation 4). Moretti credibly testified that during the call, Arias asked her what employees wanted from Optum. (Tr. 19-20). Soon after the phone call with Arias ended, Moretti

texted a group chat with 19 other employees that, "Arias was trying to tell me that if we give Optum a change they would 'POSSIBLY' give better benefits and wages." (P-6, p.1-2).[5]

Moretti testified consistently, credibly, and in appropriate detail. Moreover, Moretti was a current employee when she testified and was therefore testifying against her pecuniary interest, which further enhances her credibility. *Flexsteel Industries*, 316 NLRB 745, 745 (1995) (testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests).

In contrast, Arias testified that he simply listened to Moretti during the call, and although he attempted to interject at times, he was unsuccessful. (Tr. 182). I credit Moretti over Arias, who gave incredulous and contradictory testimony throughout the hearing and was repeatedly impeached. For example, Arias testified he never said that he worked for the Employer's "People Team," but when confronted with recorded evidence to the contrary, Arias was forced to admit that he had, in fact, falsely told employees that he worked for Optum and had the same benefits as them. (Tr. 200-01).

The Employer did not present any evidence that it had a past practice of soliciting employee grievances.

Board Law

It is well established that where an employer does not already have a practice of soliciting employee feedback, its solicitation of grievances during a union campaign raises "a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary." *T-Mobile USA, Inc*., 368 NLRB No. 81, slip op. at 9 (2019), citing *Reliance Elec. Co.*, 191 NLRB 44, 46 (1971); see also *MEK Arden, LLC*, 365 NLRB No. 109, slip op. at 2 (2017) (finding unlawful solicitation of grievances where there was no evidence that the employer had previously addressed employee complaints in same manner). An employer may rebut the inference of an implied promise by establishing a past practice of soliciting grievances in a like manner prior to the critical period. See *Horseshoe Bossier City Hotel & Casino*, 369 NLRB No. 80 (2020); *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010).

The Board has also found the extent of dissemination to be an important consideration. See, e.g., *Archer Services*, 298 NLRB 312, 314 (1990); *Gold Shield Security*, 306 NLRB 20 (1992); see also *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 246 (2014) (union offered no evidence critical-period threats were disseminated to any other employees); *Trump Plaza*

[5] Although Employer's counsel objected to the admission of exhibit P-6 on hearsay grounds, it was received not for the truth of the matter asserted (i.e., the veracity of Arias' statements), but rather the dissemination thereof in this context. The Board evaluates not only the nature of objectionable conduct, but also whether reports of it were disseminated widely within the unit. See *Avante at Boca Raton*, 323 NLRB at 560; *Q. B. Rebuilders*, 312 NLRB 1141, 1141-42 (1993). Also note: P-6, p.2 shows the full expanded message from p.1.

Associates v. NLRB, 679 F.3d 822, 831 (D.C. Cir. 2012) (remanding based on finding Board "ignored the substantial circumstantial evidence of dissemination"). In *Peppermill Hotel Casino*, 325 NLRB 1202, 1202 n.2 (1998), the Board stated that did not presume that the conduct at issue—interrogation, the impression of surveillance, threats of discharge, offers of benefit, and a discriminatory evaluation—was disseminated, but noted that because the election ended in a tie, the outcome could have been influenced by a change in the vote of either of the two individuals at whom the conduct was directed, and thus the election should be set aside.

Recommendation: Sustain Objections 3 & 4 (Solicitation of & Implied Promise to Remedy Grievances)

I find Arias' March 25 questioning of Moretti—about what employees wanted from the Employer—objectionable, as it reasonably tends to restrain protected concerted activity, especially since there is no evidence of the Employer having a past practice of soliciting employee grievances. See *Sweetwater Paperboard*, 357 NLRB 1687 (2011) (in the absence of a previous practice of doing so, an employer's solicitation of grievances during an organizational campaign is objectionable if the employer expressly or impliedly promises to remedy those grievances).

Here, Arias' solicitation carries with it the presumption of an implied remedial promise, and there is no record evidence of a past practice to rebut this presumption. See *Ichikoh Mfg.,* 312 NLRB 1022, 1024 (1993) (employer's solicitation of employee concerns implicitly promised to remedy several grievances violative). Although Arias did not commit to any specific corrective action, his conduct with Moretti was disseminated to 19 other employees, who would reasonably tend to "anticipate improved conditions of employment which might make union representation unnecessary." *Majestic Star Casino, LLC*, 335 NLRB 407, 407-08 (2001).

Accordingly, I recommend sustaining Petitioner's Objections 3 and 4.

Objection 5: During the critical, pre-election period, the Employer, through its agents and representatives, threatened employees with the loss of their ability to speak directly to management concerning workplace issues if they voted for the Union in the election.

Record Evidence

The record shows that Arias made the following statements to employees during captive audience meetings held on March 13: "Right now, the company, under the law, has a direct relationship with their employees, so they can resolve issues and do whatever they want, okay? Once a Union is voted in, that direct relationship is taken away." (P-1 at 44:38-45:05). The record further shows that on March 14, Arias reiterated to a different group of employees that if they elected the Union, "the company loses their ability to deal directly with their own employees." (P-4(a) at 13:34-40).

And, in other Employer-led meetings during the critical period, employees were shown a PowerPoint slide that stated: "A 'No' vote means we can tackle issues by directly working

together and allows you to retain your own voice and advocate for yourself. Don't let others make the decision for you." (P-5; Tr. 74, Stipulation 3).

Board Law

As a general rule, statements by employers to employees indicating a change in a relationship if employees opt for union representation are permissible if unaccompanied by threats. Compare *Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019) (violation found where there were several threats made, and re-run election directed), with *Tri-Cast, Inc.*, 274 NLRB 377 (1985) (statement was unaccompanied by other threats, thus objection overruled).

Recommendation: Sustain 5 (Threating Loss of Access to Management)

I find Arias' March 13 and 14 statements and PowerPoint slide representing that employees would lose direct access to management if they elected the Union to be objectionable, considering the context and the totality of the Employer's conduct here. See e.g., *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at 1, n.2 (2018) (employer violated Section 8(a)(1) where employees would reasonably interpret certain statements made in a power point presentation as threats to change the employer's easy-going culture and adopt a less flexible managerial approach; specifically, statements that if employees selected a union the culture would change, relationships would suffer and flexibility would be replaced by inefficiency against the backdrop of championing its own "easy-going atmosphere" where employees have the "freedom to do [their] job"), *enforcement denied,* 932 F.3d 465 (6th Cir. 2019).

Given the presence of several other threats during these meetings (as discussed in other sections), this case is more analogous to *Sysco Grand Rapids, LLC*, where, amidst several other violations, a supervisor told an employee that he would not be able to talk with the supervisor in the same manner if the union won the election. 367 NLRB slip op. at 25. The statement, in context with other threats, was found unlawful "because it indicated that a benefit (access to management) would be lost and was accompanied by other Section 8(a)(1) threats." *Id*., slip op. at 3, 1 n.6. See also, *Mead Nursing Home, Inc.,* 265 NLRB 1115, 1115-16 (1982) (re-run election directed due to presence of several employer threats, including unlawful statement to employees that if union was certified, employees would "not be permitted to go directly to [management] about particular problems that you may have").

Accordingly, I recommend sustaining Petitioner's Objection 5.

Objection 6: During the critical, pre-election period, the Employer, through its agents and representatives, compelled employees to attend both group and individual anti-union meetings.

Record Evidence

The record shows that the Employer held a number of group, as well as one-on-one captive audience meetings between March 10 to about April 10 in an attempt to reach every single employee. (Tr. 192-94, 217).

Board Law

Under the extant *Peerless Plywood* rule, employer captive audience meetings held within 24 hours of the election, as well as meetings with individuals or small groups of employees away from their workstations are objectionable. *Peerless Plywood Co.*, 107 NLRB 427, 429 (1959). See also *Glasgow Industries*, 204 NLRB 625 (1973); *P. E. Guering, Inc.*, 309 NLRB 666 (1993). This rule, however, does not prohibit "minor" conversations between supervisors or union agents and a few employees during the 24-hour period before the election. See *Electro Wire Products*, 242 NLRB 969 (1979), and *Business Aviation, Inc.*, 202 NLRB 1025 (1973). Where there was no evidence of any speech made to employees at one site within 24 hours of the scheduled polling time for the employees at that site, the election was upheld. *Shop Rite Foods, Inc.*, 195 NLRB 133 (1972); see also *Dixie Drive-It-Yourself System Nashville Co.*, 120 NLRB 1608 (1958). The rule does not interfere with the rights of unions and employers to circulate campaign literature on or off the premises at any time prior to an election. See *General Electric Co.*, 161 NLRB 618 (1966); *Andel Jewelry Corp.*, 326 NLRB 507 (1998); and *Virginia Concrete Corp.*, 338 NLRB 1182, 1187 (2003).

Recommendation: Overrule Objection 6 (Mandatory Captive Audience Meetings)

The record shows that the Employer held mandatory meetings with employees beginning March 10 and ending April 10, two days before the April 12 election. (Tr. 194). Consistent with current Board law, meetings held more than 24 hours before election alone do not constitute objectionable conduct. *Peerless Plywood Co.*, 107 NLRB at 429.

Accordingly, I recommend overruling Petitioner's Objection 6.

Objection 7: During the critical, pre-election period, the Employer, through its agents and representatives, discriminatorily enforced its rules, including its rule regarding discussing non-work subjects during work time.

Record Evidence

The record shows that prior to the Union campaign, Unit employees were permitted to discuss non-work subjects during work time, and although the Employer maintained a policy against "Solicitations and Distribution of Literature," it is unclear whether it was ever enforced. (Tr. 51-54, 134-40, 149, 220, 235, 255; P-8). However, employee Sarah Bocker testified that that about a week before the election, she was working in the chemistry lab when a coworker from a different department, Jennifer Ryan, stopped by to chat about both work-related and Union-related matters (e.g., confirming a Union meeting time), and during their conversation, Chemistry-Hematology Supervisor John Shao (Shao) approached them and said that they were not to discuss Union-related topics on the clock, on the work property and they had to wait until after-hours. (Tr. 51-52). The record further reflects that Shao was aware of Bocker's Union sympathies. (Tr. 45-46, 254-55).

Employee Jennifer Ryan (Ryan) gave corroborating testimony that she was in the back of the chemistry lab to throw waste and HIPAA in a shredding bin and happened to catch Bocker on her way out and stopped to chat about non-Union and Union-related matters when Shao approached them and said that they needed to talk about the Union somewhere else out of work time. (Tr. 133-34, 150). Ryan testified that the admonishment had dumbfounded her because in the 10 years she had worked there, she had never once been told that she could not remain and have a conversation with anybody. (Tr. 129, 134, 149-50). The record also reflects that unlike Bocker, Ryan is no Union partisan, as she testified that she ultimately signed the anti-Union petition that was being circulated by Freddie/Freddy Justiniano (Justiniano). (Tr. 145).

As discussed further in Objection 9, there is no evidence management ever admonished Justiniano or told him to go back to work, despite contravening the Employer's no-solicitation policy. (Tr. 54, 68-69, 91, 95, 137-40; P-8). Instead, Justiniano freely circulated the anti-union petition at the facility, collecting signatures on work time with the Employer's knowledge and endorsement. (Tr. 52-54, 134-40, 220, 235).

Supervisor Shao admitted during his testimony that employees are allowed to have casual conversations about non-work topics while in the lab and on the clock. (Tr. 255). Additionally, Shao testified that it was permissible for Ryan to be using the shredding bin in the chemistry lab. (Tr. 260). Shao further admitted to breaking up Bocker and Ryan's conversation and telling them to take it to a break room during one of their breaks. (Tr. 255-56). When I, as the Hearing Officer, questioned Shao about his motivation for breaking up their chat, inquiring if there were contamination concerns or PPE requirements, he was evasive and instead of pointing to any particular policy he replied flatly, "if you're not in the lab working in the lab, you should not be in the lab," despite earlier stating that Ryan was permitted to be in the lab and that employees are allowed to engage in casual conversations about non-work topics while on the clock. (Tr. 258, 260, 255). When asked on direct examination by Employer counsel if he ever directed any employee under his supervision not to talk about the Union or the election during work time, he answered, "No." (Tr. 255-56).

I do not find Shao's denial credible, and even if I were to credit that the never mentioned the Union when he broke up Bocker and Ryan's chat, that does not address his motivation for doing so when he previously testified that employees are allowed to have casual conversations about non-work topics while in the lab on the clock. (Tr. 255). Accordingly, I credit Bocker and Ryan's corroborated testimony over Shao's inconsistent and evasive testimony. Additionally, Bocker and Ryan's status as current employees is a "significant factor" that makes their testimony "particularly reliable," especially where, as here, their testimony contradicts that of their supervisor. *Flexsteel Indus.*, 316 NLRB at 745; see *Pac. Coast Sightseeing Tours & Charters, Inc.*, 365 NLRB No. 131, slip op. at 7 (2017). Further, Ryan acknowledged that she signed the anti-Union petition, making her testimony less likely to be biased. (Tr. 145).

Board Law

The Board has consistently found that restricting employees from discussing the union while permitting other topics to be discussed discriminatory. See *Gallup, Inc.*, 334 NLRB 366, 366, 377 (2001) (discriminatory treatment towards pro-union discussions without the same of anti-union discussions); *Emergency One, Inc.*, 306 NLRB 800 (1992) (employer unlawfully restricted conversation about union matters during work time, while permitting conversations about other nonwork matters); see also *Premier Maintenance*, 282 NLRB 10, 11 (1986) (promulgation of rule against solicitation during "working time" unlawful when restricted solely to union solicitation).

Additionally, promulgation or enforcement of new or previously unenforced rules during the critical period has the reasonable tendency of coercing or interfering with the exercise of employee rights under the Act and may constitute objectionable conduct. See, e.g., *Jurys Boston Hotel*, 356 NLRB 927 (2011); *Steeltech Mfg.*, 315 NLRB 213 (1994); see also *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 2, 9-10, 12 (2014); *Durham School Services, L.P.*, 360 NLRB 694, 694 n.5 (2014) *Freund Baking Co.*, 336 NLRB 847 (2001).

Recommendation: Sustain Objection 7 (Discriminatory Restriction)

Applying the above principles to the credited facts here, I find that Supervisor Shao's conduct in breaking up Bocker and Ryan's chat to be objectionable as it was discriminatorily motivated.

Arias acted in contravention of his and the Employer's practices regarding non-work discussions when he broke up the conversation between the lead Union supporter and a long-time employee. This was shocking because to the employees' knowledge, in the past 10 years there were no known instances of employees being admonished for casual conversations with colleagues. Even if I had credited Shao that he never mentioned the Union during his admonishment, it still would have been objectionable as employees would reasonably believe under these circumstances that they were under stricter scrutiny or closer supervision due to their known or suspected Union sympathies. See generally, *David Saxe Prods., LLC*, 370 NLRB No. 103, slip op. at 40 (2021); *Jennie-O Foods*, 301 NLRB 305, 310 (1991).

However, I credit Bocker and Ryan's testimony that Shao issued a discriminatory subject-matter restriction in response to their chat that was partially Union-related, which the Employer disparately enforced when allowing Justiniano's anti-Union discussions and solicitations in violation of the Employer's non-solicitation policy. This conduct would reasonably tend to interfere with employee free choice. See *Gallup, Inc.*, 334 NLRB at 366 (the enforcement of a new rule upon the commencement of a union organizational campaign is strong evidence of discriminatory intent); *Jurys Bos. Hotel*, 356 NLRB at 928 (Board found that the result of the election—decided by a single vote—might well have been affected alone by three rules, including one against solicitation, even though they were unenforced).

Accordingly, I recommend sustaining Petitioner's Objection 7.

Objection 8: During the critical, pre-election period, the Employer, through its agents and representatives, threatened employees with the loss of wage increases if they voted for the Union.

Record Evidence

The record shows that Arias made the following statements to employees during a captive audience meeting held on March 13:

> According to BLS [the Bureau of Labor Statistics], about 50 percent – it's a *50/50 shot* that a contract will even be reached, okay? Bloomberg Law just put out a recent report – I'm going to print this up and get a copy for everyone as well – *on average it takes about 465 days to actually reach a first-time contract.* (P-1 at 14:37-56) [Emphasis added.]
>
> […]
>
> The way things are currently, currently are, okay, everything has to remain the same until something is – an agreement is reached. I'll give you an example, okay? I'm going to do a neutral example, I'm going to do a good one, and I'm going to do a bad one, okay? *Let's say the company is issuing out raises to the entire company, that will not happen here because status quo is in effect here because you bargain over your wages.* So the rest of the company gets an increase and benefit or whatever they do, wages, it's being negotiated here, okay? Because if the company just went and gave you something while there's representation – violation of federal law." (*Id*. at 46:31-47:11). [Emphasis added.]

The record shows that Arias made the following statements to employees during a captive audience meeting held on March 14:

> *Let's say that the company gave a companywide raise next week. Most likely it's not going to happen here because of status quo, okay?* It would be – personally I don't like that, okay, because – but the law says it could be viewed as a bribe. (P-4a at 16:00-10). [Emphasis added.]
>
> […]
>
> *[N]ewly unionized groups, okay, have a 50/50 chance of even reaching a first-time agreement,* okay? And Bloomberg Law – this is all researchable online – Bloomberg Law put out a recent study that *on average it takes about 465 days to reach a first agreement, if they reach a first agreement. And it's important to know that because status quo is going to be in effect until an agreement is reached, okay? The law is very clear that there's absolutely no time limits.* (*Id.* at 19:12-42). [Emphasis added.]

Board Law

The Board has found that an employer's reliance on maintaining the status quo in order to justify denying employees increased wages and benefits during a union campaign or contract bargaining to be unlawful in certain contexts. See e.g., *Cemex Constr. Materials Pac., LLC*, 372 NLRB No. 130, slip op. at 76 (statements that wage increases were "in a status quo position" due to the election, and not "able to give out raises at that point for that reason" and that wage increases would be frozen for possibly years if employees unionized found unlawful); compare *W. E. Carlson Corp.*, 346 NLRB 431, 440 (2006) (company's statements that if the union prevailed in the election that bargaining could last for months or years and during negotiations wages would be frozen, unlawful), with *Mantrose-Haeuser Co.*, 306 NLRB 377, 377-78 (1992) (no violation where employer said wages and benefits are "typically" frozen during bargaining which can go on for months or years, where there was no statement benefits would be lost, and the company continued its practice of granting predetermined wage increases during the union election campaign); see also *Teksid Aluminum Foundry*, 311 NLRB 711, 711 n.2, 717 (1993) (telling employees that, should the union win, everything is frozen until an agreement is reached which could take years to negotiate, unlawful).

Recommendation: Sustain Objection 8 (Threatening Loss Wage Increases)

I find Arias' March 13 and 14 statements during captive audience meetings regarding the withholding of wage increases objectionable under these circumstances. See *Cemex Constr. Materials Pac., LLC*, 372 NLRB No. 130, slip op. at 76.

An employer must avoid attributing to the union the "onus for the postponement of adjustment in wages and benefits" or disparaging and undermining the union by creating the impression that it stood in the way of employees getting wage increases and benefits. See *Pacific FM, Inc.*, 332 NLRB 771, 792 (2000). Here, Arias repeatedly stressed the maintenance of the status quo, how long wages could be frozen given no time limit for contract bargaining, that is *if* an agreement is ever even reached, and in doing so, arguably conveyed an implicit threat that employees' representation by the Union would be futile and that employees would have to rely on the Employer to protect their interests when noting that the rest of the company would get increased wages and benefits but Unit employees could not because of the Union. See *Atlantic Forest Products*, 282 NLRB 855, 858-59 (1987) (statements suggesting an immediate wage increase without a union but a delay for an indefinite period of negotiations for an uncertain increase with a union improperly attributed the wage postponement to the union).

Contrary to the Employer's arguments, its statements are not protected in this context where they express threats of reprisal. See *Gissel Packing Co.*, 395 U.S. at 618. Arias' comments were more than a simple recitation of the law or objective facts from BLS and Bloomberg articles. Given the totality, where Arias emphasized there being no time limits for contract bargaining, coupled with the implied threats of futility and blaming Union organizing for the status quo, Arias' statements, taken as a whole, are objectionable as they reasonably tend to coerce employees.

Accordingly, I recommend sustaining Petitioner's Objection 8.

Objection 9: During the critical, pre-election period, the Employer, through its agents and representatives, solicited employees to sign a Petition asking the Union to withdraw the election petition.

Record Evidence

Although the Petitioner did not specifically address Objection 9 in its post-hearing brief, the record shows that with the Employer's knowledge and endorsement, employee Freddie/Freddy Justiniano (Justiniano) circulated an anti-union petition for weeks during the critical period at the Employer's facility during work time. (Tr. 52-54, 68-69, 90-95, 98-99, 104-05, 134-39, 220-21, 235-36). While soliciting signatures for the anti-union petition Justiniano engaged in lengthy conversations with employees, who were frequently on work time, in plain view or ear range of supervisors. *Id*. At a minimum, Supervisors Bill Krayeski, Andrew Stanley, and Brian/Bryan Gitlitz (Gitlitz) were aware of Justiniano's conduct. *Id*. Indeed, within at least 10 days of the vote, Gitlitz, during a "daily huddle," introduced Justiniano to his team and explained to employees that Justiniano was circulating a petition to delay or withdraw the Union's representation petition. *Id.*

Board Law

Although an employer may not solicit employees to revoke their union authorization cards, it is permitted to advise employees that they may do so. *See, e.g., AdvancePierre Foods*, 366 NLRB No. 133, slip op. at 4 (2018). However, it can neither provide more than ministerial or passive aid to employees who wish to revoke nor monitor "whether employees do so nor otherwise creat[e] an atmosphere wherein employees would tend to feel peril in refraining from revoking." *Id.*; *see also Chelsea Homes*, 298 NLRB 813, 834 (1990) (drawing distinction between lawfully providing "ministerial or passive aid in withdrawing from union membership" and unlawfully "actively solicit[ing], encourag[ing], and assist[ing] such withdrawals"), *enforced mem.*, 962 F.2d 2 (2d Cir. 1992).

The Board will also consider whether an employer committed contemporaneous violations when assessing if its assistance created an atmosphere where employees would tend to feel peril if they refrained from revoking their authorization. *See, e.g., AdvancePierre Foods*, 366 NLRB No. 133, slip op. at 4; *Register Guard*, 344 NLRB 1142, 1144 (2005) ("The Board may also find such advice unlawful in the context of an employer's commission of other unfair labor practices."); *L'Eggs Products, Inc.*, 236 NLRB 354, 389 (1978), *enfd. in relevant part,* 619 F.2d 1337 (9th Cir. 1980). While an employer may not violate the Act by giving "ministerial aid," the employer's actions must occur in a "situational context free of coercive conduct." *In Re Narricot Indus., L.P.*, 353 NLRB 775, 785 (2009). The essential inquiry is whether "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." *KONO-TV-Mission Telecasting Corp.*, 163 NLRB 1005, 1006 (1967).

Recommendation: Sustain Objection 9 (Acquiescence to Anti-Union Petition)

Applying the above principles, I find the Employer's acquiescence to Justiniano's circulation of the anti-union petition during the weeks leading up to the election, when the same rights were denied those who supported the Union (see Objection 7), and in contravention of the Employer's non-solicitation policy to be objectionable. See *Sci. Atlanta, Inc.*, 278 NLRB 467, 467 (1986) (election set aside because employer "acquiesced in an antiunion employee's distribution activities for a 2-week period leading up to the election, when the same rights were denied those who supported the Union"); *Hatteras Yachts, Amf Inc.*, 207 NLRB 1043, 1051 (1973) (employer "interfered with the election process" by "enforc[ing] its no-solicitation rule disparately").

Here, the Employer not only tacitly condoned, but also expressly endorsed Justiniano's anti-Union petition by introducing him to employees during team meetings on work time, explaining that he was collecting signatures to delay or withdraw the Union's representation petition. Contra its own non-solicitation policy, the Employer permitted Justiniano to circulate the anti-union petition and talk to employees at length despite prohibiting other employees from engaging in Union discussions on work time (see Objection 7), thereby exceeding ministerial aid. *Chelsea Homes*, 298 NLRB at 834.

Further, it is evident that a significant number of employees were impacted by the Employer's disparately tolerated antiunion campaigning; roughly 90 Unit employees work at the Employer's facility over which Justiniano was given free reign and the anti-union petition was widely circulated. *Sci. Atlanta, Inc.*, 278 NLRB at 467. Given the backdrop of other contemporaneous objectionable conduct, the Employer's disparate conduct here would tend to interfere with the laboratory conditions of representation elections. See *In Re Narricot Indus., L.P.*, 353 NLRB at 785; *General Shoe Corp.*, 77 NLRB at 127.

Accordingly, I recommend sustaining Petitioner's Objection 9.

Objection 10: During the critical, pre-election period, the Employer, through its agents and representatives, required employees to make an observable choice regarding their support for the Union.

Record Evidence

The Petitioner did not specifically address Objection 10 in its post-hearing brief, and it is unclear what record evidence was intended to support this objection.

Recommendation: Overrule Objection 10 (Observable Choice Requirement)

As such, I find Petitioner has not met its burden here and I recommend overruling Objection 10.

Objection 11: During the critical, pre-election period, the Employer, through its agents and representatives, interrogated employees about their views of the Union.

Record Evidence

As discussed above in Objections 3 and 4, the record shows that employee Moretti was on extended medical leave when she received an unscheduled phone call on Saturday, March 25, from Arias, who claimed to be from the Employer's "People Team." (Tr. 18-19). Moretti was surprised to receive his call on a Saturday morning, but when she answered, he asked if it was okay that he was calling her at home then and she assented. (Tr. 22).[6] Moretti credibly testified that during the phone call **Arias asked her what she thought the Union could do for employees.** (Tr. 23-24). [Emphasis added.]

Moretti also credibly testified that the tone of the call turned hostile when she challenged some of Arias' statements (see further discussion below in Objection 14) and he became agitated, raised his volume, used curse words, and said he "doesn't let his wife talk to him that way, so he would not let [Moretti] talk to him that way." (Tr. 19-22).[7]

Conversely, Arias denied speaking during the call and testified that he merely listened to Moretti talk, aside from trying to interject at times unsuccessfully. (Tr. 182). Again, I credit Moretti over Arias, who gave incredulous and contradictory testimony throughout the hearing and was repeatedly impeached. For example, despite denying speaking during the phone call with Moretti, Arias was recorded telling employees during a captive audience meeting on March 27 with about 15-30 employees present, that he had called Moretti "to go over this stuff" but that she had objected to "everything that [he] shared." (Tr. 55; P-3 at 3:06-13).

Board Law

The Board applies the totality-of-the-circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), in determining whether questioning of an employee amounts to coercive interrogation. Under this test, the Board assesses whether under all the circumstances, including the *Bourne* factors, the questioning would reasonably tend to coerce the employee at whom it is directed. See *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These and other relevant factors "are not to be mechanically applied in each case." *Rossmore House*, 269 NLRB at 1178 n.20. The Board need not conduct a "strict evaluation of each factor; instead, the flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a

[6] I found Moretti to be a reliable witness. For example, Moretti conceded that when her supervisor had previously asked her if she wished to speak with Arias, she said she would like to hear what Arias had to say. (Tr. 23).

[7] The call was audio only, not video, and Moretti, being on extended medical leave, had never met Arias in person. (Tr. 22, 18-19) I observed during the hearing that Arias wore a wedding band on his ring finger. Arias also later testified that he did have a wife, who he had falsely told employees also worked for Optum and had the same benefits as them. (Tr. 201-02).

finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the totality of the circumstances." *Medcare Assoc.*, 330 NLRB 935, 939-40 (2000) (internal quotations omitted).

Recommendation: Sustain Objection 11 (Interrogation of Union Sympathies)

I find Arias' March 25 questioning of Moretti about what she thought the Union could do for employees objectionable under these circumstances. See *Stern Produce Co., Inc.*, 368 NLRB No. 31 slip op. at 11, 23 (2019) (interrogating employees about their union support/sympathies is unlawful if, under all the circumstances, the questions reasonably tend to restrain, coerce, or interfere with Section 7 rights).

Examining the totality of the circumstances here shows that Arias surprised Moretti with his call outside work hours when the Employer does not have a practice of contacting employees in this manner, was dishonest about this identity when pretending to be from HR, probed Moretti for her opinion about the Union while appearing to seek the information to either encourage Union disaffection or discourage Union sympathies (see parallel question asked of what employees wanted from the Employer in Objection 3-4), raised his voice, used hostile language, and made other coercive statements (see other sections) along the backdrop of the Employer's undisputed Union animus. (Tr. 18-22).

Given this context, Arias questioning Moretti about what she thought the Union could do for employees would have a reasonable tendency to restrain, coerce, or interfere with protected activity. See, *Hoffman Fuel Co.,* 309 NLRB 327, 327 (1992) (questioning an open union supporter in the context of a hostile conversation coupled with veiled threats, unlawful); *Christie Elec. Corp*., 284 NLRB 740, 740-41 (1987) (supervisor asking employee what he "wanted from the union" found unlawful interrogation where accompanied by coercive comments); *Seton Co.*, 332 NLRB 979, 982 (2000)(in finding an unlawful interrogation, Board noted that "the interrogation occurred against a background of numerous other unfair labor practices..."); *Struksnes Construction Co.*, 165 NLRB 1062, 1062 (1967) ("any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism, and therefore tends to impinge on his Section 7 rights.").

Based on the foregoing, I recommend sustaining Petitioner's Objection 11.

Objection 12: During the critical, pre-election period, the Employer, through its agents and representatives, threatened to terminate employees for engaging in protected Union activities.

Record Evidence

The record shows that employee Sarah Bocker (Bocker) was a known Union supporter. (Tr. 45-46, 63, 132-33, 179, 254-55). On March 17, Bocker met with Arias one-on-one, and during their discussion she explained that she had suffered personal injuries due to a tragic

accident that also took the life of one family member and permanently injured another, adding that she would not be there right now had the settlement come through. (Tr. 62-66).

In early April, Bocker's coworkers came to her in the lab and conveyed that Arias had told employees during captive-audience meetings that Bocker, who had led the Union campaign, was waiting on a multimillion-dollar settlement and that she would up and leave everyone once she collected, so he did not know why she was bothering to organize for the Union. (Tr. 64, 179). This revelation induced a panic attack, and Bocker told Shao what had happened and explained that she was struggling. (Tr. 48, 65). She testified that Shao was very compassionate and permitted her to go sit out in her car until she could regain her composure. (*Id.*) Seeing how distressed she was, Shao went to Stanley and relayed what had transpired and that Bocker was in tears. (Tr. 223). Stanley went to the parking lot to check on Bocker, and in her emotional state, Bocker vented to Stanley that she was so upset with Arias that she could claw his eyes out. (Tr. 224, 226). Stanley cautioned Bocker about saying things like that and that she could not threaten people at work, although he acknowledged in his testimony that he knew at the time that she had not meant that literally. (*Id*.)

After Bocker's panic attack passed, she came back to the lab and within a couple hours, she and Shao spoke. (Tr. 50). Bocker expressed to Shao that she knew it would be easier if she was not there (echoing Arias' statement about why she was bothering to organize for the Union) and that she had been looking for other jobs, to which Shao responded, **"well, they have been looking at trying to – – what would happen if we were to get rid of you."** (Tr. 51, 179). [Emphasis added.]

Shao testified that he believed the Employer's desire to terminate Bocker was motivated at least in part because of her Union support. (Tr. 254-55). This belief was also held by other employees due to managements' repeated mention of her name in connection with the Union. (Tr. 59, 63, 132). Although the Employer asserts that it was contemplating dismissing Bocker because of her statement to Stanley about clawing out Arias's eyes, there is no evidence this was communicated to Bocker or was evident from the context of the conversation with Shao. Further, there is no evidence that Bocker's statement to Stanley was anything more than emotional venting (which Stanley conceded), or that Bocker ever actually threatened Arias directly.

Board Law

"It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *Am. Tissue Corp*., 336 NLRB 435, 441 (2001). "The test is whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Am. Tissue Corp*., 336 NLRB 435, 441-42 (2001). An employer remark will be deemed a coercive threat in violation of § 8(a)(1) if it "can reasonably be interpreted by the employee as a threat." *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at 5 (2018). The test is an objective one "which examines whether the employer's actions would tend to coerce a reasonable employee." *Id*. Statements are viewed objectively and in context from the

standpoint of employees over whom the employer has a measure of economic power. See, e.g., *Mesker Door, Inc.,* 357 NLRB 591, 595 (2011).

The Board has routinely found that an employer's invitation to an employee to quit in response to protected concerted activity is coercive. *McDaniel Ford*, 322 NLRB 956, 956 n.1 and 962 (1997) (citing *Stoody Co.*, 312 NLRB 1175, 1181 (1993), *Kenrich Petrochemicals*, 294 NLRB 519, 531 (1989), and *L.A. Baker Electric*, 265 NLRB 1579, 1580 (1983)); see also *Pac. Coast Sightseeing Tours & Charters, Inc*., 365 NLRB No. 131 (2017) (employer violated Section 8(a)(1) by telling employees that they could quit if they did not like their working conditions); *Medco Health Sols. of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 3 n.4 (2016) *aff'g in rel. part Medco Health Sols. of Las Vegas, Inc.,* 357 NLRB 170 (2011) (respondent's statement that, if employee could not support the respondent's policies, there were other jobs out there and perhaps "this wasn't the place for him" was an implied threat in violation of 8(a)(1)).

Recommendation: Sustain Objection 12 (Implied Threat of Discharge)

I find Shao's early April statement to Bocker about the Employer looking into trying to get rid of her after she shared that she knew it would be easier for everyone if she was not there [organizing] and was considering other jobs, to be objectionable, as it constitutes an invitation to quit in response to her Union activity. See e.g., *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (employer's statement that, if employee was unhappy, "[m]aybe this isn't the place for you . . . there are a lot of job's out there" was an implied threat of discharge); *Paper Mart*, 319 NLRB 9 (1995) (president's statement that if employee "was not happy he could seek employment elsewhere" was implicit threat of discharge); *Intertherm, Inc.*, 235 NLRB 693, 693 n.6 (1978) *enfd. in relevant part* 596 F.2d 267 (8th Cir. 1979) (implied threat to tell employees that if "he was not happy with the company he should look elsewhere for a job"); *Chinese Daily News*, 346 NLRB 906, 906 (2006) *enfd.* 224 Fed. Appx. 6 (D.C. Cir. 2007) (implied threat telling employee to resign if she was not happy with her job).

Shao's statement reasonably conveys to employees that engaging in concerted activities and their continued employment are not compatible, and implicitly threatens discharge of the employees involved. *McDaniel Ford*, 322 NLRB at 956 n.1 and 962.

Accordingly, I recommend sustaining Petitioner's Objection 12.

Objection 13: During the critical, pre-election period, the Employer, through its agents and representatives, threatened employees with loss of employment if they went on strike.

Record Evidence

The record shows that Arias made the following statements on March 13, 14, 25, and 27, respectively:

(a) March 13 Captive Audience Meeting

On March 13, Arias made the following statements during a captive audience meeting:

However, the company does have certain rights, okay. I'll give you an example—Starbucks, I know for a fact there were certain locations that unionized that voluntarily walked off the job in protest or boycotting or strike. Okay? Under that same law, the National Labor Relations Act, a company has a right to replace the workers once they walk out on strike. The workers do not get paid when they walk out on strike. A lot of their benefits, if not all their benefits, could get – come to a cease because they're no longer working, they're out there on strike. *And if the company wants to replace them or move that location, under that law, depending on the criteria, they could possibly do it. Somebody asked me in one of my meetings Friday, they said well, hey, what would happen – what if we were on strike here? Well, the same rules would apply, okay?* I don't like the lab situation because Starbucks – I don't think you can outsource that work. But *there's been a history with lab work and Quest of people outsourcing that. So the company would have a right to do that.* (P-1 at 39:18-40:24). [Emphasis added.]

(b) March 14 Captive Audience Meeting

On March 14, Arias made the following statements during a captive audience meeting:

Let's just say [employees] walk off the job and then they weren't doing their work, and there was lab work that needed to get done, *the company would have a legal right to be able to outsource that work* to like, Quest, okay. They would have – the company is just not totally handicapped, they can outsource the work if they want to. And if there was a concerted activity of a walkout, as long as there was like no threatening, or no hitting of anybody, no one is going to lose their job on that, okay. Under this law too, though, like *if the employees stay out long enough, under – by law, the employer has a right to replace those employees too, okay*. (P-4a, 06:45-07:27). [Emphasis added.]

[…]

[W]hen employees go out on strike . . . under the law, the company does have a right to permanently replace their employees when the strike happens, and they definitely have a right to outsource the work to something like Quest as well, okay. (*Id*. at 20:19-20:42).

(c) March 25 Phone Call from Arias to Moretti

As discussed above in Objections 3, 4, and 11, the record shows that employee Moretti was on extended medical leave when she received a phone call on Saturday, March 25, from Arias, who claimed to be from the Employer's "People Team." (Tr. 18-19). Moretti credibly testified that during the phone call, Arias told her that if employees "go on strike . . . Optum would just outsource the work to Quest [Laboratories]," which was then disseminated to 19 other employees (Tr. 19-20; 23-24; P-6).

Arias testified that he simply listened to Moretti during the call, and although he attempted to interject at times, he was unsuccessful. (Tr. 182). Again, I credit Moretti over Arias, who gave incredulous and inconsistent testimony throughout the hearing. For example, Arias testified that he had been hired to persuade employees not to unionize, and to that end held multiple meetings almost every day between March 10 and April 10, and made the effort to speak to nearly every employee, whether individually or in group sessions to inform and educate them, and yet Arias denied saying anything during his call with Moretti. (Tr. 155, 169, 190, 194-95). Despite his blanket denial, Arias was recorded telling employees during a captive audience meeting on March 27 that he had called Moretti "to go over this stuff" with her and made reference to "everything that [he] shared." (P-3 at 3:06-13). In contrast, Moretti testified consistently, credibly, and in appropriate detail. Moreover, Moretti was a current employee when she testified and was therefore testifying against her pecuniary interest, which further enhances her credibility. *Flexsteel Industries*, 316 NLRB at 745.

(d) March 27 Captive Audience Meeting

On March 27, Arias made the following statements during a captive audience meeting with about 15-30 employees, (Tr. 55), present:

> However, when someone says, 'you don't give us what we want, in the time we want it, we're gonna go on strike,' the employees have a right to do that. However, *the company also has a right to outsource the work, whether it's Quest, somewhere else* – if that should happen – we don't want that. *These are our employees' jobs. These are our employees' jobs – we don't want it being outsourced.* We wanna protect our employees' jobs, okay. *But when someone says, 'oh, if you don't give us what we want, we're gonna go on strike,' – yes you have that right to do so, however, you paint the [company] into a corner where under the law they have a right to do something. Like, let's have an intelligent conversation about it.* (P-3, 06:27 – 07:08). [Emphasis added.]
>
> […]
>
> the company also has a right to outsource the work, whether it's Quest or somewhere else . . . . [I]f someone says "oh if you don't give us what we want we're gonna go on strike" – yes, you have a right to do so, however, you paint the [company] into a corner where under the law they have a right to do something…like, let's have an intelligent conversation about it. (*Id*. at 06:37-07:10).

Board Law

It is well established that an employer violates the Act by threatening employees with job loss during a union organizing campaign. *See, e.g., Unifirst Corp.*, 335 NLRB 706, 706-08 (2001) (employer violated Section 8(a)(1) of the Act by making an unlawful threat of job loss, and conveying the inevitability of a strike and the futility of bringing in a union); *Connecticut Humane Society*, 358 NLRB 187, 220 (2012) ("where an employer's statements about permanent replacements make specific references to job loss, such statements are generally deemed to be

unlawful since they convey to employees the message that their employment will be terminated").

In *Laidlaw Corp.*, 171 NLRB 1366, 1369-70 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970), the Board articulated certain rights for economic strikers, namely that when economic strikers who have been permanently replaced unconditionally apply for rehire, they are entitled to full reinstatement when positions become available (unless they have acquired regular and substantial equivalent employment in the meantime). Given these rights, the Board will find objectionable conduct if an employer, without advising employees of their *Laidlaw* rights, conveys a prospect of total job loss by telling employees they may lose their jobs if they go on strike. See *Warren Manor Nursing Home, Inc.*, 329 NLRB 3, 3 (1999); *Baddour, Inc.*, 303 NLRB 275 (1991); *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989); cf. *Fiber-Lam, Inc.*, 301 NLRB 94 (1991). The employer does not have to fully detail striker protections, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights under *Laidlaw*. See *Eagle Comtronics*, 263 NLRB 515 (1982) (if statement could be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats, it is not protected); *Novi American*, 309 NLRB 544, 545 (1992).

Recommendation: Sustain Objection 13 (Threats of Job Loss Due to Strike)

I find that Arias' March 13, 14, 25, and 27 statements regarding consequences to strikes to be objectionable because they went beyond the mere recitation of the law and threatened the prospect of total job loss when taken together with the other statements made by Arias in those contexts. See e.g., *Fern Terrace Lodge*, 297 NLRB 8 (1989) (employer's statement unlawful because it went beyond a mere recitation of employer's right to permanently replace economic strikers); *Eagle Comtronics*, 263 NLRB at 516 (unlawful when coupled with threats).

In the instant case, Arias referenced Starbucks' employees striking during the March 13 captive audience meeting and failed to differentiate between economic strikes and unfair labor practice strikes, which carry different protections and reinstatement rights.[8] Additionally, Arias mentioned Starbucks moving its location while employees were striking, adding that the "same rules would apply" here, which raises the spectre of plant closure and total job loss. He also stated that the Employer would have a right to permanently outsource Unit work (which is a permissive subject of bargaining), as opposed to hiring permanent replacements at the same facility per *Laidlaw*. Similarly, during the March 14 captive audience meeting and during Arias' March 25 phone call with Moretti, Arias stated that if employees went on strike that the Employer could outsource Unit work to Quest Laboratories[9] (as opposed to hiring replacements at the same rates as Unit employees), again implying employees' jobs would be eliminated. Lastly, during the March 27 captive audience meeting, Arias repeatedly told employees that the Employer does not want to have to outsource their jobs, but that it may be painted into a corner

[8] The vast majority of recent Starbucks strikes reported publicly have been ULP strikes, not economic strikes.

[9] Arias' statement to Moretti was later disseminated to 19 other employees.

and forced to do so and will not be able to protect their jobs if employees go on strike, insinuating plant closure and total job loss.

As to statements concerning the employer's privilege to hire permanent replacements for economic strikers, the Board's view is that truthful, albeit incomplete, explanations of the privilege are protected, unless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats. *Eagle Comtronics*, 263 NLRB at 515.

Given that, here, some of Arias' statements were less than accurate (e.g., misrepresenting the rights of ULP strikers) and carried explicit and implied threats of job loss inconsistent with *Laidlaw* rights (e.g., claiming the Employer has a right to close its location and move if employees go on strike, or permanently outsource Unit work instead of hiring permanent replacements at the same location), Arias' statements could be fairly understood as threats of reprisal against employees, especially when coupled with the other threats levied during the captive audience meetings and phone call (e.g., statements of futility discussed in other sections). See e.g., *Mack's Supermarkets, Inc.*, 288 NLRB 1082, n.3 (1988) (in context involving threats to job status, unlawful to tell employee that he could be replaced in the event of a strike without further telling him about reinstatement rights); see also *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 361 (D.C. Cir. 2016) (upholding the Board's distinction between employer statements that striking employees risk "loss of a job," which the Board finds unlawful, and statements that striking employees risk "loss of job status," which the Board finds permissible); see generally *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 708 (1992), *enfd. granted* 991 F.2d 786 (1st Cir. 1993) (mere mention that strikes are possible alone is not unlawful, however other statements such as subjecting employees to greater scrutiny and possible discharge unlawful).

Further, the Board has found no merit to a contention that statements that do not directly or explicitly attribute strikes, closings, or job loss to unionization cannot constitute threats, reasoning: "Communications which hover on the edge of the permissible and unpermissible are objectionable as '[i]t is only simple justice that a person who seeks advantage from his elected use of the murky waters of double *entendre* should be held accountable therefor at the level of his audience rather than that of sophisticated tribunals, law professors, scholars of the niceties of labor law, or "grammarians."'" *Turner Shoe Co.*, 249 NLRB 144, 146 (1980) (quoting *Georgetown Dress Corp.*, 201 NLRB 102, 116 (1973)). Moreover, even in the absence of a specific finding of objectionable conduct, the Board has set aside elections where the overall impact creates a coercive atmosphere due to the employer's emphasis on strikes, plant closure, and loss of jobs if the union wins. See, e.g., *Turner Shoe Co.*, 249 NLRB 144, 147 (1980) (citing *Thomas Products Co.*, 167 NLRB 732 (1967); *Amerace Corp.*, 217 NLRB 850 (1975)).

Based on the foregoing, I recommend sustaining Petitioner's Objection 13.

Objection 14: During the critical, pre-election period, the Employer, through its agents and representatives, implied to employees it would be futile for them to select the Union.

Record Evidence

(a) March 25 Phone Call from Arias to Moretti

As discussed above (in Objections 3, 4, 11, and 13), the record shows that employee Moretti was on extended medical leave when she received a phone call on Saturday, March 25, from Arias, who claimed to be from the Employer's "People Team." (Tr. 18-19). Moretti credibly testified that during the phone call, Arias told her that "Optum would never agree to pay for [the] benefits." (Tr. 19-20).

Arias testified that he simply listened to Moretti during the call, and although he attempted to interject at times, he was unsuccessful. (Tr. 182). Again, I credit Moretti over Arias, who gave incredulous and inconsistent testimony throughout the hearing. For example, Arias testified that he had been hired to persuade employees not to unionize, and to that end held multiple meetings almost every day between March 10 and April 10, and made the effort to speak to nearly every employee, whether individually or in group sessions to inform and educate them, and yet Arias denied saying anything during his call with Moretti. (Tr. 155, 169, 190, 194-95). Despite this blanket denial, Arias was recorded telling employees during a captive audience meeting on March 27 that he had called Moretti "to go over this stuff" with her and made reference to "everything that [he] shared." (P-3 at 3:06-13).

(b) March 27 Captive Audience Meeting Led by Arias

The record shows that on March 27, during a captive audience meeting with 15-30 employees, (Tr. 55), Arias made the following statements:

> [I]f somebody wants the Union just because they're upset and they want to show the Union and stick it to 'em, by all means. *But I want you to know that when we go into bargaining…we're stuck in this process going back and forth, and you still don't have what you want and time goes down the road and you still don't have what you want,* please look at those people and say "we followed you, you took us here, you took us here, how come we still don't have what we want?" Because I believe, even though there are some people here that are just mad at the company and want to stick it to 'em, I believe that most people here want to achieve something better for themselves. (P-3 at 22:55-23:30).
>
> [. . .]
>
> The law says…the FEDERAL law says…the FEDERAL GOVERNMENT says, there is absolutely no guarantee to collective bargaining. None. The law also says there is absolutely no time limits to the collective bargaining process. . . . The employees have a right to know what the truth is. There is no time limits. . . . The law is also very clear,

> Sarah, both parties have an equal right to ask for what they want at the table but neither party can force the other side to agree. (*Id*. at 27:45-28:35).
>
> [. . .]
>
> Collective bargaining—back and forth process between someone who's way up here and someone who's way down here on a different philosophy. Okay? That's just how negotiations are. Anyone ever been through a divorce? . . . So we were stuck in a divorce hearing for *more than seven years* because we just couldn't come to an agreement. . . . If anybody wants to stay in the past and be upset, we get it, we get it. I just ask you to challenge yourself—what does that resolve, and where does that get us moving forward? (*Id.* at 32:08-33:14).

Board Law

The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction. *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011) (Board overruling ALJ and finding unlawful statement of futility when applying objective test). The statement is assessed in light of the overall context based on the perspective of a reasonable employee. *Durham School Services, L.P.*, 364 NLRB at 1576-77.

The Board routinely finds statements regarding the futility of union representation or bargaining to be unlawful threats. See, e.g., *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) (employer's statement that collective bargaining would not result in employees obtaining benefits other than what employer chose to give them found unlawful because employees "could reasonably infer futility of union representation"); *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992) (statement that employees would end up no better off than without union representation unlawful); *Lucky Cab Co.,* 360 NLRB 271, 288 (2014) (employer statement that union would not deliver for employees was unlawful threat of futility); *Durham School Services, L.P.*, 364 NLRB 1575, 1577 & 1589 (2016) (employer opining that it could be "years and years" before the benefits of union representation materialized constituted an unlawful threat of futility).

Furthermore, the Board has held that an employer's conveyance of a sense of futility warrants setting an election if the employer's statements expressly, or through clear implication, convey that it will not bargain in good faith if the union is selected. See *Madison Industries*, 290 NLRB 1226, 1230 (1988); see also *American Telecommunications Corp.*, 249 NLRB 1135, 1136 (1980).

Recommendation: Sustain Objection 14 (Threats of Futility)

I find Arias' March 25 statement—that the Employer would never agree to pay for the benefits being sought by the Union—to be objectionable as it would reasonably tend to coerce union activities in light of the hostile phone call with Moretti, which was accompanied by other unlawful statements discussed in the other sections. See *Shamrock Foods Co.*, 366 NLRB No. 117 (2018), *enfd.* 779 Fed. Appx. 752 (D.C. Cir. 2019) (adopting administrative law judge's

finding that employer threatened futility by saying it did not have to agree to anything in bargaining).

Similarly, I find that Arias' March 27 statements regarding the duration, dithering, and delay of the collective-bargaining process objectionable as they would reasonably tend to interfere, restrain, or coerce employees given the context of the captive audience meeting replete with other unlawful statements and animus. See *Libertyville Toyota*, 360 NLRB 1298, 1298 & 1332-33 & 1337 (2014) (employer statement that it could take years, if ever, for the union to secure a contract unlawfully communicated that selecting union representation would be futile).

Accordingly, I recommend sustaining Petitioner's Objection 14.

Objection 15: During the critical, pre-election period, the Employer, through its agents and representatives, engaged in surveillance of employees' union activity and created the impression of surveillance of employees' union activities.

Record Evidence

The record shows that following her phone call with Arias on March 25, Moretti texted a group chat with 19 other employees that, "[Arias] said if we go union there is no way that United [H]ealthcare is going to give us what we want and if we strike they will just [o]ut source everything to Quest." (P-6, p.3).[10]

The record shows that on March 27, during a captive audience meeting with 15-30 employees, (Tr. 55), Arias made the following statement but without disclosing how he came to learn what Moretti messaged privately to fellow employees:

> The person is not here. They're on a leave right now. (P-3 at 2:23-28).
>
> [. . .]
>
> This person [Moretti] said [to other employees], that *I said* that, 'oh yeah if we [employees] do this [elect the Union], this [and go on strike] then we're [i.e., the Employer is] gonna outsource this work. (*Id*. at 5:44-5:52).

Board Law

In determining whether an employer has unlawfully created the impression of surveillance, the Board considers "whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005), *enforced*, 181 F. App'x 85 (2d Cir. 2006); *Flexsteel Industries*, 311 NLRB at

[10] Although Employer's counsel objected to the admission of exhibit P-6 on hearsay grounds, it was received not for the truth of the matter asserted (i.e., that Arias actually made those statements), but rather as evidence of Moretti's Union activity in this context.

257; see also, *Kalthia Grp. Hotels, Inc.*, 366 NLRB No. 118, slip op. at 17 (2018) (the test is "an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act.")

The idea is that employees should be free to participate in Section 7 activities "without the fear that members of management are peering over their shoulders, taking note of who is involved in [those] activities, and in what particular ways." *Flexsteel Industries*, 311 NLRB at 257. Thus, an impression of surveillance is created when "an employer reveals specific information about a union activity that is not generally known, and does not reveal its source." *Kalthia Grp. Hotels, Inc.*, 366 NLRB No. 118, slip op. at 17 (2018). This creates the impression of surveillance "because employees are left to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring." *G4S Secure Solutions (USA) Inc*., 364 NLRB 1327, 1364 (2016).

Recommendation: Sustain Objection 15 (Creating Impression of Surveillance)

I find that Arias' March 27 conduct during a captive audience meeting with 15-30 employees, objectionable where he noted that an employee (Moretti) was on leave but that he nevertheless knew what she had communicated privately to her coworkers about Union organizing without disclosing how he came by this information. See *Kumho Tires Georgia*, 370 NLRB No. 32, slip op. at 1, n.3 (2020) (test generally met when employer reveals specific details about its employees' protected activity that are not generally known but fails to reveal the source of that information).

Applying the above test here, the relevant circumstances support that Arias created the impression of surveillance by failing to reveal during the meeting how he learned of Moretti's private communications with coworkers regarding Union organizing, thus leaving employees to wonder how he obtained this information and causing them to reasonably "fear that members of management are peering over their shoulders." *Flexsteel Industries*, 311 NLRB at 257; see also *G4S Secure Solutions (USA) Inc*., 364 NLRB at 1364.

Accordingly, I recommend sustaining Petitioner's Objection 15.

VI. CONCLUSION

I recommend that the Petitioner's Objections 6 and 10 should be overruled, but that Objections 1-5, 7-9, and 11-15 should be sustained. The Petitioner has met its burden in Objections 1-5, 7-9, and 11-15 of establishing that the Employer has engaged in objectionable conduct affecting the results of the election. Accordingly, I recommend the results of the election be set aside and a new election be ordered.

VII. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 2 by November 7, 2023. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Pursuant to Section 102.5 of the Board's Rules and Regulations, exceptions must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing exceptions does not have access to the means for filing electronically or filing electronically would impose an undue burden. Exceptions filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules do not permit a request for review to be filed by facsimile transmission.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business (5:15 p.m.) on the due date. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: October 24, 2023

/s/ Elise F. Oviedo, Esq.
Elise F. Oviedo, Hearing Officer
National Labor Relations Board