United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 4, 2026

Lyle W. Cayce
Clerk

No. 24-60653

Starbucks Corporation,

Petitioner/Cross-Respondent,

versus

National Labor Relations Board,

Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement of an Order
of the National Labor Relations Board
Agency No. 14-CA-300065

Before Smith, Wiener,[1] and Higginson, *Circuit Judges*.

Stephen A. Higginson, *Circuit Judge*:

Starbucks petitions for review of the National Labor Relations Board's (the "Board") determination that Starbucks violated the National Labor Relations Act (the "NLRA") due to a number of statements made by store managers to employees with respect to protected activities.

[1] Judge Wiener was present for oral argument but is unable to participate in this decision. The case is decided by a quorum. *See* 28 U.S.C. § 46(d).

The NLRA "functions to regulate conduct attending organizational activities in the workplace in a manner that balances between protecting the rights of employees, employers, and to a lesser extent the union." *UNF W., Inc. v. NLRB*, 844 F.3d 451, 457 (5th Cir. 2016) (citation modified). Under Section 7 of the NLRA, employees have rights including the right to organize, to "form, join, or assist labor organizations," to pursue collective bargaining through representatives, and more. 29 U.S.C. § 157 (2015). In turn, Section 8(a)(1) of the NLRA provides protection to employees such that employer actions do not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158 (a)(1).

But employers retain rights as well. Namely, "employers' right of free expression of opinion and fact" has long been protected. *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 635 (5th Cir. 2003). Under the First Amendment and Section 8(c) of the NLRA, employers may communicate their views about unionization and to make "prediction[s] as to the precise effects [they] believe[] unionization will have." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). However, speech that threatens "reprisal" violates the NLRA. 29 U.S.C. § 158(c).

The Board found that Starbucks violated Section 8(a)(1) of the NLRA by threatening employees with reprisal for participating in unionization efforts and creating the impression that it was surveilling employee organizing activity. Taking the facts underlying each claim below, we grant enforcement of the NLRB's decision as to one threat of reprisal determination and deny enforcement as to the other determinations.

I.

Around the time of the events underlying the present action, in 2022, there was discussion of unionization in Starbucks stores across the country and, in particular, in Kansas City. This petition centers around one Starbucks store—on North Amidon Avenue in Wichita, Kansas (the "Amidon store")—that had not yet unionized.

The Amidon store was managed by Carmella Neri. The store's assistant manager was Lauren Jacobs. In various interactions, both Neri and Jacobs made comments to employees referencing unions and unionization activity in the store. There were a number of interactions between the Amidon store managers and employees that gave rise to the claims underlying this petition. First, Neri made statements in individual employee meetings that referenced unions and potential changes to benefits that cannot be guaranteed in the bargaining process. Further, Neri explained to an employee why the Amidon store's hours were being shortened, with reference to relieving union pressure on employees. Jacobs also explained to an employee why the hiring portal was down, describing the difficulties with hiring when the managers are unable to discuss the union with prospective employees. The facts of these interactions will be provided in greater detail in Part III.

In July 2022, following the unionization election among Amidon store employees wherein the union lost, the union filed charges against Starbucks with the Board. In December 2022, the Board's General Counsel (hereinafter referred to as the "NLRB") issued a complaint alleging that Starbucks violated Section 8(a)(1) of the NLRA by: "threatening employees with loss of benefits if they unionized; creating the impression that employees' union activities were under surveillance; and telling employees it closed its hiring portal and reduced store hours because of employees' union or other protected activities."

The complaint was brought before an administrative law judge ("ALJ") who conducted a one-day virtual hearing on April 4, 2023. During the hearing, the three employees and Neri testified. The ALJ ultimately found that Starbucks violated the NLRA by creating the impression of surveillance and making threats of reprisal. Relevant here, the ALJ found unlawful employer speech, under Section 8(a)(1), resulting from Neri's alleged statements in the April employee meetings, Jacobs's alleged statement about the hiring portal, and Neri's alleged comment about store hours.

Following the ALJ's decision, Starbucks filed exceptions before the Board. The Board consisted of Chairman McFerran and Members Kaplan and Prouty. It adopted the ALJ's findings that Starbucks violated Section 8(a)(1) of the NLRA. But Kaplan dissented in part: he disagreed with the finding of surveillance and also found it "unnecessary to pass" on the two coercive statements regarding hiring and store hours.

The Board narrowed the ALJ's remedy for the violations, holding that the violations did not "warrant[] a broad cease-and-desist order." It issued a narrow order "requiring [Starbucks] to cease and desist from violating the Act 'in any like or related manner.'" The Board also ordered Starbucks to post a remedial notice of specified text that acknowledges Starbucks violated labor laws, that employees have a right to join a union, and that Starbucks will not act in the manner it did.

Starbucks timely petitioned for review and the NLRB cross-petitioned for enforcement. *See generally* 29 U.S.C. § 160; *see also Apple Inc. v. NLRB*, 143 F.4th 291, 296 (5th Cir. 2025). Jurisdiction is proper, and no party argues otherwise. *See* 29.U.S.C. § 160(e)–(f); *Apple Inc.*, 143 F.4th at 296.

II.

We review the Board's legal conclusions de novo. *Dresser-Rand Co. v. NLRB*, 838 F.3d 512, 516 (5th Cir. 2016).

We uphold the Board's factual findings "only if they are supported by evidence that is substantial when viewed in light of the record as a whole, including 'whatever in the record fairly detracts from its weight.'" *NLRB v. AllService Plumbing & Maint., Inc.*, 138 F.4th 889, 900 (5th Cir. 2025) (quoting *Dish Network Corp. v. NLRB*, 953 F.3d 370, 376 (5th Cir. 2020)). The substantial evidence standard considers "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951). However, "a flawed reading of the record provides no substantial evidence for a finding," *Dish Network Corp.*, 953 F.3d at 376 (citation modified), and we "must reject an order of the Board when it fails to grapple with countervailing portions of the record." *AllService Plumbing*, 138 F.4th at 900–01 (citation modified).

Finally, "[t]o the extent the Board affirms and adopts an ALJ's findings and conclusions, we apply these same deferential standards to the ALJ's decision itself." *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714 (5th Cir. 2018).

III.

As a general matter, Section 8(c) of the NLRA "explicitly provides that an employer has the right to express 'any views, argument, or opinion' so long as 'such expression contains no threat of reprisal or force or promise of benefit.'" *Brown & Root*, 333 F.3d at 633 (quoting 29 U.S.C. § 158(c)). Thus, "an employer is free to communicate to employees a statement of opinion about the union as well as predict the effect of unionization on the workplace so long as such a prediction is based on objectively verifiable facts and it does not contain a threat of reprisal or force." *Id.* (citation omitted). Employer statements rise to the level of a threat of reprisal "where 'under the totality of the circumstances, an employee could reasonably conclude that the employer is threatening economic reprisals if the employee supports' protected conduct." *Renew Home Health v. NLRB*, 95 F.4th 231, 242 (5th Cir. 2024) (quoting *Brown & Root*, 333 F.3d at 634 n.3) (citation modified).

Various statements made by Amidon store managers in conversation with employees are at issue in the present case. These conversations gave rise to the Board's determination that Starbucks unlawfully threatened reprisal in violation of Section 8(a)(1) in three ways: statements made in employee meetings potentially implicating loss of benefits; telling employees that store hours changed; and explaining to employees why the hiring portal was closed. Moreover, the Board also found that when considered together, the conversations supported the determination that Starbucks created an unlawful impression of surveillance in violation of Section 8(a)(1). We address each of the claims below.

A. Loss of Benefits

Starbucks first challenges the Board's finding that, in 1:1 meetings, Neri's statements constituted threats of reprisal by "threatening employees . . . with loss of benefits if they engaged in union or other protected activities." Finding that at least one of the statements is supported by substantial evidence, we grant enforcement of the Board's decision.

1.

The facts underlying this claim are as follows. Neri held Performance Development Conversations ("PDC meetings") with each employee, twice a year. In April 2022, Neri had meetings with three employees: Arden Ingram, Maia Cuellar-Serafini, and Ramon Fonseca. These employees were relatively new, having started work within the past year. The meetings lasted for 10 to 20 minutes, during which Neri covered employee performance, career development interest, and Starbucks benefits. Neri also "had a benefits-enrollment packet, which described employee benefits such as health coverage and paid parental leave, that she either showed or read to employees."

As relates to this claim, the below summaries describe only the pertinent statements Neri made in the PDC meetings with Cuellar-Serafini and Fonseca—statements regarding knowledge of union activity in the Amidon store or of the effects of unionization. Notably, this information was in large part drawn from the employees' testimony and recall of the meetings, because Neri's testimony was not as detailed, nor did the ALJ credit it.[2]

Cuellar-Serafini. In this meeting, Neri shared with Cuellar-Serafini that she was aware of discussions about union organizing in the store and that "there was talk going around." Cuellar-Serafini was pregnant at the time and testified that Neri discussed Starbucks's benefits, highlighting the maternity-leave benefits. However, she testified that "after explaining the benefits, [Neri] . . . said, 'If you were interested in organizing, these benefits could not be guaranteed to you.'"[3] Cuellar-Serafini also recalled that Neri advised her

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[2] Neri testified that she did not recall being aware of unionizing activity in her store, but she "wanted to make sure that they had information in case they had any questions about what was going on in Kansas City." The ALJ's credibility choices are binding "unless one of the following factors exists: (1) the credibility choice is unreasonable, (2) the choice contradicts other findings, (3) the choice is based upon inadequate reasons or no reason, or (4) the ALJ failed to justify his choice." *UNF W.*, 844 F.3d at 457 (quoting *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1406 (5th Cir. 1996)). None of these factors exists and therefore we maintain the ALJ's credibility finding.

[3] Cuellar-Serafini testified that Neri pulled the benefits package away while telling Cuellar-Serafini that benefits may not be guaranteed. However, Cuellar-Serafini had previously submitted an affidavit that does not mention this, and, in her testimony, she stated that her recollection of events would have been more accurate at the time of her affidavit.

and other employees to do their own research about the union and make the decision that was right for them.

Fonseca. In this meeting, Neri said she was aware of "some unionization efforts going around in the district." Fonseca recalled that Neri "helped [him] look through the packet [of benefits]," and she "brought up the Union while we were talking about it, and said that if we were to unionize, then our benefits would be put on the table, and potentially we could lose some of them or, you know, who knows what the change would be if we were to unionize."

The ALJ held that Neri's statements in these PDC meetings violated the NLRA because they "threaten[ed] employees with the loss of benefits if they selected the Union as their bargaining representative." The ALJ, relying on *Gissel Packing Co.*, considered the references to benefits to be a prediction and reasoned that "[s]tatements that predict changes in working conditions or benefits must be 'carefully phrased on the basis of objective fact' to reflect the give-and-take nature of future collective bargaining." *See Gissel Packing Co.*, 395 U.S. at 618.

The ALJ held that Neri's statements in the PDC meetings included unlawful threats of reprisal. First, "Neri stated that Cuellar-Serafini could not be guaranteed maternity benefits if employees unionized," and without mentioning that "benefits could also go up, Neri implicitly threatened that Cuellar-Serafini stood only to lose crucial benefits." Second, Neri's statements to Fonseca that "benefits would be put on the table, and potentially some could be lost, if employees unionized," lacked reference to or explanation of "the give-and-take nature of collective bargaining." Without "objective facts" to support Neri's statements, they constituted a threat of "the loss of existing benefits."

The Board adopted the ALJ's findings. Kaplan wrote separately. He agreed that the statement to Cuellar-Serafini was unlawful under Board precedent, which requires reference to the collective bargaining process. However, Kaplan noted that the ALJ "mischaracterized the record in stating that during her PDC meeting with Cuellar-Serafini, Neri told Cuellar-Serafini that she could not be guaranteed maternity benefits if employees unionized." Instead, "Neri's statement that benefits could not be guaranteed referred to benefits in general not just the maternity benefits."[4] Moreover, because Kaplan agreed that the statement to Cuellar-Serafini constituted a threat of reprisal, he also found it "unnecessary to pass on" whether the statement to Fonseca in the PDC meeting was also a violation of Section 8(a)(1).

2.

Starbucks challenges the finding that Neri's statements during PDC meetings with Cuellar-Serafini and Fonseca amount to threats of reprisal by referencing loss of benefits. Starbucks first argues that the ALJ, whose reasoning was adopted by the Board, erred in applying the wrong burden of proof. Substantively, Starbucks also argues that statements did not amount to an unlawful prediction of the effect of unionization and that employee subjective impressions are relevant. We disagree on both grounds with respect to the statements Neri made to Cuellar-Serafini, granting the NLRB's request for enforcement of the Board's determination, and we need not reach the statements to Fonseca.

[4] As Kaplan recounted, Cuellar-Serafini testified that "Neri explained the benefits" and then stated, "If you were interested in organizing, these benefits could not be guaranteed you."

A.

As a first-order issue, Starbucks contends that the Board erred in adopting the ALJ's reasoning that Starbucks failed to meet its burden of proof. Starbucks argues that the NLRB "carries the burden of proving the elements of an unfair labor practice." *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983). The ALJ, relying on Board precedent, held that "[t]he burden of proof falls on the employer to show that their statements were based on fact and not threats."

In *Valmont Industries, Inc. v. NLRB*, we addressed burden shifting. 244 F.3d 454, 464–65 (5th Cir. 2001). There, in the context of a Section 8(a)(3) violation, our court recognized that once the NLRB had made "the required showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have discharged or disciplined the employee even if the employee had not engaged in union activity." *Id.* at 465. While different than a Section 8(a)(1) violation, we apply the same burden shifting principle here.

Accordingly, we disagree with Starbucks that the burden remained on the NLRB. The Board placed the burden on Starbucks after finding that the NLRB demonstrated that Neri's statements were coercive. Starbucks then needed to prove that it negated any coercive threat, for example by demonstrating that statements were fact-based as discussed in the following section.

B.

Turning to the substantive issue, in determining whether a statement was unlawful, we consider both whether it was a predictive statement and whether a reasonable employee would perceive a threat. Under our precedent, we agree that Neri's statements to Cuellar-Serafini contained both of these qualities, thus the Board did not err in finding a threat of reprisal.

Starbucks contends that Neri's statements in the PDC meetings were dissimilar to the types of statements that our precedents have found to be unlawful predictions. It also argues that Neri's statement generally alludes to the bargaining process and was non-coercive in nature. The question of "whether statements have a threatening quality is a factual" one, which is entitled to deferential substantial-evidence review. *UNF W.*, 844 F.3d at 462 n.7.

Employers may "tell 'what [they] reasonably believe[] will be the likely economic consequences of unionization that are outside [their] control,' and not 'threats of economic reprisal to be taken solely on [their] own volition.'" *Gissel Packing Co.*, 395 U.S. at 619 (quoting *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967)). However, the context surrounding the statement matters. With respect to statements that address wage or benefit reductions, we have held that "such a statement is *not* a threat of reprisal where it was made in a context indicating that bargaining is a process in which each side makes its own proposals, that it requires mutual agreement, and where existing benefits may be traded away." *UNF W.*, 844 F.3d at 458 (emphasis in original) (citation modified); *see also Gissel*, 395 U.S. at 618 (holding that employer predictive statements "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control").

But a statement is "impermissible" when it fails to include "any reference to the collective-bargaining process or to any economic necessities or other objective facts as a basis for its prediction that wages might be reduced." *UNF W.*, 844 F.3d at 458 (internal quotation marks and citation omitted). Here, Neri stated that "benefits could not be guaranteed" to

Cuellar-Serafini if she was interested in organizing. This statement included none of the requisite context to temper the predictive statements and ground them in objective fact. *See id.*

Moreover, Neri made this statement after having just highlighted the maternity benefits to Cuellar-Serafini. Although the ALJ mischaracterized the testimony,[5] it remains true that Neri highlighted maternity benefits and proceeded to say that benefits may not be guaranteed, thus suggesting "Cuellar-Serafini stood only to lose crucial benefits." Without context, the statements were not clearly "cast as a prediction of demonstrable economic consequences, but rather as a threat of retaliatory action," one that can "be taken solely on [Starbucks's] own volition." *Gissel*, 395 U.S. at 619 (internal quotation marks and citation omitted). Thus, even though Neri's "statement could be plausibly understood as highlighting the give-and-take of negotiation," her statement that "benefits could not be guaranteed" due to organizing, "paired with reference to benefits that were wholly in Starbucks's control could be reasonably interpreted as a suggestion that Starbucks was going to take a punitive bargaining position by threatening those benefits." *Starbucks Corp. v. NLRB*, 179 F.4th 321, 330 (5th Cir. 2026).

Finally, Starbucks argues that the context of Neri's statements was non-coercive, including the fact that the PDC meetings with employees were short discussions and generally for providing positive feedback. Moreover, it reasons that there is no evidence that Cuellar-Serafini, for example, felt threatened. These background facts are unavailing. We are only concerned with the objective employee perspective under the totality of the

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[5] The ALJ explained that "Neri stated that Cuellar-Serafini could not be guaranteed maternity benefits if employees unionized." While the maternity benefits appear to have been implicated in Neri's statement, the record does not support finding that Neri stated that outright.

circumstances. *Renew Home Health*, 95 F.4th at 242. Maintaining an objective standard, the Board's decision—that an employee could reasonably feel their union activities were threatened by a suggested reduction in benefits—was supported by substantial evidence. Coupled with the reasonable finding that Neri's statements were unlawful predictive statements, we grant enforcement of the Board's determination that Neri's statements to Cuellar-Serafini constituted an unlawful threat of reprisal.

Because we reach this finding regarding the statements to Cuellar-Serafini in the PDC meeting, we need not separately address the statements made to Fonseca. As Kaplan recognized, the remedy is the same regardless.

B. Store Hours Changes

Starbucks next challenges the Board's finding that it acted unlawfully where a manager told "employees that it had reduced the store's operating hours because of the employees' union or other protected activities." We conclude that this statement did not rise to the level of a threat of reprisal.

1.

Throughout the spring of 2022, the Amidon store experienced staffing shortages. In the summer, Neri began closing the store a half-hour earlier on weekdays and an hour and a half earlier on weekends.

The specific statement at issue stems from a conversation wherein Fonseca inquired about the hours change. Fonseca testified that he asked Neri why the store was closing earlier, to which Neri said that it was "to relieve some of the pressure that the Union had on the people." Fonseca testified that he simply responded, "Okay."

Starbucks requires both a shift supervisor and a barista to be working in order for the store to be open. Employee shifts "can only [be] schedule[d] eight hours at a time, at a maximum," so in reducing the store hours to 16 hours per day, Neri testified that she was able to schedule "two supervisors for the whole day, one in the morning and one at night, and then Baristas also."

Notably, Fonseca was a shift supervisor. In this position, he was privy to information about why employees were missing work. Fonseca testified that "there was a decent amount" of employees who were not showing up to work around this time.[6] He understood these "call-outs" were not union-related; employees "were mostly calling off when they were sick, or some incident happened." Fonseca also testified that employee "call-outs" interfered with the store's ability to stay open, and that the Amidon store has had to close early a number of times "[b]ecause it wasn't properly staffed."

The ALJ held that Starbucks violated the NLRA when "Neri told Fonseca in July that the Amidon store hours had been reduced by a half hour due to the union activity of the store's employees." The ALJ reasoned that "it is irrelevant" that "the evidence failed to provide that [this] adverse action was due to union activity." Additionally, the ALJ credited Fonseca's, but not Neri's, testimony regarding this interaction. The Board adopted the ALJ's determination that it constituted an unlawful threat for Starbucks to have "link[ed] the . . . reduction in employees' work hours by a half hour to Section 7 activity."

2.

We analyze whether the statements regarding store hours constitute a threat of reprisal under the same framework set forth above. Here, however,

[6] Neri also testified to the extent of shortages, explaining that there had been 27 call-outs in a single week.

we find the Board's decision is not supported by substantial evidence and deny enforcement of this claim.

First, the ALJ mischaracterized Neri's testimony. As Starbucks argues, Neri "never actually said that the hours were reduced *because* partners were participating 'in union activity,'" as the ALJ recounted. Although Neri's statement regarding store hours referenced the union, she did not suggest that union activity will be penalized. Neri's remark was that she was trying to "relieve some of the pressure that the Union had on the people." We find this materially different from linking the store hours change to the employees' protected activities.

This correction is of import for the very reason that it diminishes the basis for finding Neri's remark to be coercive. For example, in *NLRB v. McCullough Environmental Services, Inc.*, our court considered a threat to reduce hours if the union won the representation election. 5 F.3d 923, 929–30 (5th Cir. 1993). The NLRB relies on this case to contend that a reduction of hours can constitute an unlawful labor practice. But that precedent is readily distinguishable. Here, there is no outright threat or invocation of a reduction in store hours in the same manner, rendering it meaningful to capture what exactly Neri said. Accordingly, the Board's reasoning, which adopted that of the ALJ's, failed to grapple with essential "countervailing portions of the record" and is, therefore, lacking substantial evidence on that basis alone. *AllService Plumbing*, 138 F.4th at 901.

Second, reviewing the record as a whole, it is not apparent that substantial evidence supports the finding that a reasonable employee in Fonseca's shoes would have understood the statement to be a coercive threat. The ALJ's analysis is entirely based on Fonseca's testimony about his interaction with Neri, yet his testimony reveals that he understood the challenges from understaffing and that it was not uncommon to respond by reducing hours. Specifically, he testified that, when understaffed, the hours have had to fluctuate before and, as shift supervisor, he understood that employees were calling out of work for illnesses or various personal reasons—but not because of the union. Because we consider the "reasonable inferences an employee could draw from the employer's statements," *McCullough Env't Servs., Inc.*, 5 F.3d at 930 n.5, we recognize that a reasonable employee in Fonseca's position—a shift supervisor—would understand Neri's statement differently from how another employee potentially would.

Because "we uphold the Board's factual findings only if they are supported by evidence that is substantial when viewed in light of the record as a whole," we therefore deny enforcement of the claim that Neri's statement regarding store hours constituted an unlawful threat in violation of Section 8(a)(1). *AllService Plumbing*, 138 F.4th at 900.

C. Hiring Portal Changes

Next, Starbucks challenges the Board's determination that a manager "telling employees that it had closed the store's hiring function . . . because of the employees' union or other protected activities" constituted a threat of reprisal. As above, we conclude that the statement does not rise to the level of a threat of reprisal.

1.

In April 2022, Fonseca received inquiries from customers interested in applying for a job at Starbucks. Interested applicants apply through Starbucks's online hiring portal; however, the customers that spoke to Fonseca claimed that they were unable to find the hiring portal to submit their application. Jacobs did not testify, but according to Fonseca's testimony, he confirmed that the hiring portal was down for the Amidon store. He later shared this with Jacobs, the store's assistant manager. Fonseca testified that Jacobs responded by saying that the portal was closed "because of the unionization efforts." More specifically, he recalls Jacobs's claiming, "that with the unions, [Starbucks] couldn't talk about [unions] during the hiring process, so they . . . didn't feel comfortable hiring new people on without talking to them about the Union." Fonseca testified that he then said the store was "understaffed and that we needed more people," to which Jacobs responded that the current employees "didn't want to work and weren't covering shifts." Fonseca did not check the portal following this conversation to see if or when it was online again.

Although Neri was not a party to the interaction, she was asked about hiring during her testimony. She testified that she did not remember the hiring portal's being closed, but she recognized that the portal has had technical issues or glitches in the past. Neri also explained that, regardless, the Amidon store was "actively interviewing" during the spring and summer of 2022 and hiring did not change because of the unionization effort.

The ALJ held that Starbucks violated the NLRA when "Jacobs told Fonseca that the hiring portal was closed due to her reluctance to hire amid a union campaign." As with store hours, the ALJ reasoned that it is not determinative that "the evidence failed to provide that [this] adverse action was due to union activity." Thus, the ALJ ultimately held that it remains an unlawful threat for Starbucks to have "link[ed] the closing of the hiring portal . . . to Section 7 activity." The Board adopted the ALJ's findings here as well.[7]

[7] Kaplan noted that it was unnecessary to pass on whether the hiring portal statement was unlawful "as this additional finding would not affect the remedy" in light of the store hours determination.

2.

We again evaluate whether these statements are threats of reprisal. As with the store hours statements, we find that the Board's decision regarding the hiring portal statements lacked substantial evidence for two reasons.[8]

First, there is a question of whether, "under the totality of the circumstances," the hiring portal statements rose to the level of coercion or a threat of reprisal. *Renew Home Health*, 95 F.4th at 242. While Starbucks argues the statements did not reference unionization in a way that was coercive, the NLRB asserts that the hiring portal statement "conveyed to a reasonable employee that Starbucks might take further adverse steps in the future should employees continue their union activities." Specifically, the NLRB argues that the threat would be of understaffing the Amidon store and exacerbating bad working conditions, or of "convey[ing] that Starbucks considers applicants' opinions of union activity relevant to their suitability as employees—and thus that it might consider current employees' union sentiments or continued union activity relevant as well." Yet, this argument is divorced from context or the "common-sense interpretation" the NLRB claims.

We must consider the context of the statements regarding the hiring portal. In *Renew Home Health v. NLRB*, for example, our court agreed with

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[8] The parties also dispute whether the ALJ failed to credit countervailing testimony. Starbucks's core argument is that the ALJ's finding largely rests on "a single phone call that Fonseca claimed he had with Jacobs," yet there was "unrebutted" evidence in the record that was not considered by the ALJ: Neri's testimony that the store was "actively interviewing" in the spring and summer of 2022. The NLRB refutes the importance of Neri's testimony about ongoing hiring, pointing to the fact that "Section 8(a)(1) violations turn on an objective tendency to coerce from the perspective of a reasonable employee." We agree with the NLRB with respect to Neri's testimony's being of lesser importance under the objective standard.

petitioner's argument that statements were not "viewed in context," and found the Board's analysis to be insufficient and conclusory, and therefore "not entitled to deference." 95 F.4th at 243 (explaining that "[o]ur deferential standard of review applies only when the Board engages in reasoned decision-making" and that "[w]ithout sufficient analysis, the Board's conclusory holding . . . cannot be evaluated for its plausibility"). The ALJ only found that Jacobs expressed a "reluctance to hire amid a union campaign," a determination that is conclusory in itself. Yet, per Fonseca's testimony, Jacobs conveyed no reluctance to hire but instead conveyed that doing so was difficult without being able to discuss the union. This distinction is of import in light of the context of hiring; wages and benefits—aspects of employment that may change following unionization—are two terms of employment that prospective employees would reasonably want to know before beginning their employment. Thus, in light of the context and the exact statement Jacobs made, we find substantial evidence lacking that it was coercive in nature.

Second, we find substantial evidence lacking for the reason that the hiring pause statements were too attenuated from current employees' terms and conditions of employment. We have held "[a] violation of § 8(a)(1) occurs when an employer takes adverse action against specific employees in connection with terms and conditions of their employment that are subject to collective bargaining." *NLRB v. Arkema, Inc.*, 710 F.3d 308, 320 (5th Cir. 2013). Take, for example, *Denton County Electric Cooperative, Inc. v. NLRB*, which the NLRB relies on for support. 962 F.3d 161 (5th Cir. 2020). That case involved raises for employees, a matter that is squarely within their terms and conditions of employment. *Id.* at 164. Yet, the hiring of future employees is not squarely an issue of current employees' "terms and conditions" of employment. We recognize that statements about hiring may connect to current employees if the statement is made in such a way to draw that connection. However, the statements made here about the hiring pause are too attenuated from current employees. As discussed above, the context of the statement did not tie in to current employees' employment by threatening reprisal on account of their protected activities.

From these two bases, we find the Board's reasoning lacked substantial evidence, thus enforcement is denied as to the hiring portal claim.

D. Impression of Surveillance

Finally, Starbuck's challenges the Board's finding that it "create[ed] the impression that employees' union or other protected activities were under surveillance." Here, too, we find the decision lacking substantial evidence.

1.

The facts underlying this claim stem from the PDC meetings. As described in Section III.A, Neri held these meetings with a number of employees and referenced having knowledge of union activity in the district and the store. In addition to the meetings with Cuellar-Serafini and Fonseca, as previously detailed, Neri also had a meeting with Ingram. In this meeting, Neri said, "voting in favor of a union doesn't only affect those in favor of it, it affects everyone at the store," and told Ingram to "keep that in mind." Ingram also recalled that Neri did not mention if or how she knew about unionizing activities at the Amidon store.

In evaluating Neri's references to unions during the PDC meetings, it is also necessary to understand the context of where organizing activity took place. From the employees' testimony, union discussions may have occurred both in and out of the store. Cuellar-Serafini, for example, testified that she had "conversations with [her] co-workers outside of the workplace." But Ingram testified that she "would sit *out there* with [her] co-workers" when discussing unionization. The meaning of "out there" is not readily apparent, although Starbucks asserts that it suggests "out there" on the floor inside the Amidon store instead of in the back of the store.

The ALJ first discussed the allegation that Starbucks "has created the impression that employees' union activities are under surveillance." The ALJ considered "whether, under all the circumstances, the employer's statements or other conduct would lead reasonable employees to assume that the employer has placed their union activities under surveillance." *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 4 (2018), *enfd.* 939 F.3d 798 (9th Cir. 2019). The ALJ emphasized that the "standard is objective," and "the impression of surveillance does not turn on whether a supervisor observed union activity."

In discussing the context, the ALJ recognized that "Neri's comments about union activity in Kansas City or the district alone did not reasonably convey the impression" of surveillance, but that the full circumstances "indicate otherwise." Namely, the ALJ focused on two statements: (1) "Neri's statement to Cuellar-Serafini that there was talk going around in the Amidon store about unionizing"; and (2) "her statement to Ingram that [] a vote in favor of unionization affects everyone at the store and she 'should keep that in mind.'" Coupled with Neri's statements "about the potential consequences" of unionization on employees' benefits, and in light of these remarks' seemingly being "out of the ordinary" for PDC meetings, the ALJ held that Neri's statements of "her awareness of union activity in the Amidon store and within the company district violated Section 8(a)(1)."

The Board majority adopted the ALJ's findings as to surveillance. It found Neri's statements to Ingram and Cuellar-Serafini to be determinative. The majority also noted that Neri failed to convey how she obtained knowledge of the union activity, which is important because it found that the

Amidon store employees were discussing their organizing only outside the workplace.

Kaplan dissented, reasoning that "Neri's statements did not show that she had specific knowledge of organizing activities or who was taking part in them but instead indicated only her general awareness of the union campaign at the Amidon store and in the district." Kaplan further found that Ingram's description of sitting "out there" with co-workers to discuss unionizing meant that employees were apparently "engaging in open union activity prior to May 2022," when it was publicly announced. Finally, Kaplan disagreed with the majority's reliance on the out-of-the-ordinary context of Neri bringing up unionization during PDC meetings, which were the first meetings to occur after the efforts were underway. He reasoned, "it is illogical to assume that employees would feel coerced because unionization had not been discussed at PDC meetings in the past given that there had never before been any reason to discuss unionization."

2.

Starbucks argues that the Board focused on inaccurate findings that union-related conversations took place only outside the Amidon store and that Neri's discussions with employees on this topic were "out of the ordinary" for PDC meetings. Further, Starbucks contends that the Board also failed to focus on the necessary inquiry of whether the impression of surveillance was one that "tends to interfere with, restrain, or coerce Union activities." *NLRB v. Mueller Brass Co.*, 509 F.2d 704, 708 (5th Cir. 1975).

We first address the two bases of the Board's decision, finding that neither is supported by substantial evidence. Turning to the question of coercion, we consider whether the alleged surveillance had a tendency to coerce or interfere with employee activities. Determining it does not, we deny enforcement of this claim.

A.

The Board anchored its reasoning on statements Neri made to employees Ingram and Cuellar-Serafini and, from this, it reasoned that employees "did not engage in open union activity in the workplace." Although Cuellar-Serafini said she had conversations outside of work, that in itself does not mean all conversations occurred there. Critically, Ingram's testimony calls this into question, yet the Board failed to fully grapple with Ingram's testimony. Although not referenced by the Board nor the ALJ, Ingram shared that she "would sit out there with [her] co-workers" when she discussed organizing. Kaplan's dissent raised this exact point. The parties dispute the meaning of "out there with my coworkers"; however, we agree with Kaplan that its plain meaning describes being out in the main area of the store as opposed to the back.

Both the Board majority and dissent discussed the Board precedent, *National Hot Rod Assn.*, 368 NLRB No. 26, slip op. at 2–3 (2019), but the decision supports Kaplan's dissenting position: that the key inquiry is whether "all" activities were conducted outside the store. Ingram's testimony counters the notion that *all* discussions of unionization occurred outside the Amidon store. The ALJ provided, and the Board adopted, "a flawed reading of the record" with respect to where such conversations took place. *Dish Network Corp.*, 953 F.3d at 376. The Board's first error was in "fail[ing] to grapple with countervailing portions of the record." *AllService Plumbing*, 138 F.4th at 901.

Next, we consider another basis of the Board's determination: that Neri's statements were "out of the ordinary" and contributed to leading "reasonable employees to assume that [Starbucks] had placed their union activities under surveillance." Aligned with Kaplan's dissent, Starbucks challenges this characterization, reasoning that "if discussing unionization for the first time is per se evidence of unfair labor practices, then employers would risk the Board's wrath every time they bring up unionization." Noting that Neri first referenced unionization efforts in the April PDC meetings, Starbucks highlights that, simply, these meetings were the first ones after such efforts began. We agree, finding the context "adds nothing to the coerciveness inquiry," and therefore is at least not supportive of the Board's finding. *Intertape Polymer Corp. v. NLRB*, 801 F.3d 224, 240 (4th Cir. 2015); *see also id.* (acknowledging that "[t]he union campaign itself was 'out of the ordinary'").

Taken together, these two bases do not provide substantial evidence to support the Board's finding.

B.

Finally, we turn to Starbucks's assertion that the Board also erred in failing to determine whether the alleged surveillance was coercive.

In *NLRB v. Mueller Brass Co.*, relied on by Starbucks, we held that the NLRA "does not prohibit a conversation which merely acknowledges the employer's awareness of an employee's Union activities." 509 F.2d at 709. Instead, the surveillance, or the impression of surveillance, rises to the level of an unfair labor practice under Section 8(a)(1) only if it "tends to cause interference with or restraint of an employee in the exercise of his statutory rights." *Id.*

There, for example, the employer was alleged to have created an impression of surveillance from a manager's brief statement that he was aware of an employee's loaning his car to others to go to union meetings. *Id.* at 707. Our court held that the testimony alone "does not prove that the Company created an impression of surveillance," and that, "without evidence of a background of antiunion animus or a widespread pattern of antiunion conduct on the part of the Company, [the employee's] statements do not establish that the Company interfered with, restrained, or coerced Union activities in any manner." *Id.* at 708.

Later, our court similarly held that "[i]n order for an employer to violate Section 8(a)(1) by illegal surveillance, interrogation or any other unlawful act, he must 'interfere with, restrain, (or) coerce' employees in the exercise of their Section 7 rights." *NLRB. v. Computed Time Corp.*, 587 F.2d 790, 794 (5th Cir. 1979) (quoting *NLRB v. Atkins Saw Div. of Nicholson File Co.*, 399 F.2d 907, 910 (5th Cir. 1968)).[9]

The NLRB instead draws on *Hendrix Manufacturing Co. v. NLRB*, in which we recognized that "the furtive nature of the [employer's] snooping tends to demonstrate spectacularly the state of the employer's anxiety" about unions, thus when employers engage in surveillance, employees "are under the threat of economic coercion, retaliation, etc." 321 F.2d 100, 104–05 n.7 (5th Cir. 1963).The NLRB argues that an employer acts unlawfully when "it tells employees it is aware of union activities that the employees have deliberately kept private without revealing its source of information," because it causes employees to speculate as to how the employer learned of the activities.

We find that the Board erred under either *Hendrix* or *Mueller Brass*. Neri's statements were distinct from those in *Hendrix*, which involved a supervisor "interrogat[ing]" an employee about having "attend[ed] a Union meeting." *Id.* at 104; *see also Delchamps, Inc. v. NLRB*, 585 F.2d 91, 93–94 (5th Cir. 1978) (affirming the Board's surveillance finding, where supervisors stated "that union organizing meetings were being monitored by

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[9] Since then, other circuits have also interpreted the holding to stand for the proposition that surveillance alone, without evidence of its consequence, is insufficient to violate the NLRA. *See U.S. Steel Corp. v. NLRB,* 682 F.2d 98, 101 (3d Cir.1982); *Belcher Towing Co. v. NLRB*, 726 F.2d 705, 708 (11th Cir. 1984).

management and that a company 'spy' had attended the meetings"). Neri, however, only shared a general awareness of unionization talk going around. Moreover, Neri's statements can be distinguished from those in *Mueller Brass*, as her statements are better characterized as "acknowledg[ing] . . . awareness of an employee's Union activities," with no further interference attached. 509 F.2d at 709. As Kaplan recognized as well, Neri's statements merely "disclosed a general awareness of organizing activities."

There was evidence of union discussions in the Amidon store, limited evidence of whether the context was out of the ordinary, and only general awareness of the organizing activities. Thus, there was not substantial evidence to support the finding that Neri's statements created an impression of surveillance. Accordingly, we deny enforcement on this claim as well.

IV.

For the foregoing reasons, we GRANT the NLRB's request for enforcement as to the threat of reprisal for loss of benefits against Cuellar-Serafini; and we DENY its request for enforcement of the threat of reprisal claims for the statements regarding store hours and hiring portal changes and the impression of surveillance.