

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

KEYPORT AUTO BODY SHOP, INC.,)	
)	
Employer,)	
)	
and)	Case 22-RC-099498
)	
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS, LOCAL 966,)	
)	
Petitioner.)	

**EMPLOYER’S BRIEF IN SUPPORT OF EXCEPTIONS TO
REPORT AND RECOMMENDATION ON OBJECTIONS**

COMES NOW Keyport Auto Body Shop, Inc., Employer herein, and files its Brief in Support of its Exceptions to the Regional Director’s Report on Objections as follows:

STATEMENT OF THE CASE

On March 1, 2013, the International Brotherhood of Teamsters, Local 966 (“Union”) filed a petition seeking to represent a unit of all full-time and part time drivers and aides employed at the Employer’s facility located at 7061 Route 35, South Amboy, New Jersey. The Regional Director for Region Twenty-Two approved a Stipulated Election Agreement on March 14, 2013. [Attachment A]. The election was conducted on April 29, 2013. Out of approximately one hundred twenty (120) eligible voters, sixty-seven (67) voted in favor of the Union, forty-two (42) were cast against the Union, and seven (7) ballots were challenged.

On April 26, 2013, the Employer timely filed its Objections to the Conduct Affecting the Result of the Election (“Objections”). [Attachment B]. Thereafter, Employer submitted evidence in support of its Objections [Attachment C] including the affidavits of putative bargaining unit members Glenys Garcia [Attachment D], Marian Caba [Attachment E], and Margarita Castro [Attachment F]. The Employer’s objections asserted as follows:

First Objection. Prior to the election, certain individuals, which, upon information and belief included agents of the petitioning labor organization, by and through their conduct, engaged in a deliberate attempt to deceive and threaten eligible voters by informing voting members of the unit that if they failed to vote in favor of the Union, they would be terminated by the Employer. These untruthful statements were not only widely disseminated, but apparently were also widely believed by members of the voting unit. This conduct interfered with the absolute right of eligible voters to make a free and untrammelled choice on the issue of unionization.

Second Objection. In light of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Canning v. National Labor Relations Board, et al.*, No 12-1115 (January 25, 2012) that President Obama's recent appointments to the National Labor Relations Board are unconstitutional, it is Employer's position that Region 22 currently lacks authority under 29 U.S.C. § 159 to investigate or conduct a hearing on the pending petition in this matter because, absent a quorum, the Board has no authority investigate or conduct hearings which may be delegated to Region 15 [sic] under 29 U.S.C. § 153(b). Employer provides this notice and objection in order to preserve such argument for subsequent review, and its continued participation and cooperation in these proceedings does neither waive the foregoing nor acknowledges this Regional Office's authority to investigate or conduct a hearing on the current petition.

Thereafter, the Regional Director conducted an administrative investigation. On May 15, 2013, without holding a hearing or seeking Employer's position regarding evidence uncovered during his administrative investigation, the Regional Director issued a "Report on Objections" [Attachment G]. In this Report, the Regional Director recommended that both of Employer's objections be overruled without any evidentiary proceedings.

STATEMENT OF FACTS

A. Objection 1

The pertinent facts are set forth in the affidavits of Ms. Garcia, Ms. Caba and Ms. Castro. Many of the drivers and monitors working for Employer at its South Amboy location are first and second generation immigrants from the Dominican Republic. Consequently, many of these drivers speak primarily Spanish, and do not speak English well. In the weeks preceding the

election – and specifically in the days immediately before the election – Union supporters began telling individuals and spreading rumors that if the Union was not elected, the Company would fire all employees at the South Amboy location. Ms. Garcia, Ms. Caba, and Ms. Castro all attested to their concern about this rumor, and testified that they all believed many other drivers were also concerned about it and that these statements and rumors affected how they voted. Ms. Garcia explained that because of misinformation from the Union many drivers did not understand how the election process worked.

B. Objection 2

There is no dispute that the election herein took place on April 19, 2013, during a time when the validity of the appointment of members to the Board have been challenged as unconstitutional.

STATEMENT OF ISSUES

1. Whether the Board should reject the Regional Director's recommendation to overrule Objection 1 and should direct that an evidentiary hearing be conducted [Exceptions 1, 2, & 3].

2. Whether the Board should reconsider its holding in *Janler Plastic Mold Corporation and Pattern Makers' Association of Chicago*, 186 NLRB 540 (1970) and subsequent cases in circumstances where there is evidence that voting employees do not sufficiently understand the election process to discount threats of employer retaliation for not voting in favor of representation. [Exceptions 1, 2, & 3].

3. Whether the Board should sustain Objection 2 and direct that the election be set aside based on the Board's lack of a constitutional quorum. [Exception 4].

ARGUMENT

A. The Board Should Reject The Regional Director’s Recommendation to Dismiss Objection 1 and Should Remand For An Evidentiary Hearing.

The Regional Director’s recommendation to overrule Objection 1 without any evidentiary hearing should be rejected. The Board’s rules require that a “hearing shall be conducted with respect to those objections or challenges which the regional director concludes raise substantial and material factual issues.” 29 C.F.R. § 102.69 (d). In assessing whether a hearing should be directed, the proper inquiry is not whether the objecting party’s “evidence” as presented to the regional director would suffice on its face to set aside the election, but instead whether that evidence raises substantial and material issues of fact that, if true, would warrant setting aside the election. It is the issues of fact that the evidence raises, not the quality or sufficiency of the evidence itself, that controls the scope of the regional director’s investigation and whether a hearing must be held. If the objecting party’s evidence creates a “prima facie” case of objectionable conduct, “the Board is not free to dismiss the objections—as it did here—simply on the basis of ex parte communications that contradict the proffer.” *Swing Staging, Inc. v. NLRB*, 994 F.2d 859, 861 (D.C. Cir. 1993); accord, *NLRB v. Superior of Missouri, Inc.*, 233 F.3d 547, 550 (8th Cir. 2000). The proffer of evidence cannot be conclusory, but “must point to specific events and specific people.” *Swing Staging* at 862 (quoting *Anchor Inns, Inc. v. NLRB*, 644 F.2d 292, 296 (3d Cir. 1981)).

With respect to the Regional Director’s conclusion that those who allegedly made statements to voting employees were not agents of the Union, the Regional Director found that “the Employer did not present nor did the investigation otherwise reveal that [the Union] imparted any actual or implied authority to these individuals which would support a finding that they are [the Union]’s agents within the meaning of Section 2(13) of the Act.” (Report, pg. 3).

Yet, the Employer presented three sworn affidavits, each of which identified the individual(s) who made the statements at issue as persons the affiants believed “were Union supporters[.]” (Attachment D, ¶ 8; Attachment E, ¶ 8; Attachment F, ¶ 8). It is difficult to discern what additional evidence, short of that available at a hearing, the Employer could have procured and provided in support of its objection given that the Board has long held that “[u]nder no reasonable construction of privilege... may an employer under the law, and under circumstances here described, interrogate one employee of another's union activities.” *Guild Indus. Mfg. Corp.*, 133 NLRB 1719, 1727 (1961). Certainly, the statements of three separate employees that each was told by an individual they believed to be a Union agent and supporter raised a substantial and material factual issue as to whether the statements were made by agents of the Union.

Instead, the Regional Director relied upon his own administrative investigation – to which the Employer was not privy – in reaching his conclusion that no evidence supported the conclusion that these statements were made by agents of the Union. Yet, nowhere are the results of that investigation described in the Report, nor did the Employer have the opportunity to comment on the findings of that investigation prior to issuance of the Regional Director’s Report. Presumably, the Regional Director inquired of the Union whether it directed or authorized any of its agents or representatives, including supporters to make such statements and (not surprisingly) the Union presumably denied that it had. But this conclusion based on ex parte communications is clearly improper where the Employer has raised a genuine issue of fact as to whether the statements were made by agents of the Union. Because the Employer’s evidence raises substantial issues of material fact relating as to whether the statements at issue were made by an agent of the Union, and the Regional Director’s conclusion that it was not was based upon an ex parte investigation, the Board should direct an evidentiary hearing in this matter.

Even assuming *arguendo*, but incorrectly, however, that the Regional Director's conclusion that the statements at issue were not made by an agent of the Union was correct, the statements nonetheless warrant setting-aside the results of the election. It is settled that the Board will not set aside an election based on third-party threats unless the objecting party proves that the conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); see also *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003); *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). In assessing the seriousness of an alleged threat, the Board considers the following factors: (1) the nature of the threat itself; (2) whether it encompassed the entire unit; (3) the extent of dissemination; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time of the election. *Mastec N. Am., Inc.*, 356 NLRB No. 110 (Mar. 7, 2011)(citations omitted). It is important to note that these factors are not elements; rather, "[t]he fundamental question that consideration of the five factors is intended to illuminate ... is whether the conduct created a general atmosphere of fear and reprisal rendering a free election impossible." *Id.*

As to the first factor, that nature of the threat was as extremely serious – job loss. Thus, factor one weighs in favor of setting aside the election. As to factor two, again, the statements at issue were directed at (and would have affected) all unit employees because the threat was that the Employer would "fire *everyone*." (Attachment D, ¶ 8). As to the third factor, the Regional Director's conclusions are contrary to the evidence submitted by the Employer. The affidavits submitted clearly note that not only the affiants, but that "many other drivers" also heard and were concerned about these statements. Further, given that the election was relatively close, a

change of only thirteen votes would have affected the outcome of the election. As to the fifth factor, the Employer's evidence demonstrates that it was made in two to three days before the election; thus, it was very near the time of the election. Thus, factors 1, 2, 3 and 5 favor setting aside the election.

Although there was no evidence that those making the statements could effectuate dismissal, this is neither dispositive nor particularly persuasive because, as explained more fully below, many of the individuals in the bargaining unit were recent immigrants and did not understand the election process. For these reasons, even if the statements were made by third-parties, the Board should reject the Regional Director's recommendation and direct a new election, or, alternatively, a hearing to resolve the factual disputes raised by the Employer's evidence.

B. The Board Should Reconsider Its Bright-Line Holding in *Janler Plastic Mold Corporation and Pattern Makers' Association of Chicago*, and Subsequent Decisions Where Evidence Demonstrates That Employees Did Not Understand The Election Process and Were Influenced By Statements and Rumors That They Would Be Terminated If The Union Was Not Elected.

The Employer is cognizant of the fact that, in the past, the Board has held that such allegations may be insufficient to overturn the results of a representation election, but the Employer believes the facts and circumstances in this case warrant either reconsideration of this bright-line rule or an exception to its application.

In *Janler Plastic Mold Corporation and Pattern Makers' Association of Chicago*, 186 NLRB 540 (1970), the Board held that a “ ‘threat’ that employees would lose their jobs if they did not vote for [the union]” was not “coercive or objectionable.” *Id.* at 540. The Board reasoned, without explanation, that it was “satisfied that the employees could reasonably be expected to evaluate these statements as noncoercive and not as threats.” *Id.* Further, it opined that because the vote was conducted in a secret ballot election and because there was no reason to believe that

the Employer favored the Union and would discharge those who did not vote for it, it did not interfere with employee free-choice. *Id.* It is worth noting that Chairman Miller dissented in *Janler* on the grounds that threats of job loss made so close to the time of the election as to deny contrary assurances or neutralization are sufficiently serious that a hearing should be held to resolve the objection.

Subsequent Boards and Administrative Law Judges have relied on the decision in *Janler* to reject such challenges. See e.g. *Underwriters Laboratories, Inc. and Int'l Union of Operating Engineers, Stationary Local No. 39*, 323 NLRB 300 (1997) (“the Board has long held that employees can reasonably be expected to evaluate such remarks as being illogical and unenforceable[.]”); *NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 796 (1991) (Board affirmed on reasoning that threats were made two-and-one-half months before the election, the threat was not “renewed” or disseminated.)

The time has come, however, to reconsider the Board’s decision in *Janler*. First, the reasoning in *Janler* is both conclusory and unsound. The Board did not consider the fact that many employees do not understand the practical limitations of a labor organization’s authority. Thus, what to the Board – which is well-versed in the authority of employers and unions regarding termination – may have appeared to be an empty threat, could coerce the vote of an employee concerned for his or her livelihood because he or she does not understand that a labor organization cannot obtain his or her dismissal.¹ Here, the Employer’s evidence demonstrated that many of the voting employees were recent Dominican immigrants who simply did not understand the election process and were concerned about these statements such that it affected

¹ Consider that the Board’s regulations require the Employer to turn over to the Union a list of the names and addresses of all employees within the putative bargaining unit, and that the Employer is prohibited from making many changes in the terms and conditions of employment during the period before the election. These and other circumstances suggest to the uninitiated employee that a labor organization has much more knowledge and authority than *Janler* and its progeny acknowledge.

their votes. The Board itself argued in *Nat'l Ass'n of Mfrs. v. NLRB*, Case No. 12-5068, slip op at *6 (D.C. Cir. May 7, 2013), that part of the motivation for its proposed Notice Posting-Requirement was that immigrants make up “an increasing proportion of the nation’s work force” and “are unlikely to be familiar with their workplace rights[.]” Given that the Board has acknowledged this reality, it should revisit its one-size-fits-all conclusion that such statements cannot be the basis for overturning a representation election.

Further, at least one appeals court has rejected the reasoning in *Janler*. In *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436 (4th Cir. 2002), the Fourth Circuit held that such threats of job-loss for failing to vote for the union coupled with a belief among employees “that the pro-Union employees, even if not vested with the direct power to terminate one’s employment had the ability to effectuate the same result through indirect means[.]” warranted the setting-aside of an election. *Id.* at 445-46.

Perhaps more importantly the Board’s analysis in *Janler* and its progeny simply ignores the real threat implied by such statements: that the Employer is angry with employees for having petitioned for representation, and unless a union is elected to protect employee jobs the Employer will terminate them. The *Janler* decision simply assumes that the only reason an Employer might discharge an employee for not voting in favor of a union is because the Employer *wanted* that particular union as the employees’ bargaining representative. If this were the only consideration, the reasoning of *Janler* and its progeny might be sound. But, as discussed above, *Janler* fails to consider the coercive effects of such threats in light of the implication that the Employer would discharge all employees because some supported *any* union.

Finally, as a practical matter, the Employer submits that since labor organizations are well-aware of the holding in *Janler*, they routinely make such threats with impunity, as appears to have occurred here. Given that these statements have continually arisen subsequent to the *Janler* decision, there is every reason to overrule, or at least create exceptions, to the reasoning in *Janler*.

This case illustrates why continued adherence to *Janler* is unsound. Many of the individuals voting in the election in this matter were recent immigrants. They do not understand the NLRB election process or the role of unions, and are limited in their understanding of English. The evidence submitted strongly demonstrates that these allegations were widespread and close in proximity to the election (just two to three days before the election); thereby preventing factual information about the falseness of these statements to be circulated. Under these circumstances, there is a material fact regarding whether such threats coerced employees to vote contrary to their wishes in violation of their right to exercise their Section 7 rights. For these reasons, the Board should order a new election in this matter.

C. The Board Should Sustain Objection 2 and the Election Should Be Set Aside, Alternatively, The Board Should Not Decide This Case Until It Has A Lawful Quorum of Constitutionally Appointed Members.

Employer excepts to the Regional Director's conclusion that Employer's Objection 2 – that Region 22 lacked authority under 29 U.S.C. § 159 to investigate or conduct a hearing on the pending petition because absent a quorum, the Board had no authority to investigate or conduct hearings which may be delegated – should be overruled based on the Board's decision in *SGT International, Inc.*, Case 21-RC-097525 (April 25, 2013) and *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn 1 (March 13, 2013). Employer acknowledges the Board's position on these matters, but urges reconsideration of them based not only on the decision of the United States Court of Appeals for the District of Columbia Circuit in *Noel Canning v. NLRB, et*

al., No 12-1115 (January 25, 2013) but also on the Third Circuit's recent decision in *NLRB v. New Vista Nursing and Rehabilitation, L.L.C.*, Nos. 12-1027 & 12-1936 (May 16, 2013).

While the Employer understands that the Board disagrees with this decision and is seeking review before the United Supreme Court, the Employer submits that the most appropriate course of action when a serious challenge to the Board's authority to act has been questioned by two United States Circuit Courts of Appeals and is currently before the United States Supreme Court is to refrain from exercising its authority until resolution of the challenge of its authority to act. Further, given that the D.C. Circuit has potential jurisdiction to review all Board decisions, continuing to issue decisions will unduly prejudice the rights of parties to receive fair review by a constitutionally appointed Board in the future by prejudging cases at a time when the Board members lack any proper power. Thus, with respect, the Employer explicitly objects to any active review or decision by the Board until the it has a constitutionally appointed membership.

Because the election itself was conducted at a time when the Board was without the constitutional power to make decisions, conduct elections, and conduct hearings and investigations, Region 22 was also without authority to conduct such activity. Thus, because the Board was without authority to hold such an election or conduct an investigation into the results thereof, any delegated authority to its regional directors is terminated during the period of incapacity. *Laurel Baye of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473 (D.C. Cir. 2009) ("an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended"). For these reasons, the Employer respectfully requests the Board overturn the results of this election until it has a lawful quorum, or alternatively, to stay consideration of these Exceptions until it obtains such a quorum.

CONCLUSION

WHEREFORE, based on the foregoing, the Employer respectfully requests that the election be set aside and that this matter be held in abeyance until the Board has a lawful quorum. Alternatively, the Employer respectfully requests the Board overrule or create an exception to its decision in *Janler*, and/or direct a new election in this matter, or alternatively to direct the Regional Director to hold an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May, 2013, a true and correct copy of the above document was filed via electronically on the Board's website with the following individuals:

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/s/ Rex P. Fennessey

I further certify that on the 31st day of May, 2013, a true and correct copy of the above document was served via e-mail and via United States first class mail, postage prepaid, upon:

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