UNITED STEELWORKERS
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of	)	
	)	
PAC TELL GROUP, INC. D/B/A U.S. FIBERS	)	Case No. 10-RC-101166
	)	
Employer	)	
	)	
And	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	)	
	)	
Petitioner,	)	
_____	)	

CHARGING PARTY'S RESPONSE TO THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Respectfully submitted on this 17th day of October, 2013

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BACKGROUND

Pursuant to a petition filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898 ("Union") and a Decision and Direction of Election issued by NLRB Region 10 on May 3, 2013, an election took place on May 29 and 30, 2013 at the Pac Tell Group Inc., D/B/A U.S. Fiber ("Employer") facility in Trenton, South Carolina in a unit composed of full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance employees. The ballot count showed 71 votes for representation by the Union, 59 against, with 7 challenged ballots. Four of the seven challenged ballots were cast by employees whom the Employer argued, in the pre-election hearing and in the instant proceedings, are supervisors under Section 2(11) of the Act: Eduardo Sanchez, Jose Lal, David Martinez, and Adauco Torres. The Decision and Direction of election found that the Employer failed to establish tha these four individuals were supervisors under the Act.

The Employer filed sixteen objections to the election results, asserting that alleged supervisors Jose Lal, David Martinez, and Adauco Torres engaged in coercive conduct interfering with employee free choice such that the election results must be set aside. The Employer's objections state in the alternate that the alleged objectionable conduct was committed by third parties. In addition, the Employer's objections allege that the Union, through its agents, officers, and representatives, interfered with the fair operation of the election process. A hearing on the Employer's objections was held on July 1, 2, and 3, 2013.[1] The Hearing Officer recommended that the Employer's Election Objections be upheld. The USW subsequently filed Exceptions to the Hearing Officers findings. The Employer filed Cross-Exceptions.

[1] The record in the instant proceeding includes the transcript and exhibits from the pre-election hearing,

Upon reviewing these exceptions and cross-exceptions filed by the Employer, the Regional Director issued a Supplemental Decision and Certification of the Representative. The Employer filed a Request for Review of the Supplemental Decision. The USW offers this response in opposition to that Request for Review based on the failure of the Employer to meet the limited grounds allowed for finding a "compelling" reason to grant a Request for Review as provided in Section 102.67(c) of the NLRB's Rules and Regulations. The Employer argues that in the Supplemental Decision the Regional Director erroneously found that the putative supervisors are not supervisors. The Employer further argues that even if the putative supervisors are not supervisors under the Act that they still engaged in "third party" conduct that should result in setting aside the election, an argument that they did not raise in Exceptions or Cross-Exceptions prior to the Regional Director issuing the Supplemental Decision.

ARGUMENT

Grounds for a Request for Review

Section 102.67 (c) of the NLRB's Rules and Regulations provides that "The Board will only grant a request for review where compelling reasons exist." These compelling grounds are limited to

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) the departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

The Employer claims that it has grounds for its Request for Review to be granted based on (1) and (2) above. The Employer failed to establish either of these grounds with regards to the Regional Director's determination that the putative supervisors do not have supervisory authority as defined by the Act or the failure of the Regional Director to determine that the putative supervisors engaged in third party conduct that would warrant setting aside the election results.

The Determination on Supervisory Authority

Both parties have argued and briefed the issue of supervisory authority extensively within the case record from the initial unit determination hearing to the post-election objections hearing to the Exceptions and Cross-Exceptions. The USW's position is that the Regional Director clearly made the correct decision based upon the information and arguments presented by the

parties and it is not necessary to repeat the same arguments.

In the Supplemental Decision and Certification of Representative, the Regional Director provided a detailed analysis of why the Employer failed to meet its burden in proving that the putative supervisors engage in assignment or responsible direction as defined by the Act. At every stage of the process including the Supplemental Decision, the finding has been that the Employer failed to meet its burden in establishing that the putative supervisors engaged in discipline or the granting of raises.

Even if the Employer feels that these decision should have been different it has failed to establish that "substantial questions of law and policy are raised because of the absence of, and departure from, officially reported precedent" or that "the Regional Director's decisions on certain substantial factual issues are clearly erroneous on the record and such errors prejudicially affected the rights of the Employer." The Regional Director relied on the long established precedent that the burden of proving supervisor status rests on the party asserting such status and that conclusory statement do not establish proof of such status. *See Dean and Deluca New York, Inc*., 338 NLRB1046 (2003).

Furthermore, with regards to assignment and responsible direction, the Regional Director relied on the post-Kentucky River Board decisions. See *Croft Metals, Inc*., 348 NLRB 717 (2006); *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006). These determinations were consistent with the USW's arguments and they most certainly are not departures from officially reported precedent or based upon clearly erroneous factual determinations that would serve as a "compelling" basis to grant Review.

It is worth pointing out that even in its own Request for Review, the Employer failed to

establish that any direction the putative supervisors engaged in was "responsible" as defined by Board precedent. Even if the putative supervisors review production reports and investigate discrepancies in them, this does not establish that they are "responsible" as defined under *Oakwood* and *Croft*.

The Employer makes an additional disingenuous argument that the Regional Director's decision "defies logic and ignores reality." (Request for Review at 8). The Employer blusters that production could not possibly operate without the exercise of supervisory authority by Martinez, Lal, Torres, and Sanchez. However, under the Employer's own theory of the case, that is exactly how the Employer's facility functioned until October 2012, when these four employees were allegedly "promoted to supervisor" and given additional authority. (Request for Review at 5). The Employer cannot credibly assert both of these claims at once. Moreover, the Regional Director properly found that "the role of the putative supervisors in the production process appears to be more of a lead person." (Decision at 18). They play a role as a conduit to those with supervisory authority, but this does not make them into supervisors. *See PPG Aerospace Industries*, 353 NLRB No. 23 (2008) (authority is not supervisory "[w]here the putative supervisor serves as a conduit relaying assignments from management").

In short, the Employer has failed to prove that the putative supervisors engaged in assignment, responsible direction, discipline, granting of raises or benefits, or any other supervisory criteria as defined by the Act. More so, the Employer has failed to establish that the Regional Director departed from established Board precedent or relied on erroneous factual determinations in any way that would meet the NLRB's grounds for granting a Request for Review. Attempting to raise secondary indicia, such as the ratio of statutory supervisors relative

to the number of employees most certainly does not establish grounds for establishing that the Regional Director departed from established Board precedent in making a determination on supervisory status.

Third Party Conduct

The Regional Director properly chose not to analyze any of the alleged objectionable conduct under the Board's standard for third party conduct. The severity and pervasiveness of the conduct at issue do not approach the extremely high threshold that the Board has set for overturning an election based on third party conduct. The Regional Director properly found that this standard, therefore, does not apply to this case.

The Employer argues in its Request for Review that four comments allegedly made by David Martinez and one comment allegedly made by Jose Lal constituted threats of job-loss so severe and pervasive that they warrant overturning the election. Allegedly objectionable conduct by non-supervisory employees who are not union agents is assessed under the standard for third party conduct.[2] Conduct by third parties warrants the reversal of election results only when it is "so aggravated as to create a general atmosphere of fear or reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 N.L.R.B. 802, 803 (1984). In assessing such conduct, the Board looks at "(1) the nature of the threat, (2) whether the threat was directed at an

[2] Notably, the Employer does not attempt to argue that they are agents of the Union. The Board will find that an agency relationship between an individual employee and the union is present when, with respect to the specific conduct alleged to be objectionable, the individual has actual or apparent authority to act on behalf of the union. *Cornell Forge Co.*, 339 N.L.R.B. 733, 733 (2003). Where non-supervisory employees make threats of job-loss that do not reflect union policies, they are not acting as union agents. *See N.L.R.B. v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 114 (D.C. Cir. 2012). There is no evidence that the allegedly objectionable statements made by the non-supervisory employees here were made while the employees were acting on behalf of the Union.

entire unit, (3) the extent of the dissemination of the threat, (4) whether the person making the threat was capable of carrying it out (and whether employees likely acted on that fear), and (5) whether the threat was made near the time of the election." *N.L.R.B. v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 116. The Employer's Request for Review fails to show that review should be granted based on any of these factors.

The Employer fails to establish that the Martinez and Lal statements are of a threatening nature. The statements, which expressed the possibility of job loss if the Union did not win the election, could reasonably be seen by employees as an endorsement of the job security that inures to employees as a benefit of union representation. Further, as the Union has explained in earlier briefings, the Board has held that statements implying that employees will lose their jobs if they vote against union representation are reasonably viewed by employees as illogical, unreasonable and unenforceable. *See N.L.R.B. v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 116 (reasonable employees would "conclude that the Employer would not fire employees who aided its cause" by voting against representation); *Underwriters Laboratories Inc. v. N.L.R.B.*, 147 F.3d 1048, 1051 (9th Cir. 1998) ("an employer would have no reason for firing a group of employees who voted against the union"); *Janler Plastic Mold Corp.*, 186 NLRB 540, 540 (employees exposed to a representation that "they would lose their jobs if they voted against union representation" would "reasonably be expected to evaluate these remarks as noncoercive and not as threats").

The statements were not accompanied by physical aggression or physical threats, profanity, or even raised voices, and did not occur in the context of a campaign where the union used intimidating tactics. The Employer's reliance on the subjective view of one employee,

Ignacio Bamaca, to establish the severity of the statements is misplaced. "[A] particular employee's subjective 'understanding'" of allegedly threatening remarks is not "competent evidence to prove a coercive or objectionable effect." *Janler Plastic Mold Corp.*, 186 NLRB 540 (1970).

The Employer fails to support its bare assertion that the alleged threats were directed at the entire bargaining unit such that a "general atmosphere" of fear or reprisal prevailed. The attendance of Martinez, Lal, or other employees who the Employer alleged to be supervisors at union meetings is entirely irrelevant, as there is no allegation that the allegedly objectionable statements were made or repeated at union meetings. Similarly, the fact that an employee—Adauco Torres—who did not make or condone any of the alleged threats wore union insignia has nothing to do with these statements. No reasonable employee would perceive that statements by Martinez and Lal were related to Torres' unobjectionable garb.

Nor were the alleged threats disseminated. The Employer alleges at most that the statements were made to small groups of employees. There is simply no evidence that the statements were widely discussed or perceived as threats by large portions of the 137 person bargaining unit.

There is no evidence that Martinez or Lal have the power to carry out threats of discharge. The Regional Director properly found that Martinez and Lal do not hold the supervisory authority to initiate, recommend, or enact any level of discipline. There is no action they can take which could lead to discharge. The "threats," therefore, lack credibility.

Finally, on the issue of whether threats were "rejuvenated," the Employer relies entirely on testimony that on the day of the election, David Martinez remarked to some employees that

they should "think well." That innocuous comment is not a threat, nor does it "rejuvenate" other statements that the Employer characterizes as threats. The words "think well" are not pro-union, nor do they carry any implication of threat or coercion. At most, a reasonable employee who was aware that Martinez was in favor of union representation could interpret the statement as a generic exhortation that voting for representation is the better choice.

Each of the foregoing five factors militates against a finding that isolated statements allegedly made by two non-supervisory employees acting as non-agent third parties should lead to a reversal of the results of a Board-supervised election.

CONCLUSION

The Employer has failed to establish that the putative supervisors in this case have supervisory authority much less that the Regional Director violated any of the grounds that would provide for a Request for Review to be granted in making that determination. Furthermore, the Employer has failed to establish that the putative supervisors engaged in third party conduct that would warrant setting aside election results much less that the Regional Director violated any of the grounds that would provide for a Request for Review to be granted in making that determination. The Employer also failed to raise the issue of third party conduct in its cross exceptions despite there never having been a finding of such conduct being established as objectionable at any point in this case. The Employer's Request for Review should not be granted and the Supplemental Decision and Certification of Representative should stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing Charging Party United Steelworkers' Response to the Employer's Request for Review from the Above-Captioned Case was made on the following from Pittsburgh, Pennsylvania this 17th day of October, 2013.

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