

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 25

STARBEST CONSTRUCTION, LLC

Employer,

And

25-RC-184895

INDIANA/KENTUCKY/OHIO REGIONAL  
COUNCIL OF CARPENTERS

Petitioner.

**STARBEST CONSTRUCTION, LLC'S REQUEST FOR  
REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

StarBest Construction, LLC, ("StarBest" or "Employer") hereby requests review of the October 18, 2016 Decision and Direction of Election of Regional Director (Region 25), Patricia K. Nachand in this case. For the reasons set forth below, this request for review should be granted and the election should be set aside because there was an imminent cessation of operations of the Employer for the work covered by the proposed unit and therefore no election should have been conducted. Directing an election in these circumstances was contrary to established Board precedent.

**INTRODUCTION**

On September 22, 2016, the Indiana/Kentucky/Ohio Regional Council of Carpenters filed a petition for an election regarding a proposed unit of full-time and part-time carpenters employed at StarBest's jobsites in Northwest Indiana. A pre-election hearing was held on October 4, 2016.

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<sup>1</sup> As shown below, given the factual record and findings in this case, this Request for Review meets the required grounds for review under Board Rule 167(d), including but not limited to the fact that a substantial question of law or policy has been raised because the Regional Director's decision departs from official Board precedent.

The Regional Director issued a Decision and Direction of Election on October 18, 2016. The election was held on October 31, 2016.

One of the issues addressed in the Decision and Direction of Election was whether an election was proper in light of the Employer's arguments that there would be an imminent cessation of carpentry operations in Northwest Indiana and that the employees encompassed by the petitioned for unit would not have a reasonable expectation of future employment. At the time the election petition was filed, StarBest was nearing completion of carpentry work on a project for its customer in LaPorte, Indiana. The Employer only had one other project that involved carpentry work (of limited duration) in Northwest, Indiana (a project in Portage, Indiana), but that carpentry work had been subcontracted to another Company on September 12, 2016, prior to the election petition being filed. (See Decision and Direction of Election, p. 3) Despite the fact that the LaPorte job was nearly complete at the time the petition for an election was filed and that the Portage work had already been subcontracted, the Regional Director rejected StarBest's position and ruled that the employees in petitioned-for unit had a reasonable expectation of future employment. This decision, as shown below, was contrary to Board precedent.

After issuance of the Decision and Direction of the Election, an election was held on October 31, 2016. The number of eligible voters were a mere 3 individuals, due to the cessation of carpentry work at the LaPorte site. Of those 3 eligible voters, only 1 voted, and that person voted in favor of the Union. *See* 10/31/2016 Tally of Ballots. However, 5 additional individuals attempted to vote. None of these 5 individuals met the eligibility requirement set forth in in the Decision and Direction of Election (p. 5) (to be eligible carpenters must have employed on October 16, 2016 and must have worked the requisite number of days specified).

On November 4, 2016, the Petitioner filed unfair labor practice charges (Cases 25-CA-17807 and 25-CA-187284) claiming that the challenged voters had been unlawfully terminated due to protected concerted activity. These unfair labor practice charges alleging unlawful termination were dismissed and the Petitioner's appeal to the General Counsel was also rejected. (Exhibits 1 and 2).

On August 9, 2017, the Regional Director issued a "Supplement Decision on Challenged Ballots, Revised Tally of Ballots, and Certification of Representative." In the Supplemental Decision, the Regional Director affirmed the challenges, and rejected the Petitioner's request to count these ballots, finding that the challenged voters failed to meet the eligibility requirements. Because the unfair labor practice charges challenging the terminations of the non-eligible voters were dismissed, the Regional Director held that the lawfulness of the terminations would not be reconsidered in the context of the election decision.

For the reasons stated below, under Board Rule 102.69(c) and (d), StarBest seeks review of the Regional Director's October 18, 2016 Decision and Direction of Election. This Request for Review is timely as it has been filed within 14 days of the Supplement Decision on Challenged Ballots, Revised Tally of Ballots, and Certification of Representative.

### **ARGUMENT**

The Regional Director erred in finding that there was no imminent cessation of operations and that the individuals employed within the proposed unit had a reasonable expectation of continued employment.<sup>2</sup> Evidence presented in the pre-election hearing clearly showed that the carpentry work at the LaPorte job site was almost complete and was anticipated to cease

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<sup>2</sup> In the Regional Director's December 30, 2016 Decisions to Dismiss the Unfair Labor Practice Charges, the Regional Director acknowledged that that "evidence failed to controvert the Employer's stated basis for the layoffs; namely, that the employees were laid off because the job was ending and there was no longer enough work for a full crew. Under these circumstances, dismissal of the charges is appropriate." Exhibit 1.

immediately. The Regional Director's Decision and Direction of Election also found that all of StarBest's carpentry work, including the subcontracted work, in Northwest Indiana was anticipated to be completed by December of 2016. See Decision and Direction of Election, p. 1. The General Counsel's decision denying the appeal of the dismissal of unfair labor practice charges found that carpentry work at the LaPorte site actually ceased on October 29, 2016, two-days before the election. (Exhibit 2) Also, as recognized by the General Counsel, there was no work carpentry available at the Portage, Indiana site because that work had been contract out prior to the election petition being filed. (Exhibit 3) See also, Decision and Direction of Election, p. 2

The Regional Director's decision is contrary to Board precedent because Board law provides that when it is reasonably certain that conducting an election will serve no purpose, the Regional Director should dismiss the election petition. This condition is met when cessation of the employer's operations is imminent. *See Davey McKee Corp*, 308 NLRB 839 (1992) In *Davey McKee*, the Board found that no useful purpose would be served by holding an election where the employer's two construction projects were scheduled to end within 29 days of the election, the employer had no ongoing projects within the geographic area, and had not bid on any other projects. Here, like in *Davey Mckee*, the evidence presented at the pre-election hearing showed that StarBest had one construction project in the geographical area (LaPorte) where carpentry work was available and that this carpentry work was anticipated to (and in fact did) cease imminently. The only other carpentry project within the geographical area was Portage, where there is no dispute that all carpentry work had been subcontracted. As a result, the Regional Director erred in finding that there was no imminent cessation of carpentry work. *See also M.B. Kahn, Construction*, 210 NLRB 1050 (1974); *General Motors*, 88 NLRB 119 (1950); *Brace Engineering*

*Co.*, 38 NLRB 1263 (1942); *Fruco Construction Co.*, 38 NLRB 991 (1942); and *Larson Plywood*, 223 NLRB 1161 (1976).

The Regional Director relied on *Retro Environmental, Inc.*, 364 NLRB No. 70 (2016) in attempting to distinguish this case from *Davey McKee*. However, *Retro Environmental* is not similar to this case because *Retro Environmental* involved an employer with a history of ongoing, recurring projects within the geographical area (up to 20 projects over the previous five-year period). Because of this, the Board held that despite the fact that there were no current projects, there was not an imminent cessation of operations of this employer. Conversely, in this case, StarBest had only two limited duration projects and no history of or plans to conduct future carpentry work in the jurisdiction. As stated above, the carpentry work at the LaPorte site was virtually complete by the time election was conducted and StarBest had contracted out the limited carpentry work at the Portage site prior to the election petition being filed. The circumstances of this case are much more like *Davey McKee* as StarBest had no available carpentry work and no plans to have any available carpentry work for employees in the proposed unit past October of 2016. The Regional Director erred in directing an election and failing to dismiss the petition.

### CONCLUSION

Based on the foregoing, Starbest's Request for Review should be granted. Based on the record evidence and the Regional Director's factual findings, no election should have been conducted due to the imminent cessation of operations for jobs within the proposed unit. The Regional Director's decision is contrary to established Board precedent and the Board should grant StarBest's Request for Review, reverse the direction of the election, nullify the Supplemental Decision certifying the Petitioner, and dismiss the election petition.

Respectfully Submitted,



Gary Fealk (Michigan Bar No. P53819)

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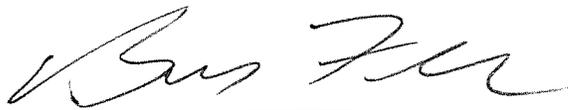
Counsel for Employer: StarBest Construction, LLC

August 23, 2017

## CERTIFICATE OF FILING AND SERVICE

I, Gary S. Fealk, attorney for StarBest, Construction, LLC hereby certify that I have e-filed the above Request for Review with the National Labor Relations Board (“NLRB”) via the NLRB’s e-filing system **on August 23, 2017**. I also certify that I have e-filed the above Request for Review with Regional Director, Region 25, Patricia K. Nachand **on August 23, 2017** via the NLRB’s e-filing system (and sent a courtesy copy to the Regional Director by First Class mail). I further certify that I caused this Request for Review to be served on the following parties by first class mail and e-mail:

Petitioner Indiana/Kentucky/Ohio Regional Council of Carpenters through its Counsel: PAUL BERKOWITZ, PAUL T. BERKOWITZ & ASSOCIATES, LTD., 123 W Madison St Ste 600, Chicago, IL, 60602-4625; [paul@pbtlaw.com](mailto:paul@pbtlaw.com)



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Counsel for Employer: StarBest Construction, LLC

August 23, 2017

## EXHIBIT 1



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

REGION 25  
575 N Pennsylvania St Ste 238  
Indianapolis, IN 46204-1520

Agency Website: [www.nlr.gov](http://www.nlr.gov)  
Telephone: (317)226-7381  
Fax: (317)226-5103

December 30, 2016

David O'Brien Suetholz, Attorney at Law  
Kircher, Suetholz & Associates, PSC  
515 Park Ave  
Louisville, KY 40208-2318

Re: STARBEST CONSTRUCTION, LLC  
Case 25-CA-187807

STARBEST CONSTRUCTION, LLC  
Case 25-CA-187824

Dear Mr. Suetholz:

We have carefully investigated and considered your charges that Starbest Construction, LLC has violated the National Labor Relations Act.

**Decision to Dismiss:** Based on that investigation, I have decided to dismiss your charge for the reasons discussed below.

Your charge alleges that the Employer violated Sections 8(a)(1) and 8(a)(3) of the Act by laying employees off on September 23, 2016, and September 29, 2016. However, the evidence failed to demonstrate a linkage between the employees' Union and protected concerted activities and their layoffs. Further, the evidence failed to controvert the Employer's stated basis for the layoffs; namely, that the employees were laid off because the job was ending and there was no longer enough work for a full crew. Under these circumstances, dismissal of the charges is appropriate.

**Your Right to Appeal:** You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at [www.nlr.gov](http://www.nlr.gov). However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

**Means of Filing:** An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), click on **E-File Documents**, enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1015 Half**

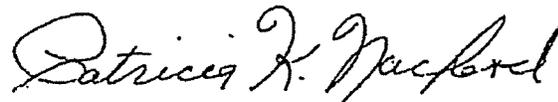
**Street SE, Washington, DC 20570-0001.** Unless filed electronically, a copy of the appeal should also be sent to me.

**Appeal Due Date:** The appeal is due on **January 13, 2017**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than January 12, 2017. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

**Extension of Time to File Appeal:** The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before January 13, 2017**. The request may be filed electronically through the *E-File Documents* link on our website [www.nlr.gov](http://www.nlr.gov), by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after January 13, 2017, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

**Confidentiality:** We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,



PATRICIA K. NACHAND  
Regional Director

Enclosure

cc: INDIANA/KENTUCKY/OHIO  
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Asad Malik  
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## EXHIBIT 2



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570

February 28, 2017

DAVID O'BRIEN SUETHOLZ, ESQ.  
KIRCHER, SUETHOLZ & ASSOCIATES PSC  
515 PARK AVE  
LOUISVILLE, KY 40208-2318

Re: Starbest Construction, LLC  
Cases 25-CA-187807  
25-CA-187824

Dear Mr. Suetholz:

Your appeal from the Regional Director's refusal to issue complaint has been carefully considered. The appeal is denied substantially for the reasons in the Regional Director's letter of December 30, 2016.

On appeal, you contend that the Employer's justification for the layoff is not supported by the circumstances of the case. A review of the evidence presented during the investigation, however, disclosed that the Employer had legitimate business justifications for its actions. It established that the work at the LaPorte job site was winding down and because of this, the Employer began reducing the work force with its first layoffs on September 23, 2016. The Employer continued reducing its work force until the last employee ceased working at the site on October 29, 2016. While you contend the Employer still had employees working on the site in November 2016, the probative evidence does not support your assertion in this regard. Under these circumstances, the weight of the evidence establishes that the Employer would have laid off its employees despite their support for the Union.

As to your position regarding work at the Portage, Indiana job site, the evidence disclosed that prior to the filing of the representation petition, the Employer had subcontracted that work to another company. When the first layoffs occurred on September 23, 2016, there was no work available for employees at the Portage site, despite the statements of the Employer's foreman. Considering your assertion that the Employer has recently solicited contractors for the Portage site, there is insufficient basis to find the Employer was obligated to offer jobs at the Portage site to those laid off or that its initial effort to subcontract the work at Portage was an attempt to avoid offering the work to those laid off.

Accordingly, the circumstances do not warrant the issuance of a complaint against the Employer at this time.

Sincerely,

Richard F. Griffin, Jr.  
General Counsel



By:

\_\_\_\_\_  
Mark E. Arbesfeld, Acting Director  
Office of Appeals

cc: PATRICIA K. NACHAND  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS  
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GREENWOOD, IN 46143

kf

**RECEIVED**  
**MAR - 3 2017**  
**GARY S. FEALK**