

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

DAWSON CONSTRUCTION, LLC

Employer

and

Case 19-RC-219495

**PACIFIC NORTHWEST REGIONAL COUNCIL
OF CARPENTERS, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA**

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, an election was conducted in a unit of the Employer's carpenters. The tally of ballots showed that of the approximately 112 eligible voters, 47 cast ballots for the Petitioner, and 27 cast ballots against representation. There were 12 non-determinative challenged ballots and 6 void ballots. Therefore, Petitioner received a majority of the votes.

The Employer timely filed four objections. On July 24, 2018, the hearing officer issued a report in which she recommended overruling the objections in their entirety. The Employer filed 12 numbered exceptions to the hearing officer's recommendations, as well as a brief supporting those exceptions.¹ The Petitioner (also referred to as "Union") filed an Answering Brief.

In its exceptions, the Employer contends that the Hearing Officer incorrectly relied upon the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), and that Petitioner's representatives mischaracterized the application of Board law (including *Deklewa*) when communicating with eligible voters. Exc. 1, 4-8, 12. Moreover, the Employer excepts to the Hearing Officer's determinations regarding alleged conflicts between Board law and the Petitioner's obligations to the Employer under a Project Agreement ("Agreement") that was part of the record. Exc. 5, 9-11; EX 4. In addition, the Employer excepts to some of the Hearing Officer's characterization of facts and credibility determinations. Exc. 2-3.

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Where the Employer's exceptions do not address specific findings, determinations, and recommendations made by the Hearing Officer, I adopt in

¹ The following abbreviations will be used to refer to relevant documents and evidence, if applicable. The Employer's Exceptions are "Exc."; the Employer's Exceptions Brief is "Exc. Brf."; the Petitioner's Answering Brief is "Ans. Brf." the Hearing Officers Report is "Report"; the Hearing Transcript is "Tr."; Board Exhibits are "BX"; The Employer's Exhibits are "EX"; The Petitioner's Exhibits were marked as "Union" exhibits and so are "UX".

whole the recommendations in the Report for the reasons articulated by the Hearing Officer. I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the hearing officer that all of the Employer's objections should be overruled. Accordingly, I am issuing a Certification of Representative.

I. APPLICATION OF DEKLEWA IN § 8(f) CASES

Because the Employer has extensively challenged (See Exc. 1, 4-7) the application of *Deklewa* to the statements Petitioner made (or allegedly made) in the instant case, I begin my analysis by confirming that *Deklewa* does apply to the background of this case and applies to all § 8(f) agreements. 282 NLRB at 1385. As the Hearing Officer properly noted in her decision, the Board often addresses issues outside of the specific factual parameters of a given case. Report 4 n.1. What may be characterized as dicta may nonetheless be binding precedent in related cases, because the Board creates and modifies precedent by both rule-making and by administrative decisions. See e.g. *Boeing*, 365 NLRB No. 154 (2017); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

In *Deklewa*, the Board specifically set forth a new and comprehensive framework for evaluating § 8(f) relationships between unions and employers, and its commands remain binding. The Board was firm and clear in stating that “[a] vote to reject the signatory union will void the § 8(f) agreement and will terminate the § 8(f) relationship.” *Deklewa*, 282 NLRB at 1385. If the parties refuse to terminate such agreements and relationships, the parties violate § 8(a)(2) and § 8(b)(1)(A) of the Act. *Id.* After the § 8(f) relationship is terminated, the “Board will prohibit the parties from reestablishing the 8(f) relationship covering unit employees for a 1-year period.” *Id.* The Board has applied *Deklewa*'s dictates broadly rather than narrowly, reflecting its status as an authoritative statement of Board law in § 8(f) cases. See e.g. *Operating Eng'rs, Local Union No. 3*, 331 NLRB 369, 370 n.10 (2000) (Applying *Deklewa* to prohibit even *initial* establishment of § 8(f) agreement within one year of § 9(a) election in which employees rejected Union); *Staunton Fuel & Material, Inc.*, 335 NLRB 717, 718 (2001) (Extensively discussing *Deklewa* framework and breadth of application).

Because *Deklewa* applies to § 8(f) agreements and the § 8(f) relationship as a whole, it necessarily governs any such agreements between the Employer and the Petitioner in the instant case. See Exc. 1. The Hearing Officer noted that “no evidence was entered in the record to establish any distinction between” project labor agreements and project agreements. Report 4 n.2. Because of the lack of evidence, the Hearing Officer considered project labor agreements and project agreements equivalent terms. The Employer excepts to this characterization. Exc. 2. However, the distinction between the two, if any, is immaterial to the case, because the Employer admits in its Exceptions Brief that both types of agreements are § 8(f) agreements. Exc. Brf. 7. That employees were referred by Petitioner to the Employer under these § 8(f) agreements only shows these were typical § 8(f) agreements. It does not indicate they are uniquely exempt from *Deklewa*. See *Deklewa*, 282 NLRB at 1376-80.

Therefore, when evaluating whether or not Petitioner engaged in objectionable conduct, I initially find that Petitioner would have had a legal duty to void its § 8(f) agreements in the event that it lost the election, and that it cannot be found to have coerced eligible voters by informing them of this fact. See Exc. 1, 4-8. Nor can Petitioner be found to have coerced eligible voters by informing them, reasonably accurately, of derivative impacts caused by voiding those § 8(f) agreements. Exc. 4-8.

Finally, even if Petitioner mischaracterized *Deklewa* and progeny, and/or mischaracterized relevant facts, that would not be objectionable conduct unless it rose to the level of fraud and/or coercion and/or constituted promises or threats of reprisal that Petitioner had the actual power to make good on. *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988) (misstatement of law unobjectionable); *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982) (false statements of fact unobjectionable); *Smith Co.*, 192 NLRB 1098, 1101 (1971) (employees recognize that union claims are contingent on circumstances outside their power in a way employer claims are not.); *Lalique N.A., Inc.*, 338 NLRB 986 (2003) (union promise of medical benefits if it won election not objectionable); *JTJ Trucking*, 313 NLRB 1240 (1994) (not objectionable for union to claim employees would lose health benefits if union lost election).

II. THE OBJECTIONS

A. *Alleged Threats made by Petitioner Representatives*

The Employer objected to the election by contending that, on or about June 4, 2018, Petitioner's representatives told eligible voters that if they voted "no," they would lose their jobs, their accrued and future union benefits, including vested pensions, as well as suffer the loss of their union membership and wage cuts.

Addressing this objection, the Hearing Officer properly found that Petitioner had informed voters of what would happen under Board law if voters did not select the Petitioner as their representative, and the Petitioner characterized Board law "reasonably accurately" in its conversations with those voters. Hearing Report 8-11.

To the degree that Petitioner may have mischaracterized Board law, it still could not constitute a "threat" by the Petitioner "because the [Union] had no control over what action [the Employer] might take if [the Union] lost the election." *Air La Carte*, 284 NLRB 471, 474 (1987). In addition, the Hearing Officer found, and I affirm, that no evidence was presented establishing that the Petitioner threatened employees with "loss of their Union membership."²

In its Exceptions, the Employer contends that some § 8(f) agreements may not be in conflict with Board law. Exc. 9. It is unclear what agreements would be unaffected given the Board's clear commands in *Deklewa*. In any case, the Hearing Officer's

² Had this been established, it would have reflected a Petitioner threat to do something not mandated by Board law, and which was solely within the power of the Petitioner. However, having found no evidence that Petitioner or its representatives made such a threat, there is no objectionable conduct.

determination would not reach agreements that do not conflict with the parties' obligations under *Deklewa*. However, to the degree that there is a conflict, Board law necessarily predominates.

The Employer also excepts to the Report by arguing that Petitioner would violate the Agreement if it repudiated the Agreement as required under *Deklewa*. Exc. 5, 10-11; EX 4. Though the Employer claims the Hearing Officer failed "to consider" certain portions of the Agreement, the Hearing Officer authoritatively considered the underlying issue. She wrote:

It may be the case that if the Union had lost the election it would have been placed in the unenviable position of facing liability whatever course it chose: a contract enforcement suit if it terminated the project agreements and Board charges under § 8(b)(1)(A) if it did not. The Union's statements indicate that it had chosen the consequences of terminating the contracts, to avoid liability before the Board. As I am tasked only with enforcing the Act, and have no jurisdiction over private contract disputes, I cannot fault the Union for that choice.

Report 10.

Leaving aside questions of contract interpretation, the Board cannot hold that any Petitioner must willfully violate Board law and continue to represent employees who have rejected it, simply in order to avoid interrupting a labor agreement. Any contract that requires the opposite must fail before the Act under *Deklewa*. 282 NLRB at 1385. As a result, my analysis begins and ends with the fact that Petitioner could not make objectionable threats simply by stating its legal obligations to "void" any § 8(f) agreements if it lost the election.

The Employer also notes that the Agreement includes a clause stating that "[n]othing in this Agreement shall be construed to limit the ability of employees through the voting process to decertify representation by one or more Unions in accordance with state and federal law." Exc. 11. The clause in question merely restates Board law and is wholly compatible with it. After all, no valid project agreement could require the parties to interfere with employee rights and violate state or federal law. This clause of the Agreement cannot lawfully stand for the wholly unrelated proposition that the Agreement is exempted from *Deklewa*. Since *Deklewa* still applied, the Petitioner's statements to employees remain "reasonably accurate" characterizations of Board law.

The Employer also excepts to the Hearing Officer's failure to take issue with the Petitioner's alleged misrepresentations that Region 19 supported the Petitioner's position and would repudiate all of Dawson's project agreements and project labor agreements in the event of a "no" vote.³ Exc. 12.

³ In its Answering Brief, Petitioner states that Exception 12 should be overruled on the grounds it was improperly raised for the first time in its Exceptions. Though the Employer's original objections do not explicitly reference an improper representation of Board law and action, the objections do broadly

This Exception is also without merit. In its Exceptions Brief, the Employer claims Petitioner organizer Ben Basom (“Basom”) sent an email to employees that served to draw the Region “directly into its threats of job loss.” Exc. Brf. 6. Specifically, the Employer claims that the following sentence was coercive:

[P]lease call the NLRB in Seattle at 206-220-6300, and ask them what would happen to any existing agreement should the Dawson workers vote ‘no.’

Exc. Brf. 6; UX 1.

In that same email, Basom quoted from a valid NLRB decision, *Operating Eng’s Local Union No. 3*, 331 NLRB at 370. UX 1. Encouraging employees to call the Board - in order to confirm how Board law would be applied - is the diametric opposite of misrepresenting the neutrality of the Board. Instead, it is an act of deference to the law.

Furthermore, there was brief employee testimony that said employee had asked an unknown representative of Petitioner whether Petitioner would be terminating the project agreements. The unknown Petitioner representative or representatives “said it would be in the NLRB’s court to do it [and t]hat it was out of their jurisdiction or control that the NLRB would step in at that point.” Tr. 75:15-16.

As the Hearing Officer correctly stated, the Board does not police misrepresentations of law “unless they amount to coercive threats or forgery.” Report 7 (citing to *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988), and *Midland Nat’l Life Ins. Co.*, 263 NLRB 127, 133 (1982)). In this case, Petitioner not only restated Board law reasonably accurately, but actively provided eligible voters with a Board phone number so voters could obtain accurate information from an authoritative neutral source. Relatedly, it is within the Board’s duties to find that an unlawful agreement is unlawful and to seek enforcement of such a finding. A Petitioner representative who tells an employee that “the NLRB would step in [to terminate an agreement] at that point” is not enlisting the Board to create a false endorsement of the Petitioner, but is merely paraphrasing the holding in *Deklewa*.

At worst, the Employer and Petitioner disagree about the meaning and application of *Deklewa*, but an arguable misinterpretation of law or doctrine is far from a coercive threat, forgery, or retaliatory promise. Petitioner’s communications were not objectionable because they did not have “the tendency to interfere with employees’ freedom of choice.”⁴ *Cambridge Tool Pearson Educ., Inc.*, 316 NLRB 716 (1995).

encompass alleged threats and legal misrepresentations made by Petitioner representatives. Such allegations would reasonably be read to encompass Exception 12.

⁴ Both the Employer’s Exceptions Brief and Petitioner’s Answer argue about the merits or application of *Permanente Med. Grp., Inc.*, 358 NLRB 758, 760 (2012). However, *Permanente* was a case decided by an invalid *Noel Canning* panel and the Board has not relied on it or adopted it since. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); Also See *Rockwell Mining LLC*, 09-RC-202389, 2018 WL 3091016, at *1 (DCNET June 21, 2018).

Finally, the Employer excepts to the Hearing Officer's determination not to credit Superintendent Ken Kuiken's ("Kuiken") testimony that "at one point the Union offered if we started two companies, or an additional company, and we had one that was signatory, and one was non-signatory, then that would be okay with them." Report 6 n.5. This exception is without merit and I affirm the Hearing Officer's well-reasoned determination that Kuiken's testimony lacked 1) proper foundation, 2) evidence that Kuiken had personal knowledge of the comment, and 3) an explanation of the context, meaning, or plausibility of the statement. Tr. 38:25-39:1-7; Report 6 n.5. Therefore, I do not further evaluate the Employer's arguments about "reverse double breasting" or how such a statement would impact the Petitioner's statements about its *Deklewa* obligations, if at all. Exc. Brf. 10-11.

I therefore affirm and adopt the Hearing Officer's recommendation and overrule the Employer's objection. Report 8.

B. *Alleged Threats Made via Petitioner's Flyers or Letters*

The Employer alleges that, on or around June 4, 2018, eligible voters received written flyers ("Flyer") from agents and representatives of Petitioner stating that, if they voted "no" they would lose their jobs, their accrued and future union benefits, including vested pensions, as well as suffer the loss of their union membership and be subject to wage cuts.

The key portion of the flyer employees received reads:

If you vote 'no' then all Single Jobsite Agreements cease immediately, which means overnight ALL DAWSON PROJECTS WILL BE NON-UNION and no single jobs may be signed again for a minimum of 12 months. If you wish to retain your Union job, Union pay scale, and Union benefits, you must vote 'yes.'

Report 9; EX 1.

A Petitioner representative also provided voters an undated letter ("First Letter"), which in relevant part reads:

"To be clear, if the majority of the Dawson employees vote no on this election, we will be terminating all active Project Agreements and the relationship between Dawson and the Union will cease to exist."

Report 9; EX 2.

On or after June 5, 2018, Petitioner provided a letter ("Second Letter"), signed by its attorney, to eligible voters. In relevant part, it stated that in the event of a no vote:

[T]he existing agreements become automatically void and unenforceable. The National Labor Relations Board ruled this way long ago in *Deklewa*. This means there would be no more union pension or health contributions,

and consequently no more union benefits for Dawson's workers if the 'no' vote succeeds. A 'no' vote also means that Dawson can immediately cut everyone's pay because there would be no more agreement to prevent this. Therefore, only a 'yes' vote will allow the workers['] existing wages and benefits to continue.

Report 9; EX 3.

Despite the objections, the Flyer does not contain an explicit threat of job loss nor does it contain a threat of lost union membership. Instead, it states that the Employer's projects will be non-union, that existing 8(f) agreements will cease, and that such agreements cannot be signed again for at least a year. As the Hearing Officer explained, those statements are a reasonably accurate summary of what *Deklewa* requires in the event of a "no" vote. See *Deklewa*, 282 NLRB 1585-86. In addition, the jobs would no longer be "Union jobs" and in the absence of the § 8(f) agreement, there is no guarantee that employees would receive wages on the same pay scale or receive the same benefits as the Employer could modify terms and conditions of employment at will.⁵ Even if analogous wages and benefits were retained, they would no longer be "Union" pay scale(s) or "Union" benefits, but voluntary emulations of those benefits.

However, as noted above regarding the first objection, even if Petitioner's flyer is interpreted as a threat that employees would lose benefits, pay, or their jobs, it would not be objectionable conduct because those decisions are solely within the power of the Employer. Whatever power Petitioner theoretically has over employees would cease as soon as they lost an election and complied with *Deklewa*.

The First Letter merely explains that Petitioner would abide by *Deklewa*, and so cannot serve as objectionable conduct. See e.g. *Van Leer Containers*, 298 NLRB 600, 600 n.2 (1990) ("unambiguous explanation of the Union's legal obligation" was not objectionable). As before, the Employer's exceptions regarding the application of *Deklewa* are rejected. Its implied claim that the Agreement (and similar project agreements) escape Board law in this regard is also rejected. Moreover, even if the Employer's understanding of *Deklewa* was adopted, a mere misstatement of law is not objectionable conduct. See e.g. *Riveredge Hosp.*, 264 NLRB 1094 (1982) (mis-characterizations of Board actions evaluated same as other factual misrepresentations; alteration of Board documents treated differently than mere misstatement of fact or legal meaning).

Similarly, the Second Letter explains Petitioner's obligations under *Deklewa* and restates the fact that an Employer can modify terms and conditions of employment at will after an § 8(f) agreement is voided. The Board has also held that telling employees they would lose health benefits and pension benefits, which are usually controlled by benefit funds, is not objectionable conduct. *JTJ Trucking*, 313 NLRB 1240 (1994); *Taj*

⁵ Without an § 8(f) Agreement, the Employer would be free to modify all terms and conditions of employment without bargaining and without violating the voided contract.

Mahal, 329 NLRB 256 (1999 (not objectionable for union to explain to members how terminating bargaining agreement would impact pension plan)).

I therefore affirm and adopt the Hearing Officer's recommendation and overrule the Employer's objection. Report 10.

C. Alleged Threats via False Representations about § 8(f) Agreements

The Employer also objected to the election on the grounds that the Petitioner falsely informed employees that prehire or § 8(f) agreements were automatically voided, and that this automatic voiding also reached lawful project labor agreements.

On or after June 5, 2018, Petitioner provided the Second Letter to eligible voters, and it stated that:

[T]he existing agreements become **automatically void** and unenforceable. The National Labor Relations Board ruled this way long ago in *Deklewa*. [...]

Report 9; EX 3 (emphasis added).

While it may be argued that any prehire or Section § 8(f) agreements are not "automatically" voided, as in they do not self-destruct or sever themselves, it is equally true that Board law says that a vote to reject a union "voids" any extant § 8(f) agreements. *Deklewa*, 282 NLRB at 1385. As the Employer admits in its own Exceptions Brief, any party that fails to void an § 8(f) agreement (and relationship) in such a situation is "subject to 8(a)(2) and 8(b)(1)(A) liability." Exc. Br. 8.

The Employer's argument can therefore be distilled to a claim that the Petitioner could maintain the status quo by violating § 8(b)(1)(A), and/or by being a party to unlawful § 8(a)(2) conduct. Moreover, because Petitioner could maintain an unlawful status quo, it coerced eligible voters by telling them it would follow the law and terminate its agreements. This argument is entirely untenable on its face. It is axiomatic that no party can be found to have coerced employees by informing those employees that it would act in the manner required by law and Board precedent. *Van Leer Containers*, 298 NLRB 600, 600 n.2 (1990). Indeed, in *Deklewa*, the Board emphasized that § 8(f) elections "assure that employees will not [...] be forced to continue working under the regimen of a union that they would prefer to reject or change." 282 NLRB at 1385.

Relatedly, the Employer contends that the Alaska Regional Council of Carpenters, which has since then been subsumed by the Petitioner, failed to terminate various § 8(f) agreements after losing a representation election in 2004. Exc. 8; Exc. Brf. 5; See Tr. 39:18-23; 42:13-24; 72:1-7. No evidence regarding these agreements was entered into evidence and the testimony on the subject was brief, vague, and

lacking detail.⁶ Regardless of what happened in 2004, the Employer's contention does not undercut the Hearing Officer's findings.

If in fact § 8(f) agreements were maintained without cessation after the employees rejected a representative in 2004, that would be in violation of § 8(b)(1)(A) and/or § 8(b)(2) of the Act. The implication that the Employer or Petitioner may have skirted the Act 14 years ago – an implication the record is not competent to establish - does not change the analysis. Most certainly, it cannot stand for the proposition that Petitioner was interfering with eligible voters in 2018 because it threatened to do what it was legally obligated to do.

I therefore affirm and adopt the Hearing Officer's recommendation and overrule the Employer's objection. Report 11.

D. *Alleged Petitioner Harassment of Voters by Phone and at Home*

The Employer objected to the election by alleging that Petitioner representatives harassed eligible voters on the telephone and at their homes with "repeated contacts" as well as interrogation as to how they voted.

The Hearing Officer overruled this objection, relying on *Plant City Welding, 119 NLRB 131, 133-34 (1957)* (establishing that union home visits during election campaign were not coercive). In addition, the Hearing Officer found no evidence was entered in the record showing that Petitioner interrogated employees about how they had voted. Report 11-12. The Employer's exceptions do not touch on this objection.⁷ I therefore affirm the Hearing Officer's recommendation to overrule this objection for the reasons set forth in the Report. Report 12.

III. CONCLUSION

Based on the above and having carefully reviewed the entire record, the hearing officer's report and recommendations, and the exceptions and arguments made by the Employer, I overrule the objections, and I shall certify the Petitioner as the representative of the appropriate bargaining unit.

⁶ Kuiken testified that he heard from Pete Dawson ("Dawson"; Employer Owner) project agreements had remained in place after the 2004 election, but also admitted that he was not involved in the 2004 election and was not personally aware if employees remained on a construction project after the 2004 election. Tr. 39:18-23; 42:9-16. The only other testimony on this subject was when foreman Ronald Reed testified that Dawson told him the same thing. Tr. 72:1-7. However, Dawson did not testify.

⁷ In its Exceptions Brief, the Employer does note that Petitioner's representatives made comments of the kind addressed in Objections 1 and 2 during these home visits. Exc. Brf. 4. As noted above, I find Petitioner's comments did not coerce employees or taint the election. The fact that Petitioner may have made the same statements during home visits or phone calls does not change their character or render them coercive.

IV. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for PACIFIC NORTHWEST REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, and that it is the exclusive representative of all the employees in the following bargaining unit:

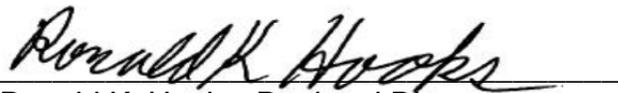
All full time and regular part-time journeymen carpenters, apprentice carpenters, and carpenter foremen employed by the Employer; excluding all other employees, all employees represented by other labor organizations, executives, superintendents, office clerical employees, and guards and supervisors as defined in the Act.

V. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by October 9, 2018. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Seattle, Washington, this 24th of September, 2018.



Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
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Seattle, WA 98174