

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

In the Matter of

DAWSON CONSTRUCTION, LLC

Employer,

and

PACIFIC NORTHWEST REGIONAL
COUNCIL OF CARPENTERS,

Petitioner/Union.

Case 19-RC-219495

**DAWSON CONSTRUCTION, LLC'S BRIEF IN SUPPORT OF REQUEST FOR
REVIEW OF REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF
REPRESENTATIVE**

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I. INTRODUCTION

This brief is in support of Dawson Construction, LLC's ("Dawson") Request for Review of the Region 19 Regional Director's Decision and Certification of Representative dated September 24, 2018. For the reasons set forth below, the Regional Director's decision to overrule certain election objections and certify Petitioner Pacific Northwest Regional Council of Carpenters ("Petitioner") as the representative of Carpenters employed by Dawson should be reviewed and reversed and a new election held, free from unlawful threats. Specifically, the Regional Director's incorrect application of dicta in the Board decision of *John Deklewa & Sons*, 282 NLRB 1375 (1987) to allow outright Union threats to voters, of loss of benefits and jobs on project agreements unless they voted for Petitioner, should be reversed under Section 102.67(d) of the Board's Rules and Regulations since the Decision: (1) raises a substantial question of law or policy regarding application of the election bar rule to project agreements; (2) was based on an erroneous determination of a substantial factual issue as to who controlled the threatened job and benefit loss; and (3) raises a compelling reason why the Board should reconsider application of the election bar under *Deklewa* to project agreements which do not result in compelled union membership.

II. DECISION BELOW AND GOVERNING LAW

Section 102.69 of the Board's Rules and Regulations governs a party's requests for Review from the final decisions of Regional Directors on election objections. Specifically, Section 102.69(c)(2) allows a party to request Board review pursuant to Section 102.67. Section 102.67(d), in turn, provides the following grounds for review of a Regional Director's decision on election objections:

- (1) That a substantial question of law or policy is raised because of ... (ii) A 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...
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

In this case, the Regional Director overruled Dawson's election objections relating to verbal and written threats by representatives of Petitioner that eligible voters would face loss of jobs and Union benefits if they voted against Petitioner. Petitioner argued, and the Regional Director agreed, that its representatives merely restated the controlling law under *Deklewa*, *supra*, that the defeat of Union certification would result in the immediate termination of any and all project agreements and project labor agreements between Dawson and Petitioner which allowed the eligible Union voters to work for non-Union Dawson. At a minimum, the Regional Director's Decision misapplied *Deklewa* to undermine the rights of voters to vote "no" and still maintain the status quo and continue to work for Dawson under project agreements. At a maximum, the Regional Director's refusal to consider the interests of voters calls for a revamping of *Deklewa*'s holding to limit its certification bar language to the circumstances involving compelled union membership of eligible voters under a Section 8(f) agreement—a key element missing from project agreements. For the reasons below, the Request for Review should be granted and the Regional Director's Decision should be overturned under the applicable Board Rules and Regulations.

III. ARGUMENT

A. The Regional Director's Reliance on the Election Bar Dicta in *John Deklewa & Sons to Overrule Dawson's Election Objections Related to Petitioner's Written and Verbal Threats of Job Loss to its Members, Represents a Departure from Board Precedent Since the Voters Were Employed on Project Agreements--Not Employer Compelled Section 8(f) Agreements.*

As the Board has uniformly held, union threats can warrant setting aside an election if the statements interfere with employee exercise of their right to vote by undermining the “laboratory conditions” of an election. *NLRB v. Urban Tel. Corp.*, 499 F.2d 239 (7th Cir. 1974). If the conduct at issue produces a climate which effectively prevents employees from making a free choice, the election should be set aside. *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064 (5th Cir. 1973). Even if a threat does not arise to the level of an unfair labor practice, it may still result in the setting aside of an election. *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782 (1962). As with employer statements, there is a difference between lawful “predictions” and unlawful “threats”—the former being outside the union’s control and the latter falling within the union’s control. Actionable economic threats include union threats to deprive members of their benefits, and loss of jobs, when tied to the employees’ exercise of Section 7 rights. *See NLRB v. Kalof Pulp & Paper Corp.*, 290 F. 2d 447, 448 (9th Cir. 1961).

While a union’s threat of job loss is typically not deemed sufficiently coercive since unions can rarely deliver on such a threat, such statements do arise to coercive conduct if, for example, the union singles out those who openly support the union and alleges they will be terminated by the employer if they vote “no.” *See NLRB v. Valley Bakery*, 1 F.3d 769, 773-74 (9th Cir. 1993). By “outing” union supporters, the requisite coercive effect is established since

union support may be viewed negatively by an employer and the supporters may wish to remain anonymous.

Other “job loss” threats deemed coercive were Union statements made immediately before an election that, unless the employees voted for the union, a major customer of the employer would no longer do business with the employer. *The Aire-Flo Corp.*, 167 NLRB 679, 679 (1967); *see also NLRB v. Ky. Tenn. Clay Co.*, 295 F. 3d 436, 440 (4th Cir. 2002)(union threat to employee that failure to support the union could result in employee being “squeezed out” of his job); *Jamesway Corp. v. NLRB*, 676 F.2d 63, 70 (3d Cir. 1982)(threat by union that, absent a “yes” vote, newly hired employees faced the risk of layoff).

At hearing, Dawson established both unlawful threats and the direct involvement of Petitioner in the authorship of such threats which amounted to a single option to the eligible Dawson Union voters who clearly outnumbered the non-union voters¹: “Vote ‘yes’ or lose your job.” Thus, written handouts expressly stated that “If you wish to retain your Union job, Union pay scale, and Union benefits, you must vote “YES.” Em. Ex. 1.² Another stated: “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,” Em. Ex. 2; other voters were led to believe that it was the NLRB which would terminate the project agreements. (Tr. 75:11-12). A third written handout indicated that “only a ‘yes’ vote will allow the workers existing wages and benefits to continue.” Em. Ex. 3.

¹ Thanks to approximately 15 project agreements and one project labor agreement with the Carpenters (Tr. 103:22; Em. Ex. 5), there were roughly 90 union Carpenters and 25 non-union Carpenters in the proposed unit. (Tr. 104:1-3).

² References to Exhibits will be “Em. Ex.[No.],” and “U. Ex. [No.].” References to the hearing transcript will be “(Tr. Page number: line number).”

These written representations were echoed by verbal threats by various Union representatives that: “[I]f there was a no vote, that all carpenters would have to leave the jobsite” (Tr. 19:14-15); “[I]f there was a no vote that all employees would be leaving the job site the following day.” (Tr. 24:8-10); “[It was] very clear that if you voted no, that you were going to lose your job” (Tr. 34:15-16); “A no vote would mean that the current jobs would be down.” (Tr. 59:12-13). These Union threats resulted in a “fear of losing your job if you vote any other way but yes.” (Tr. 94:1-4). In addition to the threats of job loss, the Union agents made it clear that a “no” vote would result in a loss of valued medical benefits. (Tr. 21:14,22).³ These statements were made at the various jobsites as well as through telephone calls and home visits by Union agents. (Tr. 19:18; 24:8-11; 33:10-24; 50:11).

Petitioner’s threats to terminate voters’ employment with Dawson which, for some employees, spanned decades (Tr. 79:9), had its intended effect. Union employees testified they were “frustrated” (Tr. 22:1-4), “worried” (Tr. 48:5-7) and “confused.” (Tr. 37:19-38:2). One eligible voter characterized the Union’s threats as “bullshit” and unnecessary “drama.” (Tr. 97:24-98:3). In sum, the Union’s threats were gravely concerning and caused a great deal of second-guessing as to whether the Union’s threats of job loss, or the employer’s reassurances of continued employment, were accurate. (Tr. 22:1-4; 37:19-38:2; 48:5-7). The Union Carpenters came to the conclusion that the only safe course of action was to vote “Yes.” (Tr. 57:9-12).

In overruling Dawson’s election objections regarding these threats, the Regional Director completely adopted the Petitioner’s defense that their threats were merely a restatement of

³ “A: [T]hey also said that our benefits, medical primarily is the one I asked about because I have five kids and my wife has some medical conditions, and they said that would be terminated immediately.” (Tr. 65:7-10).

governing law—namely dicta from the decision of *John Deklewa & Sons*, 282 NLRB 1375 (1987) regarding Section 8(f) agreements.⁴ Perhaps the Regional Director’s backing of Petitioner is understandable since the Region was drawn into the election fray as the “neutral” federal agency endorsing the Union’s interpretation. U. Ex. 1. The Region’s participation caused at least one voter to assume that, based on Petitioner’s representations, it would be the Regional office which would terminate all existing project agreements as a result of a “no” vote. (Tr. 120:7-8).

However, the Regional Director misapplied the election bar dicta in *Deklewa* thereby representing a departure from Board precedent for the following reasons. First, *Deklewa* dealt with an employer’s repudiation of a prehire of Section 8(f) agreement rather than a certification election by a union. As a result, the Board language at issue is dicta having nothing to do with the facts of this case.

Second, the *Deklewa* language did not deal, as here, with project agreements or project labor agreements. This is an important distinction since, although both are Section 8(f) agreements, neither result in compelled union membership of the employees performing work under them. Dawson’s project agreement, for example, expressly requires that the “construction work associated with the [Project] shall be performed by workers secured through referral

⁴ “A vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship. In that event, the Board will prohibit the parties from reestablishing the 8(f) relationship covering unit employees for a 1-year period. The purpose of this general prohibition is to preclude an employer and a union both from ignoring the electorally expressed preference of a majority of unit employees and from maintaining an 8(f) relationship during a period when the Act precludes holding another election, the availability of which is the sine qua non safeguard to permitting and enforcing an 8(f) contract. Failure to terminate the 8(f) relationship or its premature reestablishment after an election will subject the parties to 8(a)(2) and 8(b)(1)(A) liability.” *Deklewa*, 282 NLRB at 1385.

halls....” Em. Ex. 5, p.2. These employees were clearly union members before their employment with Dawson, based on their own choice.

Third, the dicta should not be applied in this case since strict application of the dicta would clearly undermine the very aim of the cited language: To protect “employee free choice principles” by precluding “an employer and a union both from ignoring the electorally expressed preference of a majority of unit employees....” *Deklewa, supra*, at 1385. The Section 8(f) agreements are employer-driven and require employees to be subject to union security provisions mandating union membership.⁵ The so-called “escape valve” of decertification is therefore necessary to allow such employees to overrule the employer’s unilateral wishes, and the subsequent voiding of the Section 8(f) agreement and the one-year proscription on future agreements is designed to ensure that the employer does not subsequently ignore the wishes of employees.

In this case, Dawson’s Union employees chose Union representation long before they were sent out to Dawson pursuant to project agreements. The four Dawson non-supervisory employees who testified at the hearing had a collective 78 years of Union membership between them. These Union employees who were threatened with job loss by the Union, if they voted “no” in this election, had already exercised their “free choice” when they joined the union—not due to a union security provision, but because they wished to. Application of the *Deklewa* dicta to project agreements completely turns this aim of protecting employee exercise of a right to vote free from coercion on its head. As a result, the dicta was unlawfully misapplied by the Union in

⁵ “...[S]uch agreement requires as a condition of employment, membership in such labor organization...to notify such labor organization of opportunities for employment with such employer....” 29 U.S.C. Sec. 158(f).

this case and does not undermine the coercive nature of the Union's threat of job loss if the employees voted "no."

Finally, the *Deklewa* decision does not result in the automatic repudiation of existing Section 8(f) agreements but requires a party, if it wishes, to "terminate the 8(f) relationship" or be subject to 8(a)(2) and 8(b)(1)(A) liability. *Id.* Thus, for example, the *Deklewa* sky did not fall when, in 2004, the Union lost a certification election with Dawson, and the Dawson project agreements were not repudiated. At hearing, Dawson established that, prior to the election at issue, Dawson was similarly employing a large number of Union Carpenters under various project agreements (Tr. 39:18-23), and similarly faced an election petition for Section 9(a) representational status by the Alaska Regional Council of Carpenters. (Tr. 74:21). Despite the Union's loss in that election (Em. Ex. 4), Union project agreements continued unabated and new agreements were entered into in Alaska. (Tr. 39:18-23; 72:6-7). Thus, contrary to the Regional Director's findings, the repudiation of the project agreements and project labor agreement resulting in job losses if the employees voted "no," was solely within the Union's control, as discussed more fully below.

As a result, the Regional Director's overruling of Dawson's objections, based on Petitioner's threats, represents a departure from Board precedent and should be overturned. The Regional Director's reliance on *Deklewa* dicta to overrule Board precedent on unlawful threats deprived voters of the necessary laboratory conditions to vote without fear and without coercion.

B. The Regional Director Mistakenly Ruled on a Substantial Factual Issue when He Determined that the Petitioner Could not Be Liable for its Threats Since the Job Losses Were Solely Within the Employer's Control.

One of the substantial factual issues relied upon by the Regional Director in overruling the Dawson election objections as to Petitioner's threats was that, even if Petitioner's threats were based on a mischaracterization of Board law, "the [Union] had no control over what action [the Employer] might take if [the Union] lost the election." Regional Director's Decision at p. 3, citing *Air La Carte*, 284 NLRB 471, 474 (1987). This factual determination had a significant effect on the Regional Director's analysis since Union threats may be excused if the Union cannot deliver on the threats. Here, however, the Regional Director completely ignored undisputed record evidence that Petitioner's threats of job loss were completely within the control of the Union. This fact was admitted by the Union, since in one written threat it expressly stated: "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." Em. Ex. 2 (emphasis supplied).

Indeed, the record evidence regarding the Union's refusal to repudiate its project labor agreements in 2004 after a failed certification attempt places the causation for the threatened job loss squarely within Petitioner's control, not Dawson's. The Regional Director thus missed a key factual issue necessary for determination of a "threat"—the ability to deliver on it. As a result the Regional Director's overruling of Dawson's election objections was based on an erroneous factual issue undermining its correctness.

C. The Regional Director’s Decision Raises Compelling Reasons for Reconsideration of Board Policy Regarding Application of the Election Bar Rule and the Voiding of Project Agreements as a Result of Union Certification Elections.

The Regional Director’s reliance on the *Deklewa* dicta in certifying the election results despite testimony by voters that they were “frustrated” (Tr. 22:1-4), “worried” (Tr. 48:5-7) and “confused” (Tr. 37:19-38:2), at a minimum, demonstrates the need for clarification and reconsideration by this Board, that the election bar rule resulting from unsuccessful certification elections should not apply to project agreements. Application of the election bar not only undermines the very employee free choice the Act is designed to protect, but also results in violations by one or both parties to ongoing project agreements. According to the terms of the project agreements and the Project Labor Agreement at issue, the respective project agreements could only be terminated upon “completion of the project” (Em. Ex. 5, p.13), and the parties, including the Carpenters, agreed to ensure “that the Project is assured of complete efficiency and continuity of operation, *without slowdown or interruption of any kind...*” *Id.* at p. 2 (emphasis supplied). The parties also expressly agreed 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.” *Id.* at p. 14. Significantly, this provision did not indicate that such a vote would terminate the project labor agreement.

Thus, neither the project agreements nor the project labor agreement allow termination by anything other than conclusion of the covered work. Em. Ex. 5 at p. 13.⁶ Moreover, according to agreements, the express purpose of the agreements is to ensure “...the timely, cooperative

⁶ Indeed, the project labor agreement expressly allows decertification elections *without* setting aside the agreement: “Nothing 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.” *Id.* at pp.13-14.

completion of the Project without interruption or delay.” *Id.* at p. 2. According to confused voters, Petitioner’s threats to tear up these agreements made no sense “because once you sign a contract, we thought that was binding between, you know, the City and Dawson and the PLA that was signed with the Union...we felt like that seemed a little strange.” (Tr. 59:23-60:1).

The Regional Director sidestepped the Union’s binding contractual obligations by determining that federal law would preempt any contrary contractual obligation of Petitioner. However, the Regional Director’s insistence that the Union and employer breach their existing project agreements underscores the need for Board clarification that the election bar language does not, and cannot, result in the voiding of ongoing project agreements. Application of the election bar based on these facts would also undermine, rather than serve, the labor relations stability that the Act is designed to protect. As a result, the Regional Director’s overruling of the election objections and certification of election results should be set aside in conformance with a modified Board policy that the *Deklewa* election bar dicta does not apply to project agreements.

IV. CONCLUSION

For the foregoing reasons, Dawson respectfully requests that the Regional Director’s Decision and Certification of Representative be set aside, and that, after an appropriate posting to rid the laboratory conditions of Petitioner’s unlawful threats, a new election be held.

RESPECTFULLY SUBMITTED this 9th day of October, 2018

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