Dynamic Concepts, Inc. *and* Construction and Master Laborers' Local Union 11, Petitioner. Case 05–RC–282516

July 22, 2022

DECISION ON REVIEW AND ORDER

BY MEMBERS KAPLAN, WILCOX, AND PROUTY

This case presents a narrow and relatively unusual situation. The Petitioner filed objections to an election alleging that the Employer had engaged in misconduct that warranted setting the election aside. The Employer agreed to forego litigation of the objections and proceed expeditiously to a rerun election, but the Petitioner was unwilling to agree to the holding of a rerun election in the absence of "any action whatsoever to remove the taint" of the Employer's alleged objectionable conduct. Notwithstanding the Petitioner's refusal to agree to a rerun election in those circumstances, the Regional Director approved a stipulation (signed only by the Employer) providing for a rerun election and issued a Notice of Election advising employees that the first election had been set aside "by agreement based upon alleged objectionable conduct of" the Employer. The Notice did not describe any of the Employer's alleged objectionable misconduct, or indicate that the Petitioner had not agreed to proceed to a second election in these circumstances. For the reasons explained below, we affirm that, where, as here, a party does not contest the objecting party's objections and instead agrees that a rerun election is warranted, Regional Directors may set aside the results of the election and direct a rerun election to be held at an appropriate time, which, we emphasize, must be at such time as they deem circumstances permit the free choice of a bargaining representative. But we also hold that, where, as here, the parties do not mutually agree that a rerun election should be held on a date certain and there has been no finding of objectionable misconduct by the Regional Director or the Board, the Notice of the Rerun Election must adequately inform the employees of the reasons for the rerun election. Below, we set forth the Notice of Election language to be used in these narrow circumstances.

Background

On September 7, 2021,[1] Construction and Master Laborers' Local Union 11 (the Petitioner) filed a petition seeking to represent certain employees of the Employer. Pursuant to a stipulated election agreement, an election was conducted on October 14. Of the 42 eligible voters, 5 voted for and 34 voted against representation by the Petitioner, with no challenged ballots.

On October 19, the Petitioner timely filed three objections that, in brief, alleged that the Employer had unlawfully threatened employees with loss of benefits if they voted for the Petitioner, interrogated an employee regarding his union sympathies, promised to restore pay that had previously been taken from employees, and violated the *Peerless Plywood*[2] rule by holding a mandatory massed meeting less than 24 hours prior to the election.[3]

On November 1, the Regional Director approved a Stipulation to Set Aside Election and Stipulated Election Agreement (the Stipulation). This document provided that "[t]he parties" waived the right to submit further evidence pertaining to the objections, the right to a hearing on those objections, and the right to any recommendation, report, or decision on the objections. The document further directed that a rerun election be held on the Employer's premises on November 18. Although the Employer signed the Stipulation, the Petitioner refused to do so.

On the same day he approved the Stipulation, the Regional Director issued a Notice of Election (the Notice) stating that the October 14 election:

> was set aside by agreement based upon alleged objectionable conduct of the Employer that interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, from interference by any of the parties.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's approval of the Stipulation and also filed a motion to stay the election.[4] On November 18,

[1] All dates hereinafter are in 2021 unless otherwise noted.

[2] *Peerless Plywood Co.*, 107 NLRB 427 (1953).

[3] The day before the election, the Petitioner had filed an unfair labor practice charge in Case 05–CA–284520, which, as subsequently amended, alleged that the threats, interrogation, and promise to restore wages violated Sec. 8(a)(1).

[4] On November 15, the Regional Director dismissed the unfair labor practice charge in Case 05–CA–284520, reasoning that the Notice of Election for the rerun election contained language that would be equivalent to the remedy if the unfair labor practices were found. The Regional Director subsequently revoked the dismissal on January 24,

the Board granted the request for review, finding that it raised substantial issues warranting review, and granted the motion to stay.[5]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record,[6] we hold that the Regional Director had the authority to approve a stipulation signed by the Employer, but not the Petitioner, providing for the first election to be set aside and a new election to be held. But we also conclude that the Notice he provided inadequately informed the employees of why the rerun election was being conducted, and we will therefore remand the case for further appropriate action consistent with this decision and order.

Analysis

Section 102.69(a)(8) of the Board's Rules and Regulations provides that within 5 business days after the tally of ballots has been prepared, any party may file objections to the conduct of the election or to conduct affecting the results of the election. Such objections must be accompanied by a written offer of proof. Id. If the Regional Director determines that the evidence described in the offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, the Regional Director may overrule the objections without scheduling a hearing. Sec. 102.69(c)(1)(i). If the Regional Director determines that the evidence described in the offer of proof could be grounds for setting aside the election if introduced at a hearing, the Regional Director will ordinarily issue a Notice of Hearing scheduling a hearing on the objections. Sec. 102.69(c)(1)(ii).[7]

The foregoing rules, however, presuppose that the objections will be contested. The Board also permits the voluntary resolution of objections. The Board's Casehandling Manual (Part Two) Representation Proceedings (CHM) describes the procedures used in such circumstances.[8] The parties may, for example, enter into a stipulation to void and set aside the election and to conduct a rerun election. See CHM Sec. 11452.3. Directing a rerun election based on the mutual agreement of the parties is fully consistent with the well-established principle that labor policy favors the voluntary resolution of disputes, *Olin Corp.*, 268 NLRB 573, 574 (1984), as well as the Board's general policy of honoring a stipulation of the parties if that stipulation is not contrary to Board policy. See *Barnert Memorial Hospital Center*, 217 NLRB 775, 780 (1975).[9] Foregoing investigation and litigation of the objections when the parties agree that a rerun is warranted also conserves the resources of the parties and the Government.

In addition, a Regional Director has the discretion to approve an agreement to conduct a rerun election even if the objecting party declines to enter such an agreement. As provided in CHM Section 11391.2:

> The party or parties other than the objecting party may wish to agree that the election be set aside and a new one be conducted. Written agreement of the other party or parties to set aside the election should be secured. Written agreement of the objecting party is not required.

In such circumstances, it may be that the parties have not reached a mutual agreement to proceed to a rerun election without a hearing, but there nevertheless is agreement that a rerun election is warranted. When a party files objections, the end ordinarily sought is a rerun election conducted at an appropriate time when employees can exercise free choice in the election. If the nonobjecting party or parties agree to a rerun election, there is no disagreement as to whether a rerun election should be conducted, even if the objecting party will not formally agree to waive a hearing on objections and proceed to a rerun election. Put differently, if all parties agree that a rerun is warranted, there are no substantial and material facts in dispute about whether the first election should be set aside and a rerun election held, though there may be a disagreement about the details of the rerun election. Permitting the objecting party to force a hearing on objections despite the other party or parties' agreement that a rerun election is warranted would accordingly unnecessarily expend resources while unduly delaying resolution of the question concerning representation. Cf. *Frontier Hotel*, 265 NLRB 343, 344 (1982) ("[H]earings in . . . cases [where there are no material facts in dispute] would waste time, money, and effort for all concerned, while unduly delaying resolution of the question concerning representation[.]").

2022, and stated that he would hold the charge in abeyance pending further action by the Board in this matter.

[5] Member Kaplan would have denied review and the request to stay the election.

[6] No timely briefs on review were filed.

[7] In certain limited circumstances, the Board has sustained objections and directed a rerun election without conducting a hearing. See, e.g., *Woods Quality Cabinetry Co.*, 340 NLRB 1355 (2003); *Henry Street Settlement*, 277 NLRB 901 (1985).

[8] Although the Casehandling Manual is not binding on the Board, as the following discussion demonstrates, the provisions relevant to this case are consistent with Board precedent and policy.

[9] A handful of published Board decisions also refer to the parties having agreed to a rerun election. See, e.g., *Sweetener Supply Corp.*, 349 NLRB 1122, 1124 (2007) (parties entered stipulation to set aside election and agreed to rerun); *Golden Years Rest Home*, 289 NLRB 1106, 1106 (1988) (election conducted pursuant to "Stipulation and Agreement for Second (Rerun) Election"); *Paul J. Monohon Associates*, 213 NLRB 121, 121 (1974) (parties agreed to rerun election).

Accordingly, we hold that Regional Directors have the authority to set aside the results of an election and to direct a rerun election where, as here, a party does not contest the objecting party's objections and instead agrees that a rerun election is warranted, even if the objecting party refuses to join in the stipulation. Contrary to the Petitioner's assertions, the Regional Director was not obligated to conduct a hearing in these circumstances,[10] nor did his action in approving the Stipulation otherwise violate the Board's procedures.[11] We emphasize, however, that the Regional Director must schedule the rerun election to be held at an appropriate time. Under well-settled law, the Regional Director must conduct the rerun "at such time as he deems that circumstances permit the free choice of a bargaining representative." *Baldor Electric Co.*, 245 NLRB 614, 615 (1979). Accord: *Kent Plastics Corp.*, 107 NLRB 157, 159 (1953); *Biltmore Mfg. Co.*, 97 NLRB 905, 907 (1951).[12]

The Petitioner additionally argues that the Notice provided by the Regional Director was inadequate. For the reasons that follow, we agree.

When objectionable conduct has been found, *Lufkin Rule Co.*, 147 NLRB 341 (1964), and its progeny provide that the notice of election may be modified to include the following explanation of why the original election was set aside:

> The election conducted on [DATE] was set aside because the National Labor Relations Board found that certain conduct of the [PARTY] interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

See CHM Sec. 11452.3.[13]

When the rerun election will be conducted based on the agreement of the parties, rather than a finding of objectionable conduct, CHM Section 11452.3 provides that similar language (hereinafter referred to as "modified *Lufkin* language") should be used:

> The election conducted on [DATE] was set aside by mutual agreement of the parties based upon alleged objectionable conduct of the [PARTY] that interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

However, the CHM does not set out specific language to be used when, as here, a Regional Director approves a stipulation or agreement to which the objecting party has not agreed. As previously indicated, the Regional Director's Notice here tracks the modified *Lufkin* language, save that the first sentence reads:

> The election conducted on October 14, 2021, was set aside by agreement based upon alleged objectionable conduct of the Employer that interfered with the employees' exercise of a free and reasoned choice.

It is therefore clear that the Regional Director endeavored to adapt the modified *Lufkin* language to the specific circumstances of this case, and we appreciate his attempt to adhere as closely as possible to the language used in *Lufkin* or modified *Lufkin* situations. Even so, we agree with the Petitioner's concern that employees reading this notice could reasonably—and incorrectly—assume that the Petitioner was a party to the "agreement" referenced in the Notice, along with the election details and timeline provided therein.

[10] As previously discussed, Sec. 102.69(c)(1)(ii) applies when objections are contested, which is not the case here. Further, as noted in fn. 7, above, the Board has occasionally sustained objections and directed rerun elections without a hearing. Nothing in the 2014 amendments to the Board's Rules and Regulations—which revised Sec. 102.69(c)(1)(ii) to its current form—indicated that the Board was overruling such cases. See generally *Representation—Case Procedures*, 79 Fed. Reg. 74308 (Dec. 15, 2014).

[11] Contrary to the Petitioner, the Regional Director's approval of the Stipulation did not violate Sec. 102.62(b). Sec. 102.62(b) provides a procedure for parties to waive the right to a pre-election hearing; the dispute in this case pertains to postelection matters.

[12] We reject our colleague's suggestion that we have somehow changed extant law or deviated from standard practice in emphasizing that the Regional Director must schedule the rerun election to be held at an appropriate time, meaning at least in part "at such time as he deems that circumstances permit the free choice of a bargaining representative." Our colleague cites no cases overturning that principle (or overturning any of the cases we cited in support of that principle).

[13] We reiterate that *Lufkin* language may be used when objectionable conduct has been found. However, because there has been no finding of objectionable conduct here by the Regional Director or the Board, we reject the Petitioner's argument that *Lufkin* language was required in this case. We also reject the Petitioner's apparent contention that *Lufkin* language is required in all cases except those in which the parties have mutually agreed to a rerun election. Regional Directors have the discretion to include *Lufkin* language when they deem it is warranted, see CHM Sec. 11452.3, and *Lufkin* language is standard when requested by a party, see *Keystone Automotive Industries, Inc.*, 365 NLRB No. 60, slip op. at 1 fn. 2 (2017), but the Board has never held that *Lufkin* language is mandatory in any given situation.

Thus, at minimum the Notice could inadvertently mislead employees into believing the rerun was being conducted due to the mutual agreement of the parties, which was not the case.

Of course, the Regional Director was in a position where he had no guidance regarding the wording of the Notice, because—unlike in *Lufkin* or modified *Lufkin* situations—the CHM does not contain language to be used when the objecting party will not agree to proceed to a rerun on a date certain, nor has the Board itself provided guidance in this area. We take this opportunity to provide that guidance. To begin, it bears emphasis that these circumstances differ from *Lufkin* and modified *Lufkin* situations because there has been neither a finding of objectionable conduct, nor have the parties mutually agreed to a rerun election.[14] Where objectionable conduct has been found, employees can refer to the Regional Director or Board decision sustaining the objections in order to better understand the reasons for the rerun election. Where the parties mutually agree to proceed to a rerun, they have their own reasons for entering into such an agreement; further, they have agreed to the use of the modified *Lufkin* language in the notice. It is therefore sufficient, in such circumstances, to simply advise the employees that the parties have agreed to set the election aside. From the Board's perspective, the mutuality of the agreement is what governs the situation; the parties are free to inform the employees of their respective reasons for agreeing to a rerun, and employees are free to inquire why the parties did so, but there is nothing further for the Board to convey to employees beyond the fact of the parties' agreement.

Here, however, there is no underlying Regional Director or Board decision sustaining objections, nor is there a mutual agreement among the parties to proceed to a rerun on a date certain without a hearing. Absent either of these things, employees might well wonder why precisely the Board is proceeding in this fashion. In order to better ensure that a Notice that issues in these specific circumstances is clear, accurate, and precise in advising employees of the reasons for a rerun, the Notice must (1) clearly identify the party or parties that have agreed to proceed to a rerun election, thereby avoiding language that may incorrectly suggest all parties have agreed to this course of action, and (2) describe the objections that were filed, in order to provide employees with some context regarding what the parties who have agreed to a rerun election are reacting to. We accordingly hold that the following language should be used in notifying employees of a rerun election to which the nonobjecting parties have, but the objecting party has not, agreed:

> The election conducted on [DATE] has been set aside. The [OBJECTING PARTY] has alleged that the [OTHER PARTY OR PARTIES[15]] interfered with the employees' exercise of a free and reasoned choice in the election by [DESCRIPTION OF ALLEGED OBJECTIONABLE CONDUCT[16]]. The [OTHER PARTY OR PARTIES] does not contest the [OBJECTING PARTY'S] election objection(s) and agrees that a new election is warranted. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that they National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

We emphasize that we only provide for this language in the narrow procedural circumstances presented here: where the objecting party will not agree to proceed to a rerun election even though the other parties are willing to do so. Nothing in today's decision is meant to disturb the *Lufkin* language used when there is a finding of objectionable conduct or the modified *Lufkin* language used when there is mutual agreement to proceed to a rerun, because, as explained above, those situations do not raise the same concerns present here.[17]

Conclusion

For the reasons stated above, the Regional Director was free to approve an agreement to proceed to a rerun election even though the objecting party refused to sign the agreement. But we conclude that when Regional Directors follow this procedure, the rerun election must be scheduled for an appropriate time when the circumstances permit the free choice of a bargaining representative, and the Notice advising employees of the rerun election requires more detail than was present on the Notice provided here. In this case, and in all future cases in which a Regional Director follows a similar course of

[14] Nor, for that matter, has the Employer admitted any of the conduct alleged in the objections; it has simply agreed to proceed to a rerun.

[15] This language should be adapted as needed if the objecting party alleges third party or Board agent misconduct.

[16] In providing that the Notice include a description of the alleged objectionable conduct, we leave it to the sound discretion of Regional Directors to determine the amount of detail that is warranted. We do not, however, envision that the Notice will exhaustively list the contents of each and every objection. In this case, for example, the objections could perhaps be adequately summarized as alleging "objectionable threats, interrogations, promises of benefit, and a mandatory massed meeting in violation of *Peerless Plywood*."

[17] In particular, nothing in today's decision is meant to disturb the principle that *Lufkin* language does not detail the specific conduct involved. See *Lufkin*, 147 NLRB at 342 fn. 2.

action, the language we have set forth above shall be used in notifying the employees of the reasons for a rerun election. We therefore lift the stay and remand this case for further proceedings consistent with this Decision and Order.[18]

ORDER

This case is remanded to the Regional Director for further action consistent with this Decision.[19]

Dated, Washington, D.C. July 22, 2022

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting in part.

My colleagues use this case as an opportunity to give guidance to Regional Directors in the event that they too encounter the "narrow and relatively unusual situation" raised here. Because I believe that the Regional Director properly dealt with the unique situation presented, I respectfully dissent in part.[1]

As my colleagues note, when a Regional Director sets aside an election based on objectionable conduct, he or she can amend the standard notice of election based on *Lufkin Rule Co.*[2] This case, however, does not fit squarely under the *Lufkin* or "modified *Lufkin*" approach because the Petitioner refused to agree to the Stipulation to Set Aside the Election and Stipulated Election Agreement. As a result, the Regional Director amended the notice to employees to state that "[t]he election conducted on October 14, 2021, was set aside by agreement based upon alleged objectionable conduct of the Employer that interfered with the employees' exercise of a free and reasoned choice."

I would find that the Regional Director's Notice adequately informed employees regarding the setting aside of the election. In order to more accurately reflect the unique procedural circumstances presented, the Regional Director removed the phrases "mutual" and "by the parties" that are typically used in the "modified *Lufkin*" notice. Unlike my colleagues, I would find those revisions sufficient. I do not share my colleagues' view that the employees would have interpreted the Regional Director's use of the phrase "by agreement" in the revised notice to indicate that both the Employer and the Union agreed to the Regional Director's decision to schedule the rerun election. Rather, I believe that the employees

[18] In remanding, we do not pass on the Petitioner's contentions that the objections should be consolidated with the unfair labor practice charge filed in Case 05–CA–284520, and that the Regional Director violated precedent by not addressing and providing a remedy for the unfair labor practices alleged in Case 05–CA–284520. The determination to consolidate a representation case with an unfair labor practice case lies with the Regional Director. See Sec. 102.69(c)(1)(ii). As noted above, the Regional Director has revoked his dismissal of the unfair labor practice charge and is holding it in abeyance pending the Board's ruling on this matter.

Moreover, we reiterate that the Regional Director must schedule the rerun election for "such time as he deems that circumstances permit the free choice of a bargaining representative." *Baldor Electric Co.*, supra, 245 NLRB at 615. In making that determination, the Regional Director should consider whether the direction of a second election, coupled with the more specific language in the Notice of the Rerun Election discussed above (as well as the standard boilerplate language in such notices advising employees of their Sec. 7 rights) and the passage of time since the alleged objectionable conduct will permit the free choice of a bargaining representative.

We also do not pass on the Petitioner's argument that the Regional Director should determine the method of election in light of *Austal USA, LLC*, 357 NLRB 329 (2011), and *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011). Those decisions involved determinations as to the site of a rerun election in situations where objectionable and unlawful conduct had been found; no such findings have been made in this case to this point.

[19] The Board's November 18, 2021 stay is lifted as of today's order.

[1] I agree with my colleagues that regional directors have the authority to set aside the results of an election and to direct a rerun election where a party does not contest the objecting party's objections and instead agrees that a rerun election is warranted, even if the objecting party refuses to join in the stipulation.

[2] 147 NLRB 341 (1964). Under *Lufkin Rule*, when an election is set aside because the Regional Director actually found objectionable conduct, the Regional Director can amend the election notice language to state:

> The election conducted on [DATE] was set aside because the National Labor Relations Board found that certain conduct of the [PARTY] interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

When the Regional Director sets aside an election based on the parties' stipulation, the regional director can modify the standard *Lufkin* language to state:

> The election conducted on [DATE] was set aside by mutual agreement of the parties based upon alleged objectionable conduct of the [PARTY] that interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

would have reasonably understood the notice to indicate that the party accused of committing the objectionable conduct acquiesced to the rerun. And that is, of course, what happened here.

However, even if the Regional Director's notice language is ambiguous, as my colleagues state, I still see no reason to amend it. As my colleagues point out, in the "modified *Lufkin*" situation, the parties are free to expound upon the Regional Director's Notice by providing employees with their points of view as to why the rerun is necessary. Nothing prevents the parties from doing so here as well. For these reasons, I believe that crafting a new rule for such an unusual situation is an imprudent use of Board resources and only further delays a timely rerun of the election.[3]

Additionally, to determine when a rerun election should be scheduled, my colleagues instruct the Regional Director to consider

> whether the direction of a second election, coupled with the more specific language in the Notice of the Rerun Election discussed above (as well as the standard boilerplate language in such notices advising employees of their Section 7 rights) and the passage of time since the alleged objectionable conduct will permit the free choice of a bargaining representative.

In support of their position, my colleagues resurrect language that has not been regularly seen in Board decisions of this type since the late 1970s.[4] See *Baldor Electric Co.*, 245 NLRB 614, 615 (1979) (ordering rerun "for an appropriate time when the circumstances permit the free choice of a bargaining representative"). The rerun election itself, however, is the Board's standard remedy for objectionable conduct in standalone representation proceedings. And the Board generally leaves the timing of the rerun to the sound discretion of the Regional Directors. See, e.g., *Keystone Automotive Industries, Inc.*, 365 NLRB No. 60, slip op. at 4 (2017); *PartyLite Worldwide, Inc.*, 344 NLRB 1342, 1343 (2005); *Edwards Waters College*, 307 NLRB 1321, 1132 (1992); *Crown Chevrolet Co*., 255 NLRB 826, 826 (1981). Given that a rerun election is, at bottom, what both parties seek in this case, I see no reason to delay it even further by deviating from the Board's standard practice.

For these reasons, I respectfully dissent in part.

Dated, Washington, D.C. July 22, 2022

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

[3] Likewise, I see no reason to include a summary of the purportedly objectionable conduct to the Notice. The Regional Director's Notice clearly indicated that the rerun was necessary because of the "alleged objectionable conduct of the Employer." By including a summary, my colleagues only invite unnecessary litigation over the matter.

[4] Contrary to my colleagues, I do not view a principle that the Board has not relied upon for more than 40 years as representative of a "standard practice."