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

LOCAL 1075, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA

Case No.: 7-CC-1831
7-CC-1832

and

MICHIGAN LABORERS' DISTRICT COUNCIL

Respondents

and

MCCARTHY & SMITH, INC.

Charging Party

RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46(a) of the National Labor Relations Board's Rules and Regulations, Respondents, through counsel, Scott Graham, provide the following exceptions to portions of the Decision of Administrative Law Judge Ira Sandron, dated October 29, 2009, as follows:

PAGE(S)	LINE(S)	EXCEPTION
2	9-14	The ALJ erred in finding that the testimony of witness MacAskill was more credible than the testimony of witness Bartlett regarding the nature and location of the picketing in question.
2	29-31	The ALJ erred in characterizing the nature of the "independent agreements" identified in the Opinion.
2	40-42	The ALJ erred in finding that the present phase of the project "involves the work of approximately 45 contractors and subcontractors that have contracts directly with the school district."
3	10-14	The ALJ erred in characterizing the nature of the testimony of Jeff Perkins.
4	14-16	The ALJ erred in finding that Respondents stayed in the vicinity of Gate B, and moved 100-200 feet away on hot days.
6	23-29	The ALJ erred in finding that the labor dispute was limited to BG and Gemelli. In addition, the ALJ erred in finding that the name Gemelli Concrete was added to the picket signs immediately after BG signed a contract.
6	33-34	The ALJ erred in concluding that the picketing failed to meet *Moore Dry Dock* on the basis that the name of the "primary employer(s)" was not added until the last day of picketing.
6	44-50	The ALJ erred in finding that the picketing was not confined to the "situs of the labor dispute with BG and Gemelli after June 9[.]"
6	49-49	The ALJ erred in concluding that the picketing reflected an unlawful secondary objective.

PAGE(S)	LINE(S)	EXCEPTION
7	1-2	The ALJ erred in finding that the evidence raised a "strong but rebuttable presumption" that the picketing at issue had a secondary objective.
7	3-4	The ALJ erred in concluding that the Union failed to rebut the presumption and that the picketing was unlawful.
7	12-20	The ALJ erred in concluding that Respondents engaged in an unfair labor practice, that Respondents induced or encouraged any person or party to strike or refuse to work in the course of employment, that Respondents alternatively sought to force or require the Charging Party to cease doing business with Brazen & Greer, Inc. and Gemelli Concrete, and that Respondents "threatened, coerced, or restrained the Charging Party and other neutral employers."
7	24-26	The ALJ erred in finding that Respondents engaged in "certain unfair labor practices" and that they must be ordered to cease and desist and take affirmative action.
7	31-43	The ALJ erred in making the recommendation found in part at this portion of the Order.
8	1-28	The ALJ erred in making the recommendation found in part at this portion of the Order.

Date: November 25, 2009

Respectfully submitted,

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By: Scott

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RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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INTRODUCTION

This case involves picketing at a specific job site based on the lack of a contract between Laborers' Local 1075 (and its parent body, the Michigan Laborers' District Council) and the employer association, the Michigan Chapter, Associated General Contractors ("AGC"). The picketing identified in the Order issued by the Administrative Law Judge notes that the relevant events ended on June 25, 2009. Respondents disagree. The events did not end at that time, but rather ended when the new contract was settled between the bargaining parties. Regardless of the correctness of this point, it is clear that the picketing which was the sole basis for the present complaint stopped no later than June 25, 2009. The Consolidated Complaint was filed on June 30, 2009.

The job site is the construction site for a new high school in Marysville, Michigan. The Charging Party is McCarthy & Smith, Inc. ("M&S") The Respondents are the Michigan Laborers' District Council ("MLDC") and Laborers' Local 1075 ("Local 1075"). The primary contractors identified by General Counsel are Brazen & Greer, Inc. (identified in the record of proceedings as Brazen and Greer) and Gemelli Concrete. The real dispute was between Local 1075, the MLDC and the AGC.

Despite the fact that all picketing at this job site was resolved at least five (5) days before the Consolidated Complaint was filed in this case, that General Counsel admitted there was no attempt to coerce neutral contractors, Complaints were filed and consolidated for hearing. The hearing occurred on August 26, 2009. At the time of the hearing, Respondents noted that they were uncertain of the real nature of the unfair labor practice alleged by General Counsel. In light of the fact that all picketing related to a general contract issue with an association, that all picketing ceased by June 25, 2009, that there was no interference with any neutral contractor, and that the "primary gate" was unusable, Respondents requested that a recommendation enter finding that the Complaints should be dismissed.

The Administrative Law Judge ("ALJ") disagreed. On October 29, 2009, the ALJ entered a Decision recommending that an order enter finding that the Respondents committed an unfair labor practice pursuant to Section 8(b)(4)(i) and (ii) of the Act.

Respondents have filed Exceptions to the Decision pursuant to Section 102.46(a) of the NLRB's Rules and Regulations, and file this Brief in support of those Exceptions.

STATEMENT OF FACTS

On June 30, 2009, General Counsel filed a Consolidated Complaint and Notice of Hearing in these cases. The Complaint alleged that Local 1075 and the MLDC violated various provisions of the Act. Specifically, the Consolidated Complaint alleged that, "Respondents have induced or encouraged individuals employed by the Charging Party, and other persons engaged in commerce or in an industry affecting commerce, to engage in a strike or in a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, and have threatened, coerced, or restrained the Charging Party, and the other neutral contractors and subcontractors, and other persons engaged in commerce or in industries affecting commerce at the Marysville Project." (Consolidated Complaint, ¶ 17) Respondents answered the Consolidated Complaint and denied any improper activity.

A hearing was conducted on the Consolidated Complaint on August 26, 2009. Brian MacAskill testified that he worked for M&S and was the project superintendant on the Marysville School project. (Tr. 18) His duties included scheduling work on the project. (Tr. 18) M&S is the construction manager on the project. (Tr. 19)

MacAskill testified that Local 1075 began to picket the job on June 4, 2009. He testified that Local 1075 identified a dispute with the Associated General Contractors. MacAskill testified that M&S was not a signatory to the AGC agreement with Local 1075.

MacAskill testified that, on the first day of picketing, the following contractors appeared to perform work: Brazen and Greer; Casadei Steel, Port Huron Roofing Company, Contrast Mechanical, Delta Temp, Incorporated and Gillis Electric. (Tr. 30) Brazen and Greer was the only contractor which was signatory to the Local 1075 agreement with the AGC. (Tr. 30) MacAskill watched employees of Brazen and Greer join the picket line. (Tr. 31) Employees of the other companies did not perform work that day.

On the following day, June 5, picketing continued. Employees of Casadei Steel, Contrast Mechanical and Delta Temp, Incorporated returned to work. (Tr. 43) Employees of Gillis Electric, Port Huron Roofing and Brazen and Greer did not work. (Tr. 43)

No picketing or work occurred on June 6 and 7; a Saturday and Sunday.

MacAskill testified that, late in the day on Monday, June 8, 2009, a dual gate system was completed. (Tr. 50) MacAskill identified signs showing the gates and signs posted at the gates. (Tr. 55)

MacAskill testified that, when he arrived at the job site on June 9, he asked Jeff Perkins why the picketing was not occurring at the neutral gate. Mr. Perkins responded that the picketing continued because it was informational. (Tr. 56) All employers other than Gemelli Concrete and Brazen and Greer returned to work that day. (Tr. 62)

MacAskill testified that picketing continued until June 25, 2009. (Tr. 66) According to MacAskill, on approximately June 24, picket signs mentioned Gemelli Concrete. (Tr. 73)

MacAskill testified that the picketers never blocked a gate and stayed on the side of the gate which was eventually designated as the "neutral" gate. (Tr. 77) He confirmed that Casadei Steel, Port Huron Roofing Company, Contrast Mechanical, Delta Temp, Incorporated and Gillis Electric were the only contractors on the general list that were scheduled to work (other than Brazen and Greer and Gemelli Concrete).

MacAskill testified during cross-examination that his photo of June 9 was "posed." (Tr. 79-80) He further testified that he unlocked "Gate B" on June 9, locked the gate later in the day and never unlocked it again. (Tr. 80)

MacAskill testified that none of the picketers tried to turn away any of the neutrals. (Tr. 81) All of MacAskill's exchanges with picketers were "amicable and agreeable." (Tr. 82) At one point, picketers moved their trucks at his request. MacAskill's conversations with picketers centered on the Local's dispute with the AGC. (Tr. 83)

Steve Banchero testified that he worked for M&S and that he faxed notice of the establishment of a dual gate system to the contractors scheduled to work on the job site. The fax was transmitted on June 5, 2009. The fax related to the system that was completed and posted at the end of the day on June 8, 2009.

Banchero testified that he went to the job site on June 10 and June 17 and saw picketers at the neutral gate. (Tr. 102) He said, "[t]here was a shady tree kind of between the gates that, at times, I saw the members of the local sitting under." (Tr. 103) He thought that he saw this on his June 17 visit. (Tr. 104)

Rebecca Gemelli testified that she was a "part-owner" of Gemelli Concrete, a concrete flat work company. (Tr. 110) Gemelli Concrete was a Local 1075 signatory contractor and signed a new agreement on June 25, 2009. (Tr. 111) The new agreement was an independent agreement that Gemelli negotiated. (Tr. 112) The prior agreement was the Local 1075/AGC area agreement. (Tr. 112)

Ms. Gemelli testified that, at some point, she spoke with Chris Chwalek, who she understood to be a representative of the MLDC. Mr. Chwalek called Ms. Gemelli early in June and indicated that he had an independent contract and the contract was sent to her by e-mail. (Tr. 117)

Ms. Gemelli testified that Gemelli laborers were scheduled to be on the project when the picketing occurred. Once the new contract was signed on June 25, the company began to work. The dual gates were removed before the company arrived on the site to begin post-picketing work.

During this testimony, General Counsel indicated that there was no allegation of an unfair labor practice regarding the work of Gemelli Concrete. (Tr. 123)

Don Bovre, the Director of Labor Relations with the AGC in Michigan, testified that that the Brazen and Greer and Gemelli Concrete signed a new agreement between June 20 and June 25, 2009. (Tr. 132)

William A. Bartlett testified that he was on the Marysville picket line. (Tr. 138) He went to the site on June 8, 2009. Picket signs said, "No Contract, No Work, Local 1075." (Tr. 139) Bartlett knew that Gemelli Concrete had been on the site and started work. (Tr. 139)

Bartlett testified that he was sent to the site in order to see that the picketing was done in a lawful manner because Business Manager Dan Husted had suffered an aneurysm. (Tr. 140) Bartlett testified that the picketers "were not on the gate." (Tr. 141) He testified that the picketers were 40-50 feet from the gate. (Tr. 142) The picketers were "nowhere near" the "access point." (Tr. 142)

Bartlett testified that, once Brazen and Greer signed a contract, one-half of the picketers returned to work and the Gemelli Concrete name was placed on the picket signs. (Tr. 147) This occurred between June 17 and 24. (Tr. 148)

Bartlett testified that, at some time, the picketers moved near a tree which provided shade. It was very hot. (Tr. 148) Bartlett was questioned about whether the Union ever picketed at the "primary gate." (Tr. 148) He testified that the "A Gate" was not "usable." (Tr. 148) Picketing stopped on June 25, after Gemelli Concrete signed a contract. (Tr. 149) Bartlett testified, "[e]verybody out there was signatory, and we had no more beef." (R.149)

During cross-examination, Bartlett testified that no laborer ever blocked a gate on the project. (R. 151) Bartlett testified that General Counsel's Exhibit 8 was the "posed photo." (Tr. 152) Bartlett and three others posed for Brian MacAskall, who took the photo. (R.153)

Bartlett was asked why the picket signs previously identified (No Contract, No Work). (Tr. 153) He testified that the picketing occurred because the Laborers had no contract with the AGC. (Tr. 153)

During the picketing, Laborers working under non-AGC agreements moved freely through the neutral gate and performed work on the job site. (Tr. 154)

The ALJ asked Bartlett: "So who was the picketing directed against when you had these signs?" (R.155) Bartlett responded, "It would have been and AGC contractor that would have had work going on at that time." (R.155)

During the course of the hearing, a series of record exhibits were admitted and are part of the record in the case.

ARGUMENT

The Administrative Law Judge Erred in Finding that Respondents Violated Section 8(b)(4)(i)(ii)(B) of the Act Where the Undisputed Evidence Demonstrates that Respondents Did Not at Any Time Seek to Coerce Any Party to Refuse to Work for or Contract with Brazen & Greer or Gemelli Concrete.

Introduction

This case presents three (3) issues:

1. Whether the dispute leading to the picketing at issue was directed only at two specific contractors, or whether it was directed at the AGC, an employer association that had negotiated the master contract which had expired.

2. Whether the evidence established a rebuttable presumption that the picketing in question had a secondary objective, and

3. Whether, to the extent necessary, the presumption was rebutted.

The Labor Dispute Giving Rise to this Case Involved the Absence of a Contract Between the Respondents and a Specific Employer Association, and the Picket Signs Accurately Reflected the Dispute

This case is about a dispute between Respondents and the sponsor of a specific collective bargaining agreement which expired on May 31, 2009: the Michigan Chapter, Associated General Contractors. Two contractors working on the job in question: Brazen & Greer, Inc., and Gemelli Concrete, worked under the CBA. Contrary to the findings here, the dispute was about much more than the question of whether the two companies had contracts.

The Marysville High School project is of significant size and complexity. It was scheduled to take three (3) years to complete, and would eventually involve the work of at least 45 contractors. Many of the contractors were signatory to the expired contract between the AGC and Respondents.

The contract between Respondents and the AGC expired on May 31, 2009. When picketing began, signs said, "No Contract, No Work, Local 1075." (Tr. 139)

General Counsel alleged a violation of Section 8(b)(4)(i)(ii)(B) of the Act. Specifically, General Counsel alleged that, "[r]espondents have induced or encouraged individuals employed by the Charging Party, and other persons engaged in commerce in an industry affecting commerce, to engage in a strike or in a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, and have threatened, coerced, or restrained the Charging Party, and the other neutral contractors and subcontractors, and other persons engaged in commerce or in industries affecting commerce at the Marysville Project." (Consolidated Complaint, ¶ 17)

Despite this, it appears that the real nature of the Complaint is that, despite the resolution of the dispute at least five (5) days before the Consolidated Complaint was filed; General Counsel alleged the

positioning of picketers and the picket sign language, as it occurred between June 9 and 25, 2009, violated the Act.

The ALJ specifically found that the picket sign language and the positioning of the picketers after June 9, 2009 created a rebuttable presumption that the picketing here had a secondary purpose. (Decision at 7, lines 1-2) The ALJ further found that the Respondents failed to rebut the presumption. (Decisions at 7, lines 2-4) The ALJ's findings are not supported by the record and should be reversed.

General Counsel did not at the hearing acknowledge the true nature of the labor dispute here, probably because, by the time of the hearing, the dispute was long-resolved. The dispute was between Local 1075 and the employer association, the AGC of Michigan. At the time of the picketing, there was no contract between the Local and the AGC. The picket signs reflect this.

General Counsel alleged that the present dispute involves Laborers' Local 1075 and two (2) contractors, Brazen & Greer and Gemelli Concrete. To clarify the record, Brazen & Greer executed a collective bargaining agreement during the week of June 12 and has been working on the project since that time. Gemelli Concrete signed an agreement on June 25, 2009. No dispute has existed regarding these specific contractors since the afternoon of June 25.

General Counsel sought relief in the form of an order requiring the Respondent to refrain from doing things that were never an issue. Respondents never sought to induce the employees of the Charging Party to "engage in a work stoppage or refus[e] to perform labor or services. (Consolidated Complaint at p. 5) Respondents never threatened a party in order to cause the party to withhold goods or services. Since the afternoon of June 25, 2009, Respondents have not engaged in any picketing or other activity at the site. The master contract with the AGC has been settled.

Respondents contended below that the evaluation of this Consolidated Complaint required the ALJ to determine whether Respondents engaged in any coercive activity on the job site. General

Counsel conceded that Respondents never disrupted a vehicle, engaged in dialogue with persons entering or leaving the site, or otherwise attempted to interfere with or stop neutral parties from passing through any gate. In fact, the ALJ noted during the hearing that, "I don't think the General Counsel is contending there were any actions of picketers that caused a problem." (R.156)

Despite this, in an effort to resolve the present aspect of the case, Respondents agreed on or about June 22, 2009 to move any and all activity to a reserve gate marked "Gate B." Respondents agreed to do this despite the fact that the "neutral gate" was tainted by use by Brazen & Greer, despite the fact that it is unclear whether M&S is a primary employer and despite the fact that the nature of the dispute and appropriate concerted activity has remained in issue. Respondents remained at the reserve gate from June 22 through June 25, 2009. During that time, they agreed to remain at that gate until the labor dispute was either resolved or an order entered providing instruction or direction to them.

The ALJ found that the labor dispute here that gave rise to the picketing was between Respondents and both Brazen & Greer and Gemelli Concrete. (Decision at p.6) Respondents contend that this finding was erroneous. William Bartlett testified without contradiction that the picketing occurred because an impasse had occurred between the Respondents and the AGC. (R. 153) It is clear from Bartlett's testimony that the Respondents did not limit their picketing.

The heart of the dispute seems to be that the picketers did not move from the main gate once a different gate was designated. Of course, the evidence shows that this second gate, designated as a "reserve gate," was never functional.

Respondents here except credibility findings regarding the nature of the labor dispute. Respondents recognize that the standard of review for such exceptions is that the findings will be upheld unless the clear preponderance of all the relevant evidence demonstrates that the findings are incorrect. Standard Drywall Products, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951).

In this case, in light of the scope of the project, the number of contractors involved, the fact that Respondents did not have a schedule of work, and the nature of dispute between the bargaining parties, Respondents were authorized to picket the project as part of their dispute the AGC. According to Bartlett, that is exactly what Respondents did. His testimony was not contradicted and is fully supported by the record. For this reason, the ALJ's finding that the dispute involved only Brazen & Greer and Gemelli should be rejected.

The Record Below Fails to Establish any Secondary Objective by Respondents

The relevant portions of the Act do not define secondary activity. Rather, they describe and limit specific objectives. The mere fact that conduct might arguably be found to fall within the very broad concept of a secondary boycott does not necessarily mean that the conduct will be prohibited. The Board and enforcing courts have repeatedly held that the question of whether a party has engaged in a form of prohibited conduct is based on two separate and distinct inquiries. The first inquiry involves the nature of the union's conduct and the second involves the purpose of the conduct. Both requirements must be satisfied in order to establish a violation. (See: Electro-Coal Transfer Corp., 591 F.2d 284 (5th Cir. 1979).

Here, the undisputed evidence shows that the nature of the picketing and the Union's conduct was to complain that no contract existed with the AGC for work on the Marysville project. The nature of the picketing does not in any way demonstrate coercion or any attempt to influence the conduct of a neutral employer.

In addition, the purpose of the picketing was to identify the master dispute. Again, this did not seek to influence a neutral party to withhold services or take any other action. (Cf. Operating Engineers Local 12 (Associated Engineers), 270 NLRB 1172, 1175 (1984); Plumbers Local 370 (Baugham Plumbing & Heating Co.), 157 NLRB 20, 21 (1966).

Since at least eight (8) days before this Consolidated Complaint was filed, Respondents sought to avoid the present type of dispute by moving to the reserve gate. Prior to that time, while Gemelli Concrete was the only contractor known with certainty to have primary status, all signs on site were marked with the name "Gemelli Concrete." Therefore, when the Petition was filed, even under the Regional Director's theory of the case, there was no ongoing violation of the Moore Dry Dock standards. Sailor's Union of the Pacific (Moore Dry Dock), 92 NLRB 547, 549 (1950).

The ALJ found that a rebuttable presumption was established that a secondary objective existed. Respondents contend that this finding was incorrect. The ALJ's finding was based on the conclusion that the labor dispute here was only between Respondents and the individual contractors, and that Respondents were therefore restricted to the "primary" gate. Respondents have previously argued their position that this finding was erroneous. For the same reasons, no presumption should exist that Respondents had a secondary objective.

As important, it is undisputed that there was no secondary objective or secondary activity. The job site was not disrupted in any way after June 8, 2009. This fact cannot be ignored, and should control the outcome of the proceeding.

To the Extent that a Rebuttable Presumption of a Secondary Objective was Established, Respondents Rebutted the Presumption

The ALJ found, in essence, that the location and language of picket signs identifying the dispute between Respondents and the AGC established a secondary objective. Respondents have argued to the contrary. To the extent that a presumption of a secondary objective was shown, Respondents rebutted the presumption. In essence, it is undisputed that Respondents did not coerce or attempt to coerce any person or any party to do anything. Respondents correctly identified the nature of the labor dispute at all times. Activity and work on the job site was consistent with Respondents' lack of coercion.

No evidence was presented indicating that any neutral party took any negative or adverse action based on the picketing. No evidence was presented that Respondents attempted to cause such activity. The facts showed that everyone on the job site was apparently aware of the nature of the dispute, and each was able to freely come and go from the site.

This is not a case in which an intended inducement to restrain or coerce was effective. It is a case in which no neutral party was coerced, no neutral party took negative or adverse action and no neutral party was impacted by the picketing in any way.

For these reasons, any presumption established by the evidence was rebutted. The ALJ's finding to the contrary is incorrect and should be rejected.

CONCLUSION

For these reasons, Respondents request the Board to reverse the Findings and Decision entered by the Administrative Law Judge and Order that the Consolidated Complaint in this cause be dismissed.

Date: November 25, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 25, 2009, Elizabeth A. Smeal, served a copy of the Respondents' Exceptions to the Administrative Law Judge's Decision and Brief in Support by placing said document in an envelope properly addressed as stated below:

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Date: November 25, 2009

Elizabeth A. Smeal