United States Government
NATIONAL LABOR RELATIONS BOARD
REGION 7
477 Michigan Avenue - Room 300
Detroit, MI 48226-2569

Telephone (313) 226-3200
FAX (313) 226-2090
www.nlrb.gov

December 10, 2009

Lester Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St., NW
Washington, DC 20005-3419

Re: Local 1075, Laborers' International Union of North America and Michigan Laborers' District Council Cases 7-CC-1831 and 7-CC-1832

Dear Sir:

Attached is an electronic copy of Counsel for the General Counsel's Answering Brief to Respondents' Exceptions to the Administrative Law Judge's Decision in the above matter. As indicated on the last page of the document, copies have been electronically served on all parties of record.

Very truly yours,

Sarah Karpinen

Sarah Pring Karpinen
Counsel for the General Counsel

Enclosures

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

LOCAL 1075, LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA

and **Cases 7-CC-1831**
7-CC-1832

MICHIGAN LABORERS' DISTRICT COUNCIL

Respondents

and

MCCARTHY & SMITH, INC.

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Sarah Pring Karpinen
Counsel for the General Counsel
National Labor Relations Board
Patrick V. McNamara Federal Building
477 Michigan Avenue - Room 300
Detroit, Michigan 48226-2569
(313) 226-3229
Sarah.Karpinen@nlrb.gov

Sarah Pring Karpinen, Counsel for the General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits this Answering Brief to the Exceptions to the Administrative Law Judge's decision (hereafter ALJD) filed by Respondents.[1]

I. INTRODUCTION

Respondents have raised 15 exceptions to the ALJD in this matter. Exceptions 1-4 address credibility and factual determinations made by the Administrative Law Judge (ALJ). The remaining exceptions relate to the following issues raised by Respondents in their brief:

1. Whether the dispute leading to the picketing at issue was directed at the two primary contractors named in the Complaint, or at the Associated General Contractors of Michigan (AGC), an employer association;

2. Whether the evidence supports a rebuttable presumption that the picketing in question had an unlawful secondary objective; and

[1] The following abbreviations are used in this brief:
ALJD: Administrative Law Judge Decision
GC Ex or Exhs: General Counsel Exhibit(s)
Tr.: Transcript

3. Whether Respondents rebutted that presumption.

There is ample evidence on the record to support the ALJ's finding that Respondents violated Section 8(b)(4)(i)(ii)(B) of the Act by picketing at the Marysville Project, a common situs construction site, without following the guidelines established by the Board in ***Sailors Union of the Pacific (Moore Dry Dock)***, 92 NLRB 547, 549 (1950) to ensure that their picketing did not enmesh the neutral employers working at the site in the primary labor dispute. This brief will first address the three issues raised by Respondents in their brief, and then address Respondents' exceptions 1-4.

II. DISCUSSION[2]

A. The ALJ correctly determined that Respondents picketed the Marysville project, a common situs involving both neutral and primary employers, in violation of Section 8(b)(4)(i)(ii)(B) of the Act. (Exceptions 5-15)

The ALJ correctly determined that Respondents' actions in picketing the Marysville Project in furtherance of their contract disputes with Gemelli Concrete and Brazen & Greer, the primary contractors, without taking any precautions to avoid enmeshing neutral contractors in the dispute raises a strong presumption that their picketing had a secondary objective. The ALJ was correct in his determination that Respondents failed to rebut that presumption and that the picketing was unlawful under Section 8(b)(4)(i)(ii)(B) of the Act. (ALJD 7, lines 1-4)

1. Gemelli Concrete and Brazen & Greer were the primary contractors in the dispute, not the AGC.

Respondents assert that their dispute was not with the primary contractors identified in the Complaint, Gemelli Concrete and Brazen & Greer, but with the AGC, a multiemployer bargaining group that represents various employers in negotiations with Respondents. Respondents also assert that they were "authorized" to picket the Marysville Project as part of their dispute with the AGC. Respondents presented no evidence at the hearing to support this claim. Rather, the overwhelming weight of the evidence supported the ALJ's finding that Gemelli Concrete and Brazen & Greer were the primary contractors.

Respondents' agent, abatement coordinator William Bartlett, was charged by Respondents with overseeing the picketing at the Marysville site. He admitted that Respondents did not have a dispute with any of the contractors on the site other than Gemelli Concrete and Brazen & Greer. (Tr. 140) He also admitted that Respondents stopped picketing because Gemelli Concrete signed a contract. (ALJD 4, lines 33-34, ALJD 6, lines 24-25; Tr. 149) McCarthy & Smith project superintendent Brian MacAskill testified without controversion that Bartlett called to him from across the street on the last day of picketing and said, "Gemelli signed, and we're all set." (ALJD 6, lines 25-26; Tr. 87)

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[2] This discussion relies upon the facts as set forth in the ALJD.

Respondents claim in their brief that the picket signs reflected that their dispute was with the AGC and not the primary contractors. Respondents presented no evidence at the hearing that their signs named the AGC as their target. In fact, undisputed evidence was presented at the hearing that the picket signs used by Respondents during the dispute did not identify <u>any</u> employer until about June 23, when the signs were altered to identify Gemelli Concrete as a target. (ALJD 6, lines 31-34) Multiple photographs were introduced showing signs that stated only, "No Contract, No Work, Laborers' Local 1075." (GC Exhs 8-10, 20) Respondents did not challenge those photographs, nor did they introduce any photographs of signs with any other message.

Even if the AGC had been Respondents' target, the picketing would still have been unlawful under Section 8(b)(4)(i)(ii)(B). As noted above, the AGC was not identified on Respondents' signs. The Charging Party, McCarthy & Smith, is a member of the AGC but has never been party to any AGC multiemployer contract with Respondents, and the AGC did not have authority to bargain on McCarthy & Smith's behalf. (ALJD 2, lines 34-35) McCarthy & Smith had no laborers working on the job site at any relevant time. (ALJD 2, line 36) Other contractors working on the site, including Casadei Steel, Inc., Port Huron Roofing Company, Contrast Mechanical, Inc., Delta Temp., Inc. and Gillis Electric, were not members of the AGC. (Tr. 30) Even if Respondents had been picketing the AGC, they did so at a common situs without taking precautions to avoid enmeshing neutral contractors in their dispute, and their actions were in violation of Section of the Act.

2. The evidence presented at the hearing firmly supports the ALJ's finding that Respondents had a secondary objective.

Section 8(b)(4) of the Act is designed to further "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." ***NLRB v. Denver Building Trades Council***, 341 U.S. 675, 692 (1951). The ALJ correctly found in this case that there was a strong presumption that Respondents had a secondary objective in picketing the Marysville site. (ALJD 7, lines 1-2)

Respondents claim that they did not engage in any coercive activity at the Marysville site. However, it is undisputed that they picketed that site from June 4- June 25. Picketing is prohibited by Section 8(b)(4) of the Act if, as here, its object is to exert improper influence on a neutral party. ***NLRB v. Denver Building Trades Council***, 341 U.S. 675, 689 (1951); ***Teamsters Local 122 (August A. Busch & Co.)***, 334 NLRB 1190, 1191, fn. 6 (2001). Picketing is considered to be coercive conduct because it is more than speech; it is conduct which may induce action on the part of an individual regardless of the message being communicated by the picketers. ***Laborers Eastern Region Organizing Fund***, 346 NLRB 1251, 1264 (2006).

Here, the record shows that Respondents' picketing resulted in employees of some of the neutral contractors failing to work. On June 4, after Respondents started picketing, employees of neutral contractors Casadei Steel, Port Huron Roofing, Gillis Electric and Delta Temp., all unionized companies, arrived at the site after and left without

performing any work. (Tr. 32-37) Employees of Casadei Steel and Delta Temp. returned to work the following day, but employees of Gillis Electric and Port Huron Roofing did not perform any work until after the reserve gate system was established. (Tr. 44-45)

a. Respondents' failure to comply with the criteria laid out by the Board in *Moore Dry Dock* gives rise to a rebuttable presumption that their picketing was secondary in nature.

A union may lawfully picket at a site where its primary target is working with neutral contractors (a common situs) as long as it takes precautions to prevent the neutral contractors from becoming enmeshed in the primary labor dispute. In ***Sailors Union of the Pacific (Moore Dry Dock)***, 92 NLRB 547, 549 (1950), the Board established the following criteria to determine whether picketing at a common situs is primary in nature: (1) The picketing must be strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (2) at the time of the picketing the primary employer is engaged in its normal business; (3) the picketing must take place reasonably close to where the primary employer is engaged in its work; and (4) the picketers must make it clear, through their signs or by other means, that their dispute is only with the primary employer. ***Id.*** at 549.

A failure to comply with the ***Moore Dry Dock*** standards gives rise to a rebuttable presumption that the picketing is aimed at putting unlawful pressure on the neutral employers at the site. ***Service Employees Local 87 (Pacific Telephone)***, 279 NLRB 168, 175 (1986). The record supports the ALJD's finding that Respondents' picketing failed

to comply with ***Moore Dry Dock*** and that their failure to do so raised a strong presumption that Respondents had a secondary objective. (ALJD 6-7)

(i) The record is clear that Respondents failed to identify their primary targets on their picket signs.

It is undisputed that Respondents did not identify either of the primary contractors on their picket signs until almost June 25. (ALJD 6, lines 31-32) It is well established that a union must clearly identify its primary target when picketing at a common situs. ***Local 87, Service Employees International Union***, 279 NLRB at 175; ***Service Employees Local 32B-32J***, 250 NLRB 240, 247-248 (1980). By failing to identify their primary target, Respondents created a situation where employees, customers and suppliers of the neutral employers may have been confused about the true nature of the dispute, and where some employees of the neutrals did not cross the picket line and work.

(ii) Respondents ignored the reserve gate system and picketed at the neutral gate.

There is ample evidence on the record to support the ALJ's finding that Respondents failed to honor the reserve gate system set up by McCarthy & Smith. (ALJD 6, lines 43-50) In their brief, Respondents claim that they agreed on about June 22 to move their picketing activity to the primary gate (Gate A). In Exception 5, they assert that the ALJ erred in finding that the picketers stayed in the vicinity of Gate B (the neutral gate). There is no evidence on the record to support either of these claims.

Respondents introduced no evidence at the hearing that they ever picketed at the primary gate. William Bartlett admitted that the picketers continued to gather at the neutral gate even after the primary gate was set up, and that they never picketed the primary gate. (Tr. 142, 148) Counsel for the General Counsel introduced several photographs into evidence showing the picketers at or near the neutral gate. (ALJD 4, lines 10-16, GC Exhs. 8-9)

The only other location the picketers congregated during the course of the dispute was to an area under a tree near Gate B. (ALJD 4, line 15, GC Ex. 10) Bartlett circled the tree on General Counsel's Exhibit 3 and admitted that the tree was closer to the neutral gate than it was to the primary gate. (Tr. 145, GC Ex. 3) Even if the picketers moved to the primary gate on June 22, it would not have changed the fact that they unlawfully picketed at the neutral gate from June 9 through June 22.

If a union pickets at a neutral gate, it bears the burden of justifying its disregard of the established reserve gate system. ***District Council 771***, supra; ***Operating Engineers Local 12 (McDevitt & Street)***, 286 NLRB 1203, 1203-04 (1987). As noted in the ALJD, no evidence was introduced at the hearing that the dual gate system created by McCarthy & Smith was ever breached. (ALJD 4, lines 38-40). In their brief, Respondents assert that the primary gate was not functional. However, Respondents presented no evidence at the hearing that the primary gate was not lawfully established and maintained, or that the primary contractors, their customers or suppliers had accessed the site via the neutral gate, thereby tainting it. The record supports the ALJ's finding that there was no evidence that the integrity of the dual gate system was ever breached.

3. Respondents failed to rebut the presumption that their objective was secondary in nature

The ALJ found that the evidence raised a strong but rebuttable presumption that Respondents had a secondary objective in picketing the Marysville site. Respondents presented no evidence that they took any affirmative steps whatsoever to ensure that the neutrals on the site were not enmeshed in their labor dispute with the primary contractors. There is no evidence on the record to contradict the ALJ's finding that Respondents failed to rebut the presumption that their picketing was unlawful.

B. Respondents' other exceptions are not supported by the record (Exceptions 1-4)

The other exceptions made by Respondents involve factual and credibility findings made by the ALJ. These exceptions are not supported by the evidence presented at the hearing and should be rejected.

1. The ALJ's credibility findings should be upheld. (Exception 1)

Respondents excepted to the ALJ's finding that the testimony of Brian MacAskill was more credible than the testimony of William Bartlett regarding the location and nature of the picketing at the Marysville site. (ALJD 2, Lines 8-14) The ALJ made this finding based on the demeanor of the witnesses at trial. The Board has a well established

policy of not overruling the credibility findings of an ALJ unless the clear preponderance of the evidence convinces the Board that the ALJ was incorrect in his determination. ***Beverly Health and Rehabilitation Services, Inc.***, 335 NLRB 635, fn. 3 (2001); ***Standard Drywall Products***, 91 NLRB 544 (1950). Respondents have not pointed to any evidence that supports their assertion that the ALJ was incorrect in his credibility finding, and his determination should therefore be upheld.

2. **The ALJ's characterization of the nature of the independent agreements between Respondents and Gemelli Concrete and Brazen & Greer was correct. (Exception 2)**

Respondents did not offer any support of this exception in its brief, so it is unclear how it is alleging the agreements were mischaracterized. Respondents stipulated to a joint exhibit showing the independent agreements entered into by Gemelli Concrete and Brazen & Greer. (Jt. Exh. 2) This exhibit speaks for itself.

3. **The Marysville Project involves over 45 contractors. (Exception 3)**

Respondents except to the ALJ's finding that the current phase of the Marysville Project "involves the work of approximately 45 contractors..." (ALJD 2, lines 40-41) However, in their brief, Respondents themselves characterize the Marysville Project as one of "significant size and complexity...eventually involv[ing] the work of at least 45 contractors." (Respondents' brief, p. 7) It is unclear from Respondents' brief what their objection is to the ALJ's characterization of the number of contractors involved in the

project. In any case, the issue is not a material one. While all 45 contractors were not working on the site at the time of the dispute, the record is clear that there were a number of neutral contractors working on the site at the time of the labor dispute, with others under contract to work there at other times over the course of the project. All of these contractors could have been impacted by any disruption caused by Respondents' unlawful picketing at the project site.

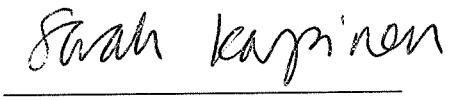
4. Jeff Perkins did not testify at the hearing, so his testimony could not have been mischaracterized by the ALJ (Exception 4)

Respondents claim in Exception 4 that the ALJ mischaracterized the testimony of Jeff Perkins. Jeff Perkins did not testify at the hearing. Brian MacAskill testified about what Perkins said to him on the first day of picketing. (ALJD 3, Lines 10-14) Respondents did not present Perkins or any other witnesses to rebut MacAskill's testimony.

III. Conclusion

For the reasons set forth above and in the Administrative Law Judge's Decision, Counsel for the General Counsel urges that Respondents' Exceptions be denied in their entirety. It is further requested that the Board affirm the ALJ's findings of fact, conclusions of law, and recommended Remedy and Order.

Dated at Detroit, Michigan, this 10th day of December, 2009.



Sarah Pring Karpinen
Counsel for the General Counsel
National Labor Relations Board
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226
(313) 226-3229

CERTIFICATE OF SERVICE

I certify that on the 10th day of December, 2009, I electronically served copies of the Counsel for the General Counsel's Brief to the Administrative Law Judge to the following parties of record:

Mr. Scott Graham, Esq.
sgraham@scottgrahampllc.com

Mr. Scott Fisher
SFisher@agcmichigan.org

Sarah Karpinen

Sarah Pring Karpinen
Counsel for the General Counsel