

**International Brotherhood of Electrical Workers,
Local 640, AFL-CIO and Timber Buildings, Inc.
Case 28-CC-268**

May 23, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On November 6, 1968, Trial Examiner Herman Tocker issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision, the exceptions, and the briefs, and finds merit in the exceptions. Accordingly, the Board adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

We do not agree with the Trial Examiner's finding that Respondent Local 640, International Brotherhood of Electrical Workers, AFL-CIO, by picketing, in furtherance of its primary dispute with Copper King Electric Co., at locations other than the purported entrance established for Copper King Electric and other unorganized employers on the Hobo Joes restaurant building project, failed to conform with the *Moore Dry Dock* standards.¹

The facts, as more fully set forth in the Trial Examiner's Decision, show that Respondent Local 640, at all times material, was engaged in a primary dispute with Copper King Electric Co., the electrical subcontractor on the Hobo Joes Restaurant construction job, for which the Charging Party, Timber Buildings, Inc., was the general contractor.²

The Hobo Joes project, located in Glendale, Arizona, was rectangular in shape, its northerly portion abutted about 160 feet along Glendale Avenue running west from 43rd Avenue, and the easterly portion of the site ran about 150 feet along 43rd Avenue from the intersection of Glendale Avenue. Vacant land abutted the construction site on the south and west. Construction at the site started in late December 1967; however, Copper King did not commence its work until the end of January 1968.³ Respondent Union commenced picketing on or about March 4, after having established that Copper King was performing work at the jobsite. On March 7, Timber Buildings, in order to end the picketing, informed Local 640 by telegram that all employees, supervisors and equipment of Copper King were off the Hobo Joes jobsite. . . . "and [were] not on the job yesterday, is [sic] not on the job today and will not be on the job for the next two weeks." Local 640 thereupon withdrew its pickets.⁴ However, Local 640, having learned of work being performed at the jobsite by Copper King, reinstated the picketing on March 11.

On March 20, Timber Buildings erected two gates at the project, one gate on 43rd Avenue at some distance from the Glendale Avenue intersection and another gate on Glendale Avenue about 150 feet from the 43rd Avenue intersection. Timber Buildings informed Local 640 by telegram, dated March 20, that the gate on 43rd Avenue was reserved for employees and suppliers of Copper King at the project site.⁵ Respondent Union, upon receipt of Timber Buildings' telegram of March 20, ordered the pickets to leave the Glendale gate and picket only the 43rd Avenue gate. Timber Buildings then erected two clearly marked signs at each gate; however, the sign erected at the 43rd Avenue gate indicated it was not reserved exclusively for the use of Copper King employees and suppliers, as its telegram to Local 640 would appear to state, but listed the names of seven other subcontractors.⁶

Prior to the erection of the gate, Local 640 had picketed with signs that clearly indicated that Copper King Electric Co. was the primary employer. Further, Local 640 by telegram dated March 21 to Robert Joe Oakley, president of Timber Buildings, informed Oakley that Local 640's dispute was only with Copper King Electric, and that Local 640 neither requested nor demanded that Timber Buildings or any of its subcontractors stop

³All dates hereinafter are 1968 unless stated otherwise.

⁴The telegram misstated the actual facts, in that evidence in the record discloses that Copper King performed work on the jobsite, on March 6, 7, 8, 9, 11, 12, and 15.

⁵The record discloses that on or about March 18, prior to the erection of the gates, Timber Buildings notified some of its subcontractors, which it designated as nonunion contractors, that they were to use the 43rd Avenue gate, and other subcontractors which it designated as its union-contractors were to use the Glendale Avenue gate.

⁶It is also clear from the record that Timber Buildings entered into an agreement with Copper King that the latter's employees would enter and work at the jobsite only at such times as Timber Buildings' project superintendent notified Copper King when to put men on the job.

¹In *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547, 549, the Board set forth the following criteria to serve as a guide as to whether the picketing of a primary employer at a common situs is violative of Section 8(b)(4)(B) of the Act: (1) At the time of the picketing the primary employer is engaged in its normal business at the situs; (2) the picketing discloses clearly that the dispute is with the primary employer; (3) the picketing is limited to places reasonably close to the location of the situs; and (4) the picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises.

²Timber Buildings, Inc. subcontracted all of the work covered by its contract to subcontractors.

doing business with Copper King.

It appears from testimony in the record that understandable confusion resulted after the placing of the signs which designated that the gate on 43rd Avenue was not only to be used by Copper King but by seven other contractors' employees and suppliers. A Local 640 picket at the 43rd Avenue gate informed the business agent for Local 640 on the morning of March 21 that all was confusion at the jobsite and the contractors were not using the proper gates. Thereupon, the pickets were told to picket the whole job, including the neutral gate. The record indicates that there were no employees of Copper King on the jobsite on March 21 or 22. It is also clear from the record that Local 640 did picket at the alleged neutral gate on March 21 and 22.⁷

The Trial Examiner, in finding that Local 640's picketing at the neutral gate was secondary and violative of Section 8(b)(4)(i)(ii)(B), based his conclusion on two established facts: (1) the picketing was all carried on at times when Copper King Electric Co. was not engaged in its normal business at the situs, and (2) the picketing was not confined to the gate allegedly reserved for employees and suppliers of Copper King. He regarded the picketing as a departure from the *Moore Dry Dock* requirements and illegal under the Board's decision in *H.L. Robertson and Associates Inc.*⁸ Contrary to the Trial Examiner, we are of the opinion that in the circumstances of this case the method and the manner in which the primary entrance was designated was not such as to warrant circumscribing the area of permissible common situs picketing.

The Board has long held that in applying the *Moore Dry Dock* standards they are not to be applied on an indiscriminate "per se" basis or with "mechanical precision" but are to be applied with "common sense."⁹ While the Board has held that picketing at locations other than at a properly marked gate may indicate noncompliance with *Moore Dry Dock* standards,¹⁰ the mere posting of signs does not limit the situs of the dispute.¹¹ We have also held that absence of primary employees is only one factor to be evaluated in determining whether at the time of the picketing the primary employer is engaged in its normal business at the situs.¹² The purpose of the separate gate is to permit lawful picketing¹³ that will be conducted so "as to

minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees."¹⁴

In the light of these principles, we are not satisfied that Local 640's picketing of the neutral gate (Glendale) on March 21 and 22 breached the *Moore Dry Dock* standards. The project was not enclosed by a fence or other barricade, had substantial street frontage on two streets, and was surrounded on the other two sides by open areas. Further, on March 20, contrary to the telegram advising Local 640 that a separate gate was to be erected on 43rd Avenue for the use of Copper King employees and suppliers, Timber Buildings erected a make-shift gate on 43rd Avenue and placed a sign which stated the gate was designated not only for the use of Copper King but seven additional subcontractors on the project.

Another gate was similarly erected on Glendale, with a sign which designated that it was for the use of 16 other subcontractors. The outside area of the project between the two gates was marked by a single strand of wire. The confusion experienced by Local 640's pickets occasioned by these postings on March 20 is readily understandable when other subcontractors failed to observe the posted entrances. In the circumstances, we are satisfied that the designation of the gates and the posting of the signs by Timber Buildings fell short of the clarity necessary to provide reasonable assurance to Local 640 that by confining its picketing to the 43rd Avenue gate, its message would be carried to all within the legitimate, direct appeal of its picket signs.¹⁵ And this is so whether or not the confusion in Timber Buildings' designation of the gates was deliberate.¹⁶ Accordingly, we find that the 43rd Avenue entrance did not restrict situs of the dispute as to Copper King and as the picketing otherwise conformed to *Moore Dry Dock* standards, it was not conducted in a manner from which a proscribed secondary object is inferable.

Timber Buildings furnished Local 640 untrue information as to the presence of Copper King on the project, and made an undercover agreement with Copper King as to when Copper King's employees

⁷*Local 761, IUE (General Electric) v. N.L.R.B.*, 366 U.S. 667, 677; *Plauche Electric Co.*, 135 NLRB 250, 255.

⁸*Local Union 319, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, etc (Center Plumbing and Heating Corp.)*, 145 NLRB 215, 223.

⁹*Suburban Development Co.*, 158 NLRB 549.

¹⁰*Brownfield Electric Inc.*, 145 NLRB 1163; *New Power Wire and Electric Corp., et al.*, 144 NLRB 1089, 1093, enfd. in pertinent part 340 F.2d 71 (C.A. 2).

¹¹In the instant case, there was no question as to the contents of the picket sign. Nor did any question arise as to the legality of Respondent Union's picketing prior to the designation of the separate gates by Timber Buildings at the Hobo Joes project.

¹²*Crystal Palace Market*, 116 NLRB 856, 859.

¹³*Suburban Development Co., supra*; *Crystal Palace Market, supra*.

¹⁴See footnote 4, *supra*, indicating that Timber Buildings misled Local 640 on an immediately prior occasion.

⁷The complaint, as amended at the hearing, also alleged illegal picketing by Respondent Union on March 25. The Trial Examiner concluded, and we agree, that there is no evidence in the record that would support a finding that Local 640 picketed at the neutral gate on March 25.

¹¹⁷¹NLRB No. 37. We are of the opinion that the Trial Examiner's reliance on this decision is misplaced. In that case, the facts established that the union was fully informed as to the scheduled hours of work of the employees of the primary employer before the picketing, and the picketing was carried on when none of the primary contractors' employees was scheduled to work; this was not the case here, where the Respondent Union had no knowledge when Copper King's employees were scheduled to work and, indeed, was misled on the matter. See *Meyers Plumbing*, 146 NLRB 888, 892.

would be called to the project. This pattern of deception warrants the conclusion that such conduct was designed, not to limit Local 640's picketing to *Moore Dry Dock* standards, but to mislead Local 640 as to when Copper King was engaged "in normal business at the situs" so as to undercut those standards. Thus, in the instant case, there is no question that Local 640 was engaged in a labor dispute with Copper King, and as heretofore found, its picketing conformed, in the circumstances, with the Board's requirements for such lawful action at a common situs.

Accordingly, since in all the circumstances we are persuaded that the picketing did not violate Section 8(b)(4)(i)(ii)(B) of the Act, we shall dismiss the complaint herein.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

HERMAN TOCKER, Trial Examiner: This cause came on to be heard before me in Phoenix, Arizona, on July 9 and 10, 1968, upon a charge filed March 21, by Timber Buildings, Inc., sometimes referred to herein as the Charging Party or Timber. The General Counsel, by a complaint issued May 8, alleged that International Brotherhood of Electrical Workers, Local 640, AFL-CIO, sometimes referred to herein as the Union or Respondent, had violated Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Labor Management Relations Act of 1947, as amended, by wrongfully picketing a Timber construction site, on or about March 21, 22, and 26. By answer dated May 16, filed May 17, the Union admitted various formal allegations related to jurisdiction, denied numerous relatively minor allegations, admitted that on or about March 21 and 22 it had picketed the construction site but justified that picketing on the ground that it was "lawful, primary picketing directed against Copper King (a subcontractor admittedly paying wages lower than union standard area wages) and that Timber Buildings, Inc., and others engaged in contracting for work on said jobsite, allied themselves in the dispute with Copper King." It denied also all conclusory allegations to the effect that it had engaged in any violation of law.

Counsel for the General Counsel, the Union, and the Charging Party participated actively in the hearing. All filed briefs subsequent to the hearing and these have been given careful consideration. After notice and opportunity to object to proposed corrections and to propose additional corrections, to which no response has been made, I have entered an order correcting the transcript in numerous minor respects.

The Issue

Timber was a general contractor engaged in the construction of a restaurant building and subcontracted all the trades involved. Some of these trades were conducted by union contractors and others by nonunion. In accordance with conventional procedures, which will be set forth in greater detail below, Timber set up one gate for utilization by the union or organized subcontractors and their suppliers and another by the nonunion or unorganized subcontractors and their suppliers. Copper King Electric Company was the nonunion subcontractor

or "primary" employer with which the Union had its dispute.

The construction site was a rectangular piece of land located on the southwest corner of Glendale Avenue and 43rd Avenue in Glendale, a suburb of Phoenix, Arizona. Its northerly portion was about 160 feet along Glendale Avenue running west from 43rd Avenue. The gate for the union subcontractors was established near the westerly end of this side. The easterly portion of the site ran about 150 feet on 43rd Avenue from the Glendale side and the gate for nonunion subcontractors was placed near the southerly end of that side. A single strand of wire about 30 inches more or less high was stretched all along Glendale Avenue and 43rd Avenue on the site to make a sort of but rather ineffective barrier or fence separating the gates and enclosing those two sides of the property. While the wire was ineffective to prevent persons from entering or leaving by scaling or creeping under it, trucks and other vehicles had to use either gate because of the high curb along the street. Vacant land abutted the construction site both on the south and the west. There were no signs or gates or wire on these two sides.

The sole issue is whether the Union wrongfully picketed and carried the picket sign in front of or at the Glendale Avenue gate on the dates mentioned in the complaint, March 21, 22, and 26, or, to be more precise because of an amendment during the course of the hearing, on March 21, 22, and 25.

The answer suggests a collateral issue whether the general contractor, Timber, so allied itself with Copper King as to justify picketing the entire site. However, I find no credible evidence of probative value to support any conclusion and finding that the picketing was directed to such a contention. The nature of the admitted picketing is to the contrary.

We are not concerned with the contents of the picket sign nor is there any claim that any picket engaged in any improper or unlawful conduct apart from the picketing of the Glendale gate.

Preliminary

In December 1967, Timber entered into a general contract for the construction of a Hobo Joe Restaurant at the site described above. It had the entire contract with the exception of the work in connection with and the supplying of two electrical signs and the installation of refrigeration equipment. It subcontracted all the trades to subcontractors. All the electrical work (with the exception of that involved in the installation of the electric signs) was subcontracted to Copper King. Although construction started late in December 1967, and Copper King commenced its work at the end of January 1968, the violations alleged herein and the issue with which we are concerned involve only the admitted picketing on March 21 and 22, 1968, and the alleged, but denied, picketing on the 25th.

Timber was anxious to do whatever was legally possible to stop or minimize any picketing at the construction site. There was nothing illegal about such a motive nor about the devices (short of deceptions) to which it might resort to lessen or circumscribe the extent of such picketing. *Plumbers Local Union No. 519 (H. L. Robertson & Associates, Inc., 171 NLRB No. 37)*. It sought and obtained competent legal advice as to how this could be done and what were its rights. Similarly, the Union was well advised, informed, and conscious of its rights with

respect to picketing and of all limitations to which it was subject by reason of the legal principles or standards to which reference will be made below.

On March 7, Timber sent the Union a telegram (filed 11:23 a.m., m.s.t. and received in the Western Union office at Phoenix at 10:34 a.m., p.s.t.) in which it stated:

CONFIRMING TELEPHONE CONVERSATION OF THIS MORNING BETWEEN TIMBER BUILDINGS SUPERINTENDENT RICHARD MORGENSON AND GLYNN ROSS, ALL EMPLOYEES, SUPERVISORS, AND EQUIPMENT OF COPPER KING ELECTRIC ARE OFF HOBO JOES JOB SITE AT 43RD AVENUE AND GLENDALE. COPPER KING WAS NOT ON JOB YESTERDAY, IS NOT ON THE JOB TODAY, AND WILL NOT BE ON JOB AT ANY TIME WITHIN NEXT TWO WEEKS. INSIST PICKETING BY YOUR UNION CEASE BY 300 PM THIS DATE, THURSDAY, MARCH 7, OTHERWISE WE WILL PROCEED WITH ALL POSSIBLE LEGAL REMEDIES.

The statements made in this telegram were not true because Copper King employees actually were on the job on the day the wire was sent and its records showed that four employees worked there March 6, two on the 7th, one on the 8th, three on the 9th, three on the 11th, two on the 12th, and two on the 15th. This deception is a factor upon which the Union may have relied for its contention that its picketing on the crucial dates involved herein was done in good faith and justifiably, I use the word "deception" because, on the basis of testimony given by Timber witnesses, Timber should have been and must have been aware that Copper King did engage and would have engaged in electrical work on the dates mentioned contrary to the representations made in the telegram. (As I have stated above, the evidence does not support a conclusion that Timber allied itself with Copper King in a manner to justify the picketing which is the alleged unlawful conduct herein. If the Union had relied on this deception it would not have limited its picketing both as to times and places in the manner in which it did. It would have proceeded to picket the entire site at all times.)

Still concerned with its effort to minimize or avert the effects of picketing at the jobsite, Timber obtained additional legal advice and, by telegram, filed 12:55 p.m., m.s.t. March 20 and received in the Phoenix office of Western Union at 12:06 p.m., p.s.t., it advised the Union:

THIS DATE A GATE ON 43RD AVE HAS BEEN RESERVED FOR EMPLOYEES AND SUPPLIERS OF COPPER KING ELECTRIC AT HOBO JOES CONSTRUCTION SIGHT [sic], 43 AVE AND GLENDALE. INSIST YOU LIMIT ANY FURTHER PICKETING OF COPPER KING ELECTRIC TO THEIR GATE ON 43 AVE.

It is not too clear (but neither is it too important) whether the gates were erected and assigned on March 20 or on March 18 because, in a communication dated March 18 addressed to all subcontractors, Timber opened by saying, "Starting today, we have erected two separate entrances to the job." (Emphasis supplied.) In this communication union subcontractors, employees, and their suppliers were assigned the Glendale Avenue gate; nonunion subcontractors, employees, and their suppliers were assigned the 43rd Avenue gate; and instructions were given that entry upon and exit from the job were to be "through the entrance reserved for them."

By telegram dated March 21, presumably in reply to Timber's of March 20, the Union notified Timber:

TO REVIEW OUR POSITION AS TO THE PICKETING OF COPPER KING ELECTRIC AT YOUR HOBO JOE

CONSTRUCTION SITE 43RD AVE AND GLENDALE LOCAL UNION 640 IBEW NEITHER REQUESTS NOR DEMANDS THAT YOU OR ANY OF YOUR SUBCONTRACTORS STOP DOING BUSINESS WITH COPPER KING ELECTRIC. LOCAL UNION 640 DISPUTE IS ONLY WITH COPPER KING ELECTRIC.

The Basic Law

This case is concerned with the picketing of a designated neutral gate after the establishment of separate gates for neutral persons and persons who may be embroiled in a labor controversy. The leading cases are *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547, and *Local 761, International Union of Electrical Workers, AFL-CIO [General Electric Company] v. N.L.R.B.*, 366 U.S. 667, which sought to trace the evolution and later development of the *Moore Dry Dock* standards. This case involving, as it does, a controversy in the construction industry, the *Local 761 (General Electric)* special guidelines are not applicable. We are governed here by the *Moore Dry Dock* standards. *Nashville Building and Construction Trades Council (Markwell & Hartz, Inc.)*, 164 NLRB No. 50; *Building and Construction Trades Council of New Orleans, AFL-CIO (Markwell and Hartz, Inc.)*, 155 NLRB 319. The *Moore Dry Dock* standards are (92 NLRB 547 at 549):

. . . [P]icketing of the premises of a secondary employer is primary if it meets the following conditions. (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*, (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Since there is no claim by the General Counsel that the Union wrongfully picketed either 43rd Avenue or Glendale Avenue, along which were stretched the wire barriers, it is immaterial that some persons might have scaled or crept under those wires. In any event, the Board recently, in *Nashville Building & Construction Trades Council, International Brotherhood of Electrical Workers Union, Local 429, etc.*, 172 NLRB No. 105, (p. 5) said:

Moreover, even assuming, *arguendo*, that Respondents were correct in believing that employees of the primary employers were entering the jobsite at unauthorized points along the highway between October 24 and 31, this would still not justify the picketing at the neutral South gate.

Additionally, the presence or absence of employees of the primary employer is of no consequence in building and construction cases. *Plumbers Local Union No. 519 (H. L. Robertson & Associates, Inc.)*, 171 NLRB No. 37. This rule is not affected by the statement of the Court of Appeals for the District of Columbia in *Seafarers International Union v. N.R.L.B.*, 265 F.2d 585 (C.A.D.C.), "We think the presence or absence of employees of the primary employer on the premises is not a critical factor in the legality of a picket line." That case is distinguishable from this and other building and construction cases because there the "premises" or "*situs*" was a ship belonging to Salt Dome, the primary employer, which had been moved into a shipyard for overhaul and repairs. The Court of Appeals recognized it as an unusual situation and, prior to making the statement about presence or absence of employees, above quoted, said,

"We do not intend here to make a ruling broader than the case before us. This boat, a piece of equipment owned by the primary employer, was actually the *situs* of the primary dispute."

Now, upon the entire record, and my observation of the witnesses, and after careful consideration of the briefs submitted, the following are my

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYERS AND JURISDICTION

At all times involved herein, Timber Buildings, Inc., the Charging Party, was and is an Arizona corporation with its principal place of business in Tempe, Arizona. It is a general contractor in the building and construction industry. At all times material herein, it was engaged in the construction of a restaurant building, to be known as Hobo Joe Restaurant, at the intersection of 43rd Avenue and Glendale Avenue, in Glendale, Arizona. It subcontracted to various subcontractors all the work required under its contract. Among such subcontractors was Copper King Electric, Inc., which did all the electrical work involved except that concerned with the installation of two electric signs. Both Timber Buildings, Inc., and Copper King Electric, Inc., are engaged in commerce within the meaning of Section 2(6) and (7) of the Labor Management Act of 1947, as amended. The Board has jurisdiction over them in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local 640, AFL-CIO, the Respondent Union, is, and at all times involved herein was, a labor organization as defined in Section 2(5) of the Act. The Board has jurisdiction over it and of this proceeding.

III. THE UNFAIR LABOR PRACTICES

The Union, by its authorized pickets, Clay Ross and Michael Burnham, on numerous dates after the erection and designation of separate gates for union and nonunion subcontractors, picketed the neutral gate — that on the westerly end of Glendale Avenue. Those gates had been assigned so that the *situs* of the Union's dispute with Copper King would be the entrance to be used by Copper King, its employees and its suppliers for ingress and egress and so that Timber and other employers who were not involved in that controversy would not be affected thereby.

It is admitted that the Glendale or north gate (the neutral gate) had been picketed on March 21 and 22. Picketing of that gate on March 25 was denied. This fact was sought to be proven by the testimony of Timber Buildings' job superintendent based upon or supported by an entry in a logbook maintained by him. The entry for March 25 is "Started picketing until 9:00 AM." This entry is at the bottom of the portion of the page on which provision is made for entries on March 25. Near the top of the page is an entry, "Kelly tile wouldn't cross picket line. Tapers 2 took off." The superintendent testified that only the drywall tapers were on the job that day and that the Kelly Tile people, installers of ceramic tile, refused to cross the picket line. This would appear to be fairly substantial evidence that there was picketing of the Glendale gate on March 25 opposed to the Respondent's

denial.

While, as will appear below, I regard most of their testimony as not worthy of credibility, both pickets, Clay Ross and Michael Burnham, denied picketing on that day. They supported their denials by reference to the fact that that day was taken up with meetings at the office of the Union's lawyer and at the National Labor Relations Board. Documentary evidence (offered and relied upon by counsel supporting the complaint) supports the assertion that there were such meetings. This is an affidavit, sworn to March 25, which, according to the uncontradicted testimony, had been brought by Clay Ross from the union attorney's office to the Board's offices on March 25. On the other hand, Timber's superintendent testified, in connection with the qualification as evidence of the entries in the logbook, "As close as my memory goes, it is supposed to be entered in there the date that it occurs. Sometimes it goes two days before I enter." He answered that he could not testify as to which "entries would have been delayed as much as two days in being entered." This creates the possibility that if the entry for March 25 was a true statement as to events which occurred at the jobsite, it might have been a delayed entry which recorded events which did not happen on that day but on an earlier or later day. As a matter of fact, this may account for the fact that the complaint initially alleged March 26. The Respondent, however, cannot be held accountable for that day because the allegation has been amended from the 26th to the 25th and counsel for the General Counsel concedes "[t]he allegation that unlawful picketing occurred on March 26, cannot be supported by the record. . . ." Faced with these conflicts in the record, bearing in mind that the counsel for the General Counsel must carry the burden of proof, and weighing the probabilities as to what might have or might not have happened on the 25th, a day on which the pickets were involved in attendance both at the office of the Union's attorney and that of the Board, I am gravely in doubt that there was any picketing on that day. For that reason, I am unable to make a finding that there was such picketing.

There being no issue that there was picketing at the Glendale gate on the 21st and 22nd, it was the duty or responsibility of the Respondent, the Union, to go forward with evidence to support a conclusion, within the standards of the *Moore Dry Dock* case (92 NLRB 547, 549), that such picketing was justified. This, it is my conclusion, the Union has failed to do.

In the first place, apart from my observation of the union witnesses, Clay Ross, John Mounts, and Michael Burnham, there are numerous additional factors on the basis of which I am unable to credit their testimony in support of their claim that the picketing of the Glendale gate was justified on March 21 and 22.

Almost at the very beginning of Ross' testimony, I received the definite impression that he sought to have me believe that he was an unpaid picket on behalf of the Union but it was developed finally that he received a compensation of \$400 a month, plus expenses. His entire testimony is generously sprinkled with vagueness, guesses, presumptions, inferences and assumptions that, on March 21 and 22, Copper King employees were working on the jobsite. Even this testimony is vacillating throughout and based on a "memory (that) isn't that good." He testified that he kept records of his picketing and observations but not one of these was offered in evidence. He admitted that he saw no electrical work on the site on the 21st and 22nd. These are just a few, but not all, of the reasons why I do not credit his testimony. If I were to characterize it

most charitably and favorably, I might say it was a telescoping or merging of what he thought he saw after the 20th into and with what he thought he remembered of what happened prior to that day.

Michael Burnham, the other picket, testified to having kept records of truck license numbers and other evidence but none of these (except that concerned with a noncrucial day, March 30) was produced. Contrary to the testimony of both Ross and Assistant Union Business Manager Mounts to the effect that Copper King used unmarked trucks or trucks from which its name had been obliterated, he testified that he saw a truck on the property with Copper King's name on it. He had no independent or personal knowledge on the basis of which he could say that Copper King employees or vehicles entered or left by the Glendale gate on March 21 and 22. His testimony that Copper King employees were doing electrical work on the job is based only on an assertion that Ross had told him that they were. He testified that he had been instructed by Mounts to picket only the 43rd Avenue gate on March 20 (which day on the basis of the evidence I fix as the day when the telegram was sent) at "mid-morning, around ten or ten-thirty, I believe." He testified as to the instruction, "A fellow by the name of Johnny Mounts [the Union's assistant business manager] came out and told us we were only to picket the east gate, and I learned later it was because of a telegram, or some type of correspondence that was delivered." (Mounts testified he had been on the site and was informed by telephone of the telegram.) Regardless of whether the time utilized was Mountain Standard Time, which probably was the time utilized, or Pacific Standard Time, Mounts could not have known of the telegram as early as 10:30 Wednesday morning because it was first received at the Western Union office in Phoenix at 12:06 p.m., p.s.t. Except for his reliance on remarks made to him by Ross, he was in no position to testify with any degree of certainty that electrical work actually was being done on the jobsite on March 21 and 22. He never had worked as an electrician. His observations were made of happenings in a building in which it was "plenty dark" from a place quite a distance away from where he was standing. To quote from his testimony as to March 25, which is typical and would apply to the other days as well, "I couldn't see any electrical work being done. There was in the area during this particular week, there was what I felt — I mean, I've never been an electrician or anything before — but by the way the construction was going on the building, I would say that electrical work was being done because of the advancement of the building."

John Mounts was the Union's assistant business manager since September 19, 1967. Prior to that time he had been employed for many years as a journeyman electrician and apprentice. The strongest bit of testimony from him was that concerning a truck with a homemade camper, of which a snapshot is in evidence. He testified that soon after having been informed of the telegram advising of the erection of the separate gates, he saw this camper leave the property from the Glendale gate. He believed this truck was a Copper King truck or was utilized by Copper King for the transportation of materials to the site in connection with the electrical work being done. This belief was based upon the fact that he had seen electrical materials in it following an alleged conversation with some electricians who had admitted to him that they worked for Copper King. He testified that they told him they did not come to the job in trucks because that was the way Copper King operated and,

from this, he inferred that it was to avoid picketing. This alleged conversation was held some time prior to the erection of the gates. If it actually transpired and he had concluded that Copper King engaged in the implied deceptive practice for the purpose of misleading the Union and preventing the picketing, it is strange to me that neither he nor the Union took any remedial measures and that they did not write even a letter complaining either to Copper King or Timber. This is a step which surely would have been taken if such a conversation had been had considering, first, the fact that it is apparent that the Union was receiving constant and good legal advice; next, that it had written a rather long letter in January 1968 to Copper King Electric containing numerous self-servicing declarations as to its position with respect to picketing; and, finally, it had sent a somewhat similar telegram to Timber following receipt of the telegram from Timber advising it of the erection of the separate gates. In addition to my doubts of the probative value and credibility of the alleged conversation with the two electricians, on the basis of which Mounts says he concluded that the camper truck was a Copper King vehicle, the uncontradicted, plausible testimony is that the camper was a truck owned and utilized by Tally & Page, the refrigeration contractor. To repeat what already has been said above, Mounts testified that trucks he saw on the job and related to Copper King did not bear any Copper King identification whereas Burnham testified that he saw the name Copper King on one. Assuming both Mounts and Ross actually saw unmarked trucks which they believed belonged to Copper King and from which the name had been blocked out, the truth of ownership easily could have been established by the license plates. No explanation was offered for the failure to offer such proof. Additionally, although he testified that he had seen electrical work being done on the site March 21, he admitted he had no knowledge whether the people he thought were electricians had entered or left the job by the 43rd Avenue gate or the other.

Moreover, much of the testimony given by all three, Ross, Mounts, and Burnham, is mutually contradictory or inconsistent.

Finally, there is no clear-cut, substantial evidence of probative value to the effect that the electricians, if indeed electricians were working on the construction site on March 21 and 22, did not enter and leave by the "primary gate" at the southerly end of the 43rd Avenue side of the site.

On the other hand, there is documentary evidence to the contrary which cannot be disregarded. Its correctness has been attested under oath by Mrs. Alice Martin, a part owner of Copper King and the mother of Dell Martin, another owner. She does the bookkeeping, maintains the payroll, and prepares the checks. To me she appeared to be a credible witness. The records show that no employee of Copper King did any work on the job on either March 21 or 22. Some slight question is raised as to whether Donald Martin, one of Copper King's electricians, worked there on March 21, a Thursday, because there were four entries of hours worked on that day, which entries were not related to any paid job. This creates a suspicion but a finding of fact may not be made on the basis of a suspicion, particularly when Mrs. Martin testified that the hours indicated involved work done in Copper King's office or store. Inasmuch as no Copper King employee worked at the site on the 21st or 22nd, under the rule of *Plumbers Local Union No. 519 (H. L. Robertson & Associates, Inc.)*, 171 NLRB No. 37, any picketing of the

site, to say nothing of the Glendale (neutral) gate, would have been illegal on that day.

Considering and comparing, therefore, the evidence and testimony offered by the Union in support of its defense that the picketing of the Glendale or neutral gate was justified either alone or along with that given in rebuttal, I am unable to find or conclude that any Copper King employee entered or left the premises by the Glendale gate on March 21 or 22 regardless of whether electrical work was being performed on the premises on those days. Moreover, I do find and conclude that Copper King did not engage in or perform any electrical work on the premises on those days. And finally, were I to disregard the evidence in rebuttal presented by counsel supporting the complaint, I would conclude nevertheless that the nature of the testimony and its contents offered in support of the defense does not have that degree of substantial probative value as to justify a conclusion that the picketing of the Glendale (neutral) gate on March 21 and 22 was justified.

On the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Timber Buildings, Inc., and Copper King Electric, Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, International Brotherhood of Electrical Workers, Local 640, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The picketing by Respondent, International Brotherhood of Electrical Workers, Local 640, AFL-CIO, of the north or Glendale Avenue gate to the Hobo Joe construction site at the southwest corner of Glendale Avenue and 43rd Avenue, in Glendale, Arizona, on March 21 and 22, 1968, was aimed at inducing strike action or absention from work by employees of subcontractors and others with whom Respondent had no dispute and, as a consequence, was a violation by the Respondent of Section 8(b)(4)(i) and (ii)(B) of the Act.

4. The aforesaid violations are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

5. The activities and operations of the Respondent as set forth above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondent, International Brotherhood of Electrical Workers, Local 640, AFL-CIO, has violated Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that an order be entered that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The following is my recommended

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Brotherhood of Electrical Workers, Local 640, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from engaging in, or inducing or encouraging any individual employed by Timber Buildings, Inc., or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal, in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, and Respondent, International Brotherhood of Electrical Workers, Local 640, AFL-CIO, shall cease and desist from threatening, coercing, or restraining the above-named employer or any other person engaged in commerce or an industry affecting commerce where, in either case, an object thereof is to force or require Timber Buildings, Inc., to cease doing business with Copper King Electric, Inc.

2. Take the following affirmative action which the Board finds will effectuate the purposes of the Act:

(a) Post at its business office and meeting hall in Phoenix, Arizona, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to assure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail a copy of said notice to the Regional Director for Region 28 for posting by Timber Buildings, Inc., if willing, at all locations where notices to its employees and subcontractors customarily are posted.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.¹

¹In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

²In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL MEMBERS

Pursuant to the Recommended Decision of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

WE WILL NOT engage in or induce or encourage any individual employed by Timber Buildings, Inc., or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services and we will not threaten, coerce, or restrain the above-named employer or any other person engaged in commerce or an industry affecting commerce where, in either case an object thereof is to force or require the above-named employer or any

other person to cease doing business with Copper King Electric, Inc., or any other person.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

INTERNATIONAL
BROTHERHOOD OF
ELECTRICAL WORKERS,
LOCAL 640, AFL-CIO
(Labor Organization)

Dated

By

(Representative)

(Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Resident Office for Region 28, Room 207, Camelback Building, 110 West Camelback Road, Phoenix, Arizona 85013, Telephone 602-261-3717.